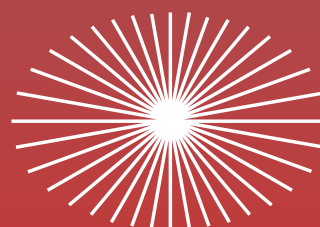
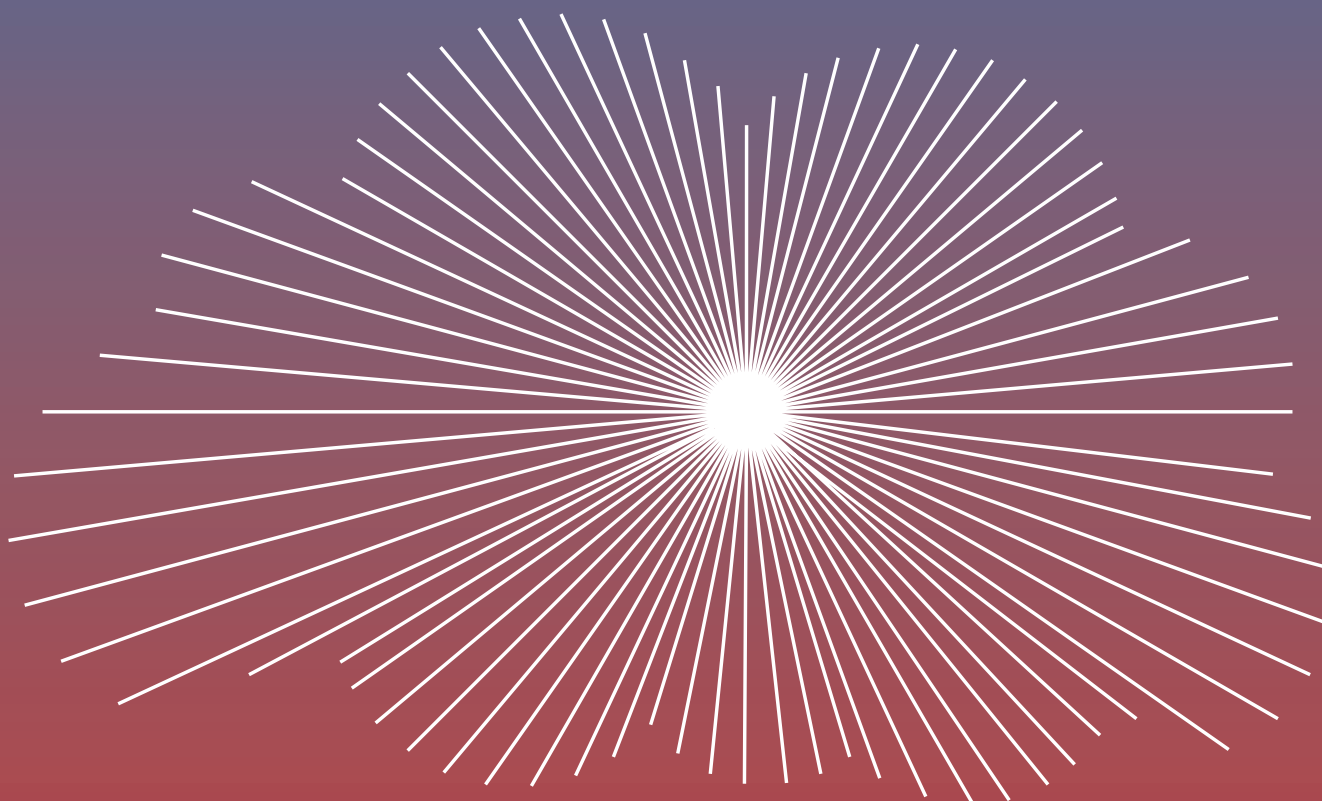


# Improving the Justice System Response to Sexual Offences

VICTORIAN  
**LAW  
REFORM\***  
COMMISSION

**Report**

September 2021



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This report reflects the law at 30 June 2021.

The Commission notes that on 13 August 2021 the Victorian Government announced that sex work will be decriminalised in Victoria through a range of reforms over the next two years.

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The cover design of the *Improving the Justice System Response to Sexual Offences* Report communicates open thinking, indicating a multitude of positive possibilities. Avoiding literal representations, it graphically suggests the impact of law reform.

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## **Note on content**

This report relates to sexual violence. Some content may be confronting or distressing.

If you need help, here are some options for advice and support:

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I don't know that I had hope, but I wanted something to be different. I so needed the narrative to change, for life to take a turn and for me to feel like life is worth it ...

With everything that's happened ... I just don't subscribe to this, I don't have hope for change ... I don't even blame the police as much as our laws, the laws aren't written to protect me.—Danielle<sup>1</sup>

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# Preface

It was a shock to find when we started work on this reference that one in five women over the age of 15 has experienced sexual assault in their lifetime, and that over 85 per cent of these assaults are not reported to police. That means that many people who have committed sexual assault are not held accountable for their actions. Sexual assault can have devastating effects on the lives of victim survivors. The Commission enquired into this problem in 2004 and much work has been done in the intervening years to reform the law in accordance with the recommendations made then. Despite that hard work, sexual offending still remains a major social ill.

It is hard to imagine more worthwhile law reform work than finding ways to free Victorians from the risk of sexual offending. The importance of that work was highlighted as never before during the course of the reference. Women came forward in that time in Victoria, throughout Australia, and internationally, to call out sexual violence. Shortly before the reference began, Harvey Weinstein was convicted of sexual crimes in the United States, and in Australia allegations were made against high-profile Australian politicians and actors. Brittany Higgins made public her allegations that she was raped in Parliament House in the office of a government minister. And Grace Tame, a victim survivor of sexual abuse, was named as Australian of the Year in recognition of her law reform advocacy on behalf of survivors. The issue of sexual violence was elevated in public discourse, giving added urgency to the need for reform of the law and prominence to the work of the Commission on this reference. It became clear during the course of the reference that this was a significant moment in history, one calling for action against sexual crime. The report responds to this call.

The recommendations made by the Commission provide a roadmap for effective change. The history of reform of the law relating to sex offences has taught us that effective change requires attention to many parts of the system which deal with sexual violence at the same time. That system is only as good as its weakest part. Thus, a perfect jury trial will only assist victim survivors if their earlier interaction with police at the time of reporting is adequate. For that reason, the report is broad in scope and recommends changes throughout the entire progress of a report of sexual violence.

One way to respond to this moment in history, and which the Commission recommends in this report, is to establish a Commission for Sexual Safety as a central body with functions designed to address sexual offending. The establishment of a Commission for Sexual Safety would be a tangible acknowledgment by the government of the community's concern.

This report is the work of many people. We have been privileged to have a highly motivated, hard-working and acute research team of Dr Joyce Chia, Dr Emma Larking, Dr Nesam McMillan, Hana Shahkhan, Jasmine Ali and Marcus Hickleton. They were led by Jacinth Pathmanathan who managed the team with outstanding grace, skill and consideration. It has been a joy to work with a group of such talented people. The public interest in the report has meant that the Communications Manager, Nick Gadd, has been particularly busy engaging with the media. He has also been responsible for some innovative ways of promoting public participation, for instance, by commissioning an animated video explaining the reference, and



establishing an online form for comment by the public. He and Gemma Walsh, the Information and Communications Officer, were of great assistance to the team in editing the draft report and ensuring its easy readability.

During the entire progress of the reference, the team has been subject to the disruption caused by the COVID-19 virus. They have largely worked from home. Some spent long hours home schooling children – time which they had expected would be available for work. Others were locked down without the interaction at work which assists the processing and refining of ideas. Despite the pressure of these circumstances and the uncertainty about what the next day would bring, the team proved adaptable and flexible. Throughout, they managed to be cheery and good-natured.

The reputation of the Commission is built on its wide outreach to the community and consideration of the feedback provided. We held 99 consultations and received 71 written submissions on this reference. Each consultation and submission represents an investment of time and energy by the contributors. We are most appreciative of the effort which each contributor put into representing their point of view. I was so often thrilled when it became clear at the start of a consultation that those involved had prepared for the occasion by canvassing others with views relevant to the subject matter. Furthermore, many of the consultations were held with the same generous contributors who had been involved in consultations for previous references. It is wonderful to see their commitment to law reform and to the work of the Commission, particularly when most of them have very busy and consuming day jobs. A special thanks is due to the victim survivors and those close to them who were prepared to tell us their stories and necessarily relive their ordeals. They took us into their world and informed our work in a way which could not be done without the insight gained from their lived experience.

My nine colleagues Liana Buchanan, the Hon. Jennifer Coate AO, Kathleen Foley, Bruce Gardner PSM, Professor Bernadette McSherry, Dan Nicholson, Alison O'Brien PSM, Gemma Varley PSM and Dr Vivian Waller, together with me, constitute the Commission. All have been actively involved in the development of the report. They all provided valuable input to the draft from the point of view of their particular deep expertise. That input gives the report a technical depth which reflects the wide sweep of the Commissioners' combined knowledge. It has been a delight to work with a group of such engaged, constructive and collegiate people. We are also very grateful for the input of the Hon. Marcia Neave AO who agreed to be a Special Advisor to the inquiry and who brought her unparalleled experience of law reform in this area to the task.

The wheels of the Commission continued to turn throughout the period of the reference despite the disruption and uncertainties caused by the COVID-19 virus. The CEO, Merrin Mason PSM, shepherded the team through the ups and downs with patience and wisdom. My numerous clashes with my computer were navigated by the technical skill of my Executive Assistant, the ever-smiling Monika George. The able support of Jennifer Joyner, the Finance and Office Manager, and Janis Dunk, the Administrative Assistant, provided for all the administrative needs of the staff with their usual high level of efficiency and commitment.

May this report herald a new dawn for a society successfully addressing sexual offending.



**The Hon. Anthony North QC**

Chairperson

Victorian Law Reform Commission

August 2021


# Terms of reference

Referral to the Victorian Law Reform Commission pursuant to section 5(1)(a) of the *Victorian Law Reform Commission Act 2000*.

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 sexual offences for victim survivors.
- The effectiveness of the 2014 reforms to the elements of sexual offences.
- The application of sexual offences to children.

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- 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. [Later extended to 20 September 2021].

# Glossary

<b>Accused</b>	A person charged with a criminal offence or offences. Also known informally as the defendant in criminal trials.
<b>Balance of probabilities</b>	The <b>standard of proof</b> in <b>civil proceedings</b> . Often described as 'more likely than not' or 'more probable than not'. A lesser standard than ' <b>beyond reasonable doubt</b> '.
<b>Beyond reasonable doubt</b>	The <b>standard of proof</b> in <b>criminal proceedings</b> . A higher standard than the ' <b>balance of probabilities</b> '.
<b>Brief of evidence</b>	The material relied on by the <b>prosecution</b> in a criminal case.
<b>Charge</b>	A statement containing details of a crime an <b>accused</b> is alleged to have committed.
<b>Child</b>	A person under the age of 18 years. See <b>young person</b> .
<b>Child Protection</b>	The Victorian Child Protection Service. Provides services to children, young people and their families. Functions include investigating matters where a child is at risk of significant harm and making applications for protection orders if a child's safety cannot be ensured within the family.
<b>Child sexual abuse</b>	Sexual offences committed against children.
<b>Civil proceeding</b>	A case under civil (non-criminal) law, where one person or organisation sues another for infringing their legal rights.
<b>Compensation</b>	Money paid to compensate people for injuries caused by crimes and other harms. In this report, 'compensation' is generally used when the person responsible for the injuries is the one who pays the money. See <b>financial assistance</b> .
<b>Complainant</b>	A term used in legislation to describe in criminal cases the person against whom a sexual offence is alleged to have been committed. Also refers to the victim/victim survivor.
<b>County Court</b>	The County Court sits above the <b>Magistrates' Court</b> and below the <b>Supreme Court</b> in the Victorian court hierarchy. In its criminal jurisdiction it hears <b>indictable</b> criminal cases, except for the most serious offences. Criminal trials in this court are usually heard by a judge and jury.

<b>Criminal justice system</b>	The system that responds to criminal behaviour and reports of criminal behaviour. It includes the police, prosecuting agencies, the courts, defence lawyers and correctional services.
<b>Criminal proceeding</b>	A case against a person accused of a criminal offence, or a part of the case, including preliminary hearings and procedures.
<b>Defence</b>	A term used to describe the <b>accused</b> person's legal team and how they defend the charges.
<b>Director of Public Prosecutions (DPP)</b>	An independent statutory appointee and the head of Victoria's public prosecutions service. They institute, prepare and conduct serious criminal matters in the <b>higher courts</b> .
<b>Family violence</b>	Defined in the <i>Family Violence Protection Act 2008</i> (Vic) to include a wide range of abusive, threatening and coercive behaviours by someone towards a family member, or acts that cause a child to be exposed to such behaviours.
<b>Financial assistance</b>	Money paid by the state to people who have been injured as a result of a crime.
<b>Higher courts</b>	In Victoria, the <b>County Court</b> and the <b>Supreme Court</b> .
<b>Indictable offence</b>	A serious crime that is usually tried in a <b>higher court</b> before a judge and jury.
<b>Indictment</b>	A formal written accusation charging a person with an <b>indictable offence</b> that is to be tried in a higher court.
<b>Informant</b>	The person who commences a criminal proceeding in the <b>Magistrates' Court</b> . Often a member of Victoria Police but sometimes a representative from another investigating agency.
<b>Jury directions</b>	Instructions provided by the judge to the jury. They guide the conduct of jurors and explain what jurors need to consider in deciding the case.
<b>Justice system</b>	The system that responds to criminal behaviour and other harms, including breaches of civil law (see <b>civil proceeding</b> ). It includes the criminal and civil courts, and the <b>Victims of Crime Assistance Tribunal</b> . Sometimes in this report, we use <b>justice system</b> as shorthand for <b>criminal justice system</b> . Where this is the case, the context makes it clear that we are discussing the <b>criminal justice system</b> .
<b>Magistrate</b>	A person who presides over a case in the <b>Magistrates' Court</b> or in the <b>Children's Court</b> , or who decides applications for assistance in the <b>Victims of Crimes Assistance Tribunal</b> .
<b>Magistrates' Court</b>	A lower court that hears less serious matters without a jury. It is responsible for hearing and determining <b>summary offences</b> and some <b>indictable offences</b> that can be tried summarily.

<b>Offender</b>	A person who has been found or has pleaded guilty to a criminal offence. See <b>person responsible for sexual violence</b> .
<b>Office of Public Prosecutions (OPP) or prosecuting agency</b>	The independent statutory authority that institutes, prepares and conducts criminal <b>prosecutions</b> on behalf of the Director of Public Prosecutions.
<b>Order</b>	A binding direction by a court or tribunal in a legal proceeding.
<b>Parties</b>	The <b>prosecution</b> and the <b>accused</b> in a <b>criminal proceeding</b> ; the plaintiff and the defendant in a <b>civil proceeding</b> .
<b>Person with a cognitive impairment</b>	The <i>Criminal Procedure Act 2009</i> (Vic) defines 'cognitive impairment' to include 'impairment because of mental illness, intellectual disability, dementia or brain injury'. In this report, the term 'person with a cognitive impairment' is used when we discuss support programs authorised by the Act and other similar initiatives. More generally, the term 'person with a cognitive disability' is used.
<b>Person who has committed a sexual offence</b>	A person who has accepted responsibility for or been convicted of a sexual offence. The phrase 'a person convicted of a sexual offence' is also used.
<b>Person responsible for sexual violence</b>	In this report, this phrase is used to refer to a person who has accepted responsibility for sexual violence in a <b>restorative justice</b> process. It does not necessarily imply an acknowledgment of criminal guilt.
<b>Plea</b>	When the <b>accused</b> person tells the court whether they are guilty or not guilty of the charge.
<b>Primary prevention</b>	Prevention of crime that focuses on the root causes of offending, such as the social or economic conditions that make offending more likely.
<b>Prosecution</b>	The lawyers, individual (for example, the <b>Director of Public Prosecutions</b> ) or statutory authority (for example, the <b>Office of Public Prosecutions</b> ) conducting a criminal case before the court on behalf of the investigating agency. In the <b>Magistrates' Court</b> , the investigating agency, such as Victoria Police, may itself conduct a criminal case. A 'prosecution' may also refer to the case against a person accused of a criminal offence.
<b>Restorative justice</b>	A justice process that brings together the people involved in or affected by a crime to repair its harms. The format may vary. For example, it may involve group conferences or exchanges of messages.
<b>Sentence</b>	The penalty given to an <b>offender</b> by a court.
<b>Sentencing hearing</b>	The hearing in which the <b>prosecution</b> and <b>defence</b> present information which they want the court to take into account when deciding the <b>sentence</b> in the case, and where the <b>victim survivor</b> can give a <b>victim impact statement</b> . At the end of the hearing, the judge summarises the case, imposes a <b>sentence</b> and explains the reasons for giving the sentence.

<b>Sexual harassment</b>	Unwelcome sexual behaviour that is offensive, humiliating or intimidating. It is not criminal, but is banned by state and federal laws in many public settings, including workplaces, schools, tertiary education, clubs, and in the provision of goods and services.
<b>Sexual offence</b>	A sexual offence is sexual violence that is against the law. Specific sexual offences in Victorian law include 'rape' and 'sexual assault'. See <b>sexual violence</b> .
<b>Sexual violence</b>	Sexual activity that happens without consent. It includes violence that is not a sexual offence and violence that is not physical, such as sexual harassment. In this report, 'sexual assault' is used instead when it is the term used in the context (such as when referring to sexual assault services).
<b>Standard of proof</b>	The level of certainty and the degree of evidence necessary to establish that a criminal or civil case has been proved.
<b>Summary offence</b>	A criminal offence that may be dealt with 'summarily' by a magistrate. Less serious than an <b>indictable offence</b> .
<b>Supreme Court</b>	The highest court in Victoria that deals with the most serious criminal offences. The Court of Appeal is a division of the Supreme Court and it hears criminal appeals from the Supreme Court or <b>County Court</b> .
<b>Technology-facilitated sexual violence</b>	Sexual violence that makes use of technology. For example, the unlawful sharing of sexually explicit images ('image-based sexual abuse').
<b>Victim/victim survivor</b>	<p>In criminal proceedings, a <b>victim</b> is a person who has suffered harm as a result of the action of an <b>offender</b>. In this report, the term applies to a person alleged by the <b>prosecution</b> to be a victim before the <b>accused</b> has been found guilty, as well as a person who has suffered due to an offence for the which the offender has been found guilty.</p> <p><b>Victim survivor</b> is sometimes used instead of victim, in the circumstances set out above. Victim survivor may also refer to a person who has experienced sexual violence that was not reported or prosecuted or did not result in a criminal conviction.</p>
<b>Victim impact statement</b>	A statement in which a <b>victim</b> can tell the court how the crime affected them. The statement is provided to the court after the <b>offender</b> has been found guilty.
<b>Victims of Crime Assistance Tribunal (VOCAT)</b>	A body established by legislation to hear and determine applications for <b>financial assistance</b> made by <b>victims</b> of violent crime committed in Victoria.
<b>Witness</b>	A person who gives evidence in a case.
<b>Young person/young people</b>	In this report, 'young person' may be used to refer to people between 12-24 years of age. In sections of the report where we are only referring to young people either under or over 18 years of age, we make this clear in the discussion.

# Executive summary

This is a summary of the key recommendations of the report. For more detail on particular topics, see the overview at the start of each chapter.

- 1 This report recommends ways to improve how the justice system responds to sexual offences.
- 2 The system needs to change, so that:
  - using it is straightforward and not traumatic for people who experience sexual violence
  - the criminal justice system holds people responsible for sexual violence to account
  - victim survivors have choices and support when seeking justice for sexual violence.

## Why does the justice system need to change?

- 3 Sexual violence is widespread. It causes serious, long-term harm. But most sexual violence is not reported to the police. Many people do not report because they think that they will not be believed, or they do not want to go through a criminal trial.
- 4 Most reports of sexual violence do not make it to court. Cases that do go to court mostly end up with someone being convicted, either by pleading guilty or being found guilty. But only about half of the trials in higher courts (the County Court and the Supreme Court) end with someone being found guilty, a rate lower than for most other offences.
- 5 Too often, people who have experienced sexual violence do not get what they need or want from the justice system. They need to be supported; to be heard; to have a voice; and to see the person responsible held to account. Instead, the justice system often leaves them feeling alone, invisible, and as if they are the ones on trial.
- 6 Positive changes have been made by governments and people working in the justice system. But this important work is far from over, and much more needs to be done.



## How should the justice system change?

### Change starts in the community

- 7 We need to build a community that understands sexual violence and supports people who experience it.
- 8 People still do not talk openly about sexual violence. They do not always know it is a crime, or how to reach out for support or to find justice. When a person discloses sexual violence, they do not always get a supportive response. These things are barriers to justice.
- 9 The Victorian Government should invest in ongoing public education about sexual violence.
- 10 Stopping sexual violence should become 'everyone's business.' Organisations like clubs and schools, and employers, should have stronger obligations to do what they can to eliminate sexual violence and harassment.

### The system needs to change

- 11 The 'system' for responding to sexual violence is under strain. Victim support services, police, and lawyers are overworked and under-resourced. The courts have serious backlogs.
- 12 The first and most urgent thing the Victorian Government should do is invest in the system.
- 13 Everyone in the system needs to work together with a shared idea of what they are trying to achieve. This would help to create a system that is straightforward to use and effective.
- 14 The Victorian Government should create a governance structure that supports everyone to work together effectively.
- 15 A multi-agency protocol should set out how everyone in the system works together. The protocol should be clear about who is responsible for what, and how to give feedback to improve the system. It should set out how to connect victim survivors to support services.
- 16 People who work in the system should be accountable, and report to parliament on their compliance with the protocol. Victims of sexual offences should have specific rights in the *Victims' Charter Act 2006* (Vic) and the Victims of Crime Commissioner should make sure these rights are respected.
- 17 Good models of working together should be expanded. Multi-disciplinary centres are an example, bringing together sexual assault services, police, and Child Protection.
- 18 The Victorian Government should strengthen joint responses to child sexual abuse, including a strong partnership between Victoria Police and Child Protection.

### Research and data are a priority

- 19 We need to understand the contexts and patterns of sexual violence, why people commit sexual violence, and how to change their behaviour. We need to evaluate what works, to help design better responses to sexual violence. Gaining this knowledge and sharing it should be a goal of the Sexual Assault Strategy the Victorian Government is developing.
- 20 To improve the criminal justice system, we need better data on what is working and what needs fixing. To achieve this, the way data is collected, used, and published should be improved. An annual report on key criminal justice data should be published, and the impact of reforms measured. The Victorian Government should fund the Crime Statistics Agency to publish regular studies on the progress of cases through the criminal justice system.

## Reporting needs to be easier

- 21 Not everyone wants to report sexual violence, but everyone should know their support, reporting, and justice options. It should be as easy as possible to contact police and support services.
- 22 The Victorian Government should set up a user-friendly website that explains what support is available, how to report, and what happens if a person does report. It should explain all the options, including financial assistance and restorative justice.
- 23 This website should be a gateway to support services, with options to connect with support services online or by phone.
- 24 There are not enough ways to contact police. People should be able to make contact with police online, making it easier to report sexual violence.

## Everyone should have access to support and reporting options

- 25 Everyone should have access to support and reporting options, wherever they live. People living in institutional contexts face unique barriers to reporting. Staff and carers may not know how to respond to disclosures.
- 26 Many inquiries have made recommendations to reduce sexual violence in institutional contexts and break down barriers to reporting. This work must continue. Regulators should support this work by implementing good practices in their different institutional contexts.
- 27 The needs of women in prison should also be addressed in the Sexual Assault Strategy. They are likely to have experienced sexual violence. The strategy should also prioritise the experiences and needs of children and young people in contact with the justice system who have experienced sexual violence.
- 28 Some people and communities do not trust the justice system or see it as a source of support. This must be addressed so that all communities have access to support, reporting and justice options.
- 29 The Victorian Government should support familiar and trusted community organisations to provide people with safe spaces to disclose sexual violence and access to information, support and reporting options. Many community organisations are already playing this role, but it should be strengthened, and they should collaborate with specialist sexual assault services.
- 30 Specialist sexual offences police (SOCITs) should build relationships with the community in their regions. They should work with community organisations and services to develop new pathways to reporting.
- 31 An Aboriginal sexual assault service is needed. It would provide a culturally safe and appropriate service for Aboriginal people who have experienced sexual violence. The current pilot programs can be developed into a permanent service model that responds to the different needs of Aboriginal women, children and men.
- 32 The Victorian Government should strengthen the support available to children and young people who use harmful sexual behaviour. Early intervention programs and support services are needed.

## Justice options should be expanded and strengthened

- 33 People have different justice needs. They include needs for emotional and practical support. To respond to these needs, the range of justice options should be expanded and strengthened.

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- 34 The time has come for restorative justice in Victoria.
- 35 Restorative justice enables people affected by a crime, including the person responsible (where appropriate), to communicate about the damage and work together to repair it. Restorative justice should be an additional justice option for victim survivors alongside the criminal justice system.
- 36 The Victorian Government should set up a restorative justice scheme for criminal offences, with guiding principles for sexual violence so that the restorative justice process is done safely and well.
- 37 Civil litigation can provide victim survivors with compensation, acknowledgement and a sense of control. But it can be hard to get legal representation to sue an individual for sexual violence.
- 38 In cases with individual defendants, the Victorian Government should fund civil cases that raise important legal or systemic issues, or where the person who experienced sexual violence faces unique barriers to justice. The Victorian Government should also, on request, enforce civil orders and settlements.
- 39 Financial assistance and 'truth telling' can meet justice needs for victim survivors. They can acknowledge the harm done and validate their experience.
- 40 We recommend strengthening financial assistance and truth telling as justice options. The time limit for making applications should be removed. There should be a specialist stream run by respected decision makers with sexual violence expertise. Decision makers should ensure 'recovery payments' are enough to recognise the negative impacts of sexual violence.
- 41 Too often, people who have experienced sexual violence are left alone to navigate a complex and frightening system. Victim survivors told us they need strong, continuous support.
- 42 Victoria has the foundation of a strong support system, but accessing specialist services is still too hard. More investment is needed to strengthen the services we have.
- 43 There are gaps in meeting immediate needs—basic things like getting a taxi to hospital after experiencing sexual violence. The Victorian Government should make flexible support packages available to people who have experienced sexual violence.
- 44 Victim advocates should be funded to 'walk with' people who have experienced sexual violence. They should provide holistic support, ranging from helping victim survivors navigate services to supporting them through the justice system. The support should cover the whole experience of the criminal justice system—before, during and beyond.
- 45 People who have experienced sexual violence need legal advice and representation. The new Victims' Legal Service should provide this, up to the point of trial if needed.

## **Stop the violence before it starts**

- 46 Previous reforms have focused on victim survivors and the criminal justice system. There is an increasing focus on perpetrator interventions in cases of family and sexual violence. An ideal response would stop sexual violence before it happens, or prevent it continuing.
- 47 As part of the Sexual Assault Strategy, the Victorian Government should develop a coordinated approach to preventing sexual offending. The focus should be on early intervention programs. Strong reintegration programs should support people who have committed sexual offences to return to the community.
- 48 The Victorian Government should adopt recommendations from our Sex Offenders Registration report.

## **Victoria should move to a strong 'affirmative consent' model**


- 49 Lack of consent is a key element of rape and other sexual offences. The definition of consent should be reviewed, along with the question of whether a person's belief in consent is reasonable. There should be a higher bar set for finding out if the other person is consenting to sex. Victoria should move to a strong model of affirmative consent.
- 50 It is a crime to remove a device such as a condom without consent, and this needs to be made clear in the definition of consent. This would help people identify it as criminal and report it.
- 51 Image-based sexual abuse is a growing problem that causes serious harm. Victoria's laws need to recognise its seriousness. Image-based sexual offences should be indictable crimes triable summarily.
- 52 Safeguards should be built into the system so that children and young people are not overcriminalised.
- 53 The investigation of image-based sexual abuse offences should be handled by police who specialise in sexual offences (SOCITs). Complainants in these cases should have the same protections as complainants for other sexual offences.
- 54 The sexual offence laws reformed in 2015 need to explain how those offences apply in cases before the reformed offences commenced ('transitional provisions'). The current situation causes major practical problems in prosecuting sexual offences, such as charges not being filed.
- 55 Past recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse should be implemented. This would make it easier to prosecute repeated and systematic child sexual abuse.

## **The criminal justice system should support everyone**

- 56 When a victim survivor reports a crime and appears in court, they should be heard and understood. People accused of sexual offences should be able to understand the charges and evidence against them, and how the criminal justice system works.
- 57 Intermediaries provide valuable support to children and people with communication difficulties. More people should be able to access them. Intermediaries should be available to anyone with communication difficulties, including the accused. They should be available in all venues of the County Court of Victoria.
- 58 Independent third persons provide valuable support in police interviews to people with cognitive disabilities. This service should have enough funding, connect people to other services, and be promoted.
- 59 Language services are especially important in the context of sexual violence. Sexual violence affects people who need language services more than others. Funding for language services should be increased. Investing in specialised training is a priority.

## **Focus on the 'front end' of the criminal justice system**

- 60 Forensic medical examinations can improve evidence in criminal prosecutions. There is an urgent need to invest in access to forensic medical examinations, especially in rural and regional areas, and for children and young people.
- 61 To give victim survivors more choices and control, they should be able to specify the gender of their forensic medical examiner. There should be more access to 'just in case' forensic medical examinations, which do not require reporting to police.

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- 62 Before reporting sexual violence, victim survivors need to feel confident that police will respond appropriately to their diverse needs and experiences. This requires immediate attention, including training. Victoria Police should continue to gain 'communication access' accreditation.
- 63 The responses of police and prosecutors to sexual violence have improved, but more can be done. Good practice should be embedded in the multi-agency protocol we recommend. There should be new rights in the Victims' Charter Act, including the right to specify the gender of the police interviewer and to have flexible interview arrangements.
- 64 There should be a focus on improving the quality of police interviews with children and young people.
- 65 There is a need to understand why sexual violence cases do not progress. There should be independence and accountability in decision making by police and the prosecution. The Victorian Government should establish an independent, multi-disciplinary panel to review and make recommendations about police and prosecution decisions.

### **People working in the criminal justice system should have specialist skills**

- 66 Sexual offences is a complex area to work in. To handle these matters well, people working in the criminal justice system need to understand sexual violence. They also need to understand complex laws and procedures.
- 67 Past reforms have helped develop the specialist knowledge and skills needed to respond to sexual violence. But good practice still does not happen across the board.
- 68 We need to create a specialised criminal justice workforce.
- 69 This specialised approach should build on the elements that have improved responses in specialist sexual offence courts.
- 70 Lawyers appearing in sexual offence cases should be encouraged to have specialist accreditation. Fees should be increased so that this complex work attracts skilled lawyers who have accreditation. Judges and magistrates should complete well-rounded and ongoing education and training courses.
- 71 In making judicial appointments, the Victorian Attorney-General should consider the potential appointees' aptitude for hearing sexual offence cases.

### **Criminal trials should be improved**

- 72 Key features of our criminal justice system make it hard for sexual offences to be proved in court, and hard for complainants to go through the process.
- 73 There have been decades of reform to address these issues, including the issue of delay. Other key reforms, such as to tendency and coincidence evidence, are still in progress.
- 74 The Victorian Government should implement recommendations from our *Committals* report to reduce delay and trauma to victim survivors.
- 75 Tendency and coincidence evidence can play a central role in sexual offence trials, especially those involving child sexual abuse. Reforms to tendency and coincidence evidence should be evaluated.
- 76 We acknowledge concerns about appeals. They may have negative impacts, such as drawing out the process for those involved. We recommend a review of appeals.
- 77 Juries in sexual offence trials may have misconceptions about sexual violence. This may affect how they assess the evidence. Sexual offence trials are complex, making a juror's job of assessing the evidence in line with the law a difficult one.

- 78 We recommend more jury directions, greater use of independent experts and more effective communication with the jury. This should include guidance in every sexual offence trial on the meaning of 'beyond reasonable doubt', given how crucial the question is to verdicts in these trials.
- 79 The Victorian Government should invest in ongoing research on juries in sexual offence trials.
- 80 Although there has been a shift towards a respectful courtroom culture, trials are often still traumatic for complainants. There should be a focus on creating a respectful environment and getting the most relevant and clear evidence from complainants.
- 81 To shift courtroom culture, the parameters of cross-examination and respectful treatment of the complainant should be considered carefully. This should be part of the planning for every sexual offence committal or trial.
- 82 Arrangements for taking evidence should be flexible and include pre-recorded evidence. There should be changes to court design and arrangements to make sure complainants feel safe and able to present their best evidence.
- 83 Complainants' rights to privacy need to be protected. They need to know if the defence wants to introduce evidence about their confidential communications with a medical practitioner or counsellor, or their sexual history. They need to be given legal advice and representation to protect those rights and have a say in decisions.

### **Future reforms need a systems-wide approach to implementation**

- 84 The recommendations in this report need to be implemented effectively. We recommend monitoring and an annual report on implementation progress.
- 85 A new Commission for Sexual Safety should be established. Its functions should span prevention, education, and the way services and the justice system respond to sexual violence. It should bring a 'systems-wide' view to implementing the recommendations in this report. It would lead the changes we want to see in responding to sexual violence.

# Recommendations

## Chapter 3

- 1 The Victorian Government should resource and support ongoing public education about sexual violence, including on:
  - a. identifying its many different forms
  - b. common misconceptions about sexual violence
  - c. sexual offences, with a focus on the law of consent
  - d. the available support options
  - e. the available justice options and what to expect from these.The content of public education should:
  - a. be informed by research and evidence on how best to generate lasting social change
  - b. be accessible and up to date
  - c. be tailored to reach all groups in the community
  - d. equip family and friends and health and other service providers to respond constructively to disclosures
  - e. include a focus on children and young people.
- 2 The Victorian Government should review the content and implementation of Victoria's Respectful Relationships Education and sexuality education with a view to:
  - a. improving its uptake by all schools, including independent and Catholic as well as government schools
  - b. increasing the focus on sexual violence
  - c. tailoring education to address diverse needs and experiences.
- 3 The Victorian Government should amend the *Equal Opportunity Act 2010* (Vic) to give the Victorian Equal Opportunity and Human Rights Commission the power to enforce the duty in section 15 of that Act to take reasonable and proportionate measures to eliminate sexual harassment as far as possible.
- 4 The Victorian Government should create an enforceable duty to take reasonable and proportionate measures to eliminate sexual violence as far as possible. The duty should apply to existing duty holders under section 15 of the *Equal Opportunity Act 2010* (Vic).



## Chapter 4

- 5 The Victorian Government should:
  - a. address as a priority the need for resourcing of key partners responding to sexual violence, including specialist sexual assault services, the police, and prosecution
  - b. review the role of health and human services in Victoria's response to sexual violence, including the capacity of specialist sexual assault services and forensic services to play their role as key partners in the system.
- 6 The Victorian Government should, as part of the Sexual Assault Strategy, consult on and develop a clear governance structure for coordinating responses to sexual violence to:
  - a. ensure a shared vision of responding as a system to sexual violence
  - b. identify and respond to systemic issues and opportunities for improvement
  - c. foster collaboration between stakeholders, including by resolving differences
  - d. ensure transparency and accountability for a system-wide response to sexual violence, including through the proposed strengthening of the role of the Victims of Crime Commissioner.
- 7 The governance structure for coordinating responses to sexual violence should include:
  - a. ministerial responsibility for sexual violence
  - b. a high-level statewide body representing government departments and key stakeholders
  - c. regional governance arrangements linked to the high-level structure
  - d. genuine and ongoing representation of views from victim survivors and diverse communities
  - e. a working group of regulators with responsibility for addressing sexual violence that will work together on ways to improve sexual safety in their areas.
- 8 The recommended high-level statewide body should develop a statewide multi-agency protocol for responding to sexual violence. This should include:
  - a. a statement of the role and responsibilities of each partner
  - b. a commitment to working collaboratively based on overarching principles
  - c. processes that identify responsibilities during key interactions and how people should interact with each other
  - d. timeframes for key interactions
  - e. processes that clarify who is responsible for communicating with the person who has experienced sexual violence
  - f. guidance on flexible arrangements for reporting sexual violence and taking statements
  - g. processes that clarify when, how and to whom referrals are to be made
  - h. how and when people should be supported to apply for intervention orders
  - i. processes for ensuring feedback between partners and for continual improvement, including the need to identify and address causes of delay
  - j. processes for resolving disputes between partners and ensuring regular review of the protocol and compliance with the protocol.



- 9 The *Victims' Charter Act 2006* (Vic) should be amended to provide that victims of sexual offences have:
- the right to be referred to specialist support services within a set timeframe
  - the right to specify the gender of the person interviewing them
  - the right to specify the gender of a forensic medical examiner
  - the right to request flexible arrangements for police interviews
  - the right to request an independent review of decisions by police or the prosecution to discontinue or not file charges or indictments after an internal review
  - the right to interpretation and translation
  - the right to special protections, including the recommended right to pre-recorded evidence
  - the right to be notified of applications to introduce confidential communications or evidence of sexual history and, as recommended, the right to be heard on those applications and to funded legal advice and representation for those applications
  - the right to be informed about the recommended restorative justice scheme for sexual offences and, if they choose to and it appears appropriate, to be referred to this scheme.
- 10 The *Victims of Crime Commissioner Act 2015* (Vic) should be amended to:
- confer on the Victims of Crime Commissioner powers to monitor progress under, and compliance with, the statewide multi-agency protocol
  - require annual public reports on progress under, and compliance with, the statewide multi-agency protocol, to parliament.

## Chapter 5

- 11 The Victorian Government should commit to and fund the expansion of Multi-Disciplinary Centres.
- 12 The Victorian Government should set up an independent review of collaboration between those working to respond to sexual violence. The review should:
- identify what could be done to improve collaboration
  - inform an implementation plan that improves collaboration, including how to implement Recommendation 11 and to identify other promising models of collaborative practice that should be implemented.
- 13 The Victorian Government should, building on the Protocol between Child Protection and Victoria Police, develop a revised protocol for child sexual abuse to improve the interactions between the justice system and the child protection system. The revised protocol should move towards:
- a partnership model across the state that includes as key partners those responsible for providing therapeutic services for children
  - clear and strong processes for joint case planning, joint training and collaborative practice
  - a strong component of advocacy for children
  - improved governance and accountability
  - an approach informed by evidence, including regular data analysis, evaluation and review.

## Chapter 6

- 14 The Victorian Government should, as part of its Sexual Assault Strategy:
  - a. identify key gaps in data, research and evaluation on the experiences of and responses to sexual violence and develop measures to address these gaps
  - b. identify the data that should be shared and mechanisms for sharing the data among key partners
  - c. identify opportunities to build on existing data on sexual violence
  - d. fund the modernisation of data systems for key agencies
  - e. develop measures and indicators to support shared goals and outcomes
  - f. identify ways to include measures of progress that reflect the experiences of people who have experienced sexual violence
  - g. commit to a consistent practice of requiring, resourcing, planning for and publishing regular evaluations.
- 15 The Victorian Government should include, in its extension of the Family Violence Data portal, data from sexual assault services, forensic medical examinations, the Office of Public Prosecutions and the higher courts.
- 16 The Department of Justice and Community Safety should establish a working group to:
  - a. publish an annual report providing key data about the response of the criminal justice system to sexual offences, including the progression of cases and trends in the criminal justice system
  - b. identify ways to record and address the reasons for delays to sexual offence cases in the criminal justice system
  - c. identify ways to include the experiences of victim survivors in the criminal justice system as part of broader outcomes on sexual violence
  - d. develop plans for measuring the impact of reforms at an early stage.
- 17 The Victorian Government should fund the Crime Statistics Agency to publish a regular qualitative review and a regular attrition study that includes police and prosecution records. This should include a follow-up qualitative review to complement its most recent attrition study.

## Chapter 7

- 18 The Victorian Government should set up a central website (or expand an existing website) to provide people with practical information on sexual violence and their options for support, reporting and justice. It should:
  - a. enable people to connect with support services online or via phone, 24 hours a day
  - b. discuss how to identify sexual violence, support options, reporting options and justice options, and possible outcomes
  - c. be user friendly and tailored to different audiences, including victim survivors, friends and family and bystanders, and people with diverse needs and experiences.
- 19 The Victorian Government should resource sexual assault support services to receive and respond to disclosures of sexual violence online and through a central website.

- 20 Victoria Police, in collaboration with sexual assault support services, should develop an online pathway to reporting sexual offences. It should:
- be victim-centred
  - require people to leave minimal details
  - be clear about who will respond and when (aiming for response times that are as short as practicable)
  - provide people with details of the central website and how to seek support in Recommendation 18.


## Chapter 8

- 21 The Victorian Government should strengthen the role of community organisations in responding to sexual violence as a priority.
- The Victorian Government should provide continued funding and support for community organisations to take on key responsibilities, including:
- providing safe spaces for people to disclose sexual violence
  - providing support to people who have experienced sexual violence and referring them to other services or the justice system
  - developing community-specific ways to prevent sexual violence and inform the community about their support and justice options
  - developing pathways to other services and the justice system, including protocols
  - collaborating with sexual assault services
  - providing training to mainstream and specialist sexual assault services on diverse needs and experiences.
- 22 The Victorian Government should review the funding arrangements of Sexual Assault Services Victoria to ensure that they can:
- provide ongoing training to community organisations on identifying and responding to sexual violence
  - provide professional supervision for community organisation staff working with sexual violence
  - develop mutual referral arrangements with community organisations
  - pursue community outreach, service co-location and secondments and establish community liaison positions in collaboration with community organisations.
- 23 Building on the experience of the current pilots, the Victorian Government should fund and support the development of permanent Aboriginal sexual assault services that respond to the different needs of Aboriginal women, children and men.
- 24 As part of the Sexual Assault Strategy, the Victorian Government should address the support and justice needs of:
- women, children and young people in contact with the justice system who have experienced sexual violence
  - children and young people using harmful sexual behaviour.
- 25 As part of its work on Recommendation 24, the Victorian Government should strengthen the availability of early intervention, diversion and therapeutic support options within the community that address diverse needs and experiences.
- 26 The Victorian Government should fund therapeutic interventions for young people using harmful sexual behaviour to meet demand.

- 27 Victoria Police should engage with priority communities to identify and put in place measures to strengthen community engagement, with a specific focus on sexual violence. This should:
- build on existing good practice in Victoria Police
  - use Sexual Offences and Child Abuse Investigation Teams as the main avenue to build relationships with communities in their area
  - create pathways to reporting between police and community organisations and victim survivors in priority communities
  - be formalised through protocols or other measures.

## Chapter 9

- 28 The Victorian Government should establish a restorative justice scheme in legislation ('the restorative justice scheme') that applies to all offences. The following principles should guide restorative justice for sexual violence in the restorative justice scheme:
- voluntary participation
  - accountability
  - the needs of the person harmed take priority
  - safety and respect
  - confidentiality
  - transparency
  - the process is part of an 'integrated justice response'
  - clear governance.
- 29 The restorative justice scheme should be adequately resourced to ensure:
- victim survivors and people responsible for harm have independent, professional support throughout the process
  - participants have access to independent legal advice
  - independent assessments for children who wish to participate are conducted, in addition to the standard screening procedures
  - children who participate are provided with independent and specialised support.
- 30 Victoria's Aboriginal communities should be supported to design accredited restorative justice programs for Aboriginal people.
- 31 The restorative justice scheme should supplement criminal justice and be available in the following situations:
- where a person harmed does not wish to report the harm or to pursue a criminal prosecution
  - where a harm is reported but there are insufficient grounds to file charges
  - where charges were filed but the prosecution discontinues the prosecution
  - after a guilty plea or conviction and before sentencing
  - after a guilty plea or conviction and in connection with an application for restitution or compensation orders
  - at any time after sentencing.
- 32 The Director of Public Prosecutions should amend the *Policy of the Director of Public Prosecutions for Victoria* to ensure that the availability of restorative justice does not influence prosecution decisions.

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- 33 Therapeutic treatment programs should be available to support people responsible for sexual violence who are participating in restorative justice and/or commit to participating in a program as part of an outcome agreement. These supports should be developed as part of the coordinated approach to preventing sexual offending in Recommendation 47.
- 34 The restorative justice scheme should require justice agencies to inform victim survivors they are entitled to request a restorative justice process.
- 35 Restorative justice for sexual violence should be available through several providers.
- 36 The Department of Justice and Community Safety should be responsible for the restorative justice scheme. The Commission for Sexual Safety (Recommendation 90) should work with the Department to provide oversight in relation to restorative justice for sexual violence. Oversight should include:
- a. establishing training standards
  - b. establishing accreditation criteria
  - c. ensuring restorative justice outcome agreements are monitored
  - d. establishing and managing a complaints process
  - e. evaluating programs and collecting data.

## Chapter 10

- 37 The time limit for applications in sexual offence cases should be removed from the new financial assistance scheme that was recommended in the Victorian Law Reform Commission's *Review of the Victims of Crime Assistance Act 1996* report.
- 38 The new financial assistance scheme that was recommended in the Victorian Law Reform Commission's *Review of the Victims of Crime Assistance Act 1996* report should include a specialised stream for sexual offences.
- Decision makers in this stream should have expertise in sexual violence, strong standing in the community and positions of authority in the new Commission for Sexual Safety (Recommendation 90).
- 39 The new Commission for Sexual Safety (Recommendation 90), or the body that has oversight of the new financial assistance scheme that was recommended in the Victorian Law Reform Commission's *Review of the Victims of Crime Assistance Act 1996* report, should report annually on themes from sexual offence victim conferences, to improve the system's response to sexual violence. These reports should be publicly available.
- 40 The new financial assistance scheme that was recommended in the Victorian Law Reform Commission's *Review of the Victims of Crime Assistance Act 1996* report should require decision makers in the sexual violence stream (see Recommendation 38) to ensure that recovery payments for sexual offences reflect current research and evidence about the impacts of sexual violence.

## Chapter 11

- 41 The Victorian Government should provide funding for people who wish to bring civil proceedings against a non-institutional defendant (or defendants) for sexual assault where:
- a. their case raises important systemic or legal issues, or
  - b. they face multiple barriers to justice and their case has reasonable prospects of success.

- 42 The Victorian Government, or an agency or authority it authorises, should bring enforcement proceedings on behalf of a person who has experienced sexual violence, if they request it.

This should be available if the individual responsible for sexual violence does not fulfil the terms of a civil settlement or court order to pay damages or compensation for injuries resulting from sexual violence.

## Chapter 12

- 43 The Victorian Government should invest in strengthening the support available to people who have experienced sexual violence, including supporting any decision making about their justice options or interactions with the justice system. This investment should include:

- a. significant increases in resourcing centres against sexual assault to meet demand
- b. funding training, secondary consultation and other supports needed to extend the capacity of other parts of the service system to respond to sexual violence.

- 44 The Victorian Government should make flexible support packages that were introduced as part of family violence reforms available to people who have experienced sexual violence.

- 45 The Victorian Government should consult on and co-design a model of victim support that uses single advocates to provide continuous support for people who have experienced sexual violence across services and legal systems. These independent advocates should:

- a. provide information about justice options
- b. support them to understand and exercise their rights, including their rights under the *Victims' Charter Act 2006* (Vic)
- c. support their individual needs, including through referrals to services
- d. liaise with, and advocate for them to, services and legal systems.

The model of an independent advocate should:

- a. aim to empower those experiencing sexual violence
- b. enable advocates to provide holistic, individualised and specialised support, including specialised expertise and understanding of working with children and young people
- c. not depend upon a person's engagement with the criminal justice system
- d. give priority to people who are under-served and/or who face the most complex interactions between services and systems
- e. include diverse points of access to such support
- f. be co-designed with under-served communities and people who have experienced sexual violence
- g. include support and training for advocates
- h. include oversight of the scheme.

- 46 The Victorian Government should fund legal advice and, where necessary, representation until the point of trial and in related hearings, to ensure victim survivors can exercise their rights and protect their interests, including:
- a. their rights and privileges in relation to evidence (for example, the confidential communication privilege, alternative arrangements and special protections, access to intermediaries)
  - b. their rights to privacy in relation to disclosures of personal information (for example, information about their sexual history, the nature of cross-examination, or suppression orders)
  - c. their options for compensation, including under the *Sentencing Act 1991* (Vic), victims of crime compensation, and civil or other compensation schemes
  - d. the implications of taking part in restorative justice and referrals to restorative justice when applying for compensation or restitution orders.

## Chapter 13

- 47 As part of the Sexual Assault Strategy, the Victorian Government should develop a coordinated approach to preventing sexual offending, with a focus on early intervention programs that meet the Headline Standards in the National Outcome Standards for Perpetrator Interventions.
- 48 To help prevent reoffending, the Victorian Government should ensure that reintegration programs for people who have committed sexual offences are available and funded to meet demand. This should include a trial of the Circle of Support and Accountability program in Victoria.
- 49 Key outstanding recommendations from the Victorian Law Reform Commission's *Sex Offenders Registration* inquiry should be immediately implemented to enable
- a. an individualised and discretionary approach to registration
  - b. shorter registration periods with more regular review
  - c. protection for children and young people from registration
  - d. any necessary transitional arrangements.

## Chapter 14

- 50 The Victorian Government should review the definition of consent under section 36 of the *Crimes Act 1958* (Vic) and the fault element of 'no reasonable belief in consent' under section 36A of the same Act with the aim of moving towards a stronger model of affirmative consent. In doing so, it should:
- a. formulate a requirement for a person to 'take steps' to find out if there is consent
  - b. consult widely with members of communities and stakeholders
  - c. deliver training and education for people working in the criminal justice system on the reforms
  - d. deliver community education and programs on the reforms.
- 51 Section 36(2) of the *Crimes Act 1958* (Vic) should be amended to include a new circumstance in which consent is not given by a person where, having consented to sexual activity with a device to prevent sexually transmitted infections or contraceptive device, the other person does not use, disrupts or removes the device without the person's consent.

- 52 The image-based sexual offences in sections 41B, 41C, 41DA, 41DB of the *Summary Offences Act 1966* (Vic) should be relocated to the *Crimes Act 1958* (Vic) as indictable sexual offences and amended to:
- include the taking of intimate images without consent or being 'reckless' as to consent
  - expand the offence of distributing intimate images to include being 'reckless' as to consent
  - define 'intimate image' so that it applies to people of diverse genders, including transgender people and intersex people, and include altered intimate images
  - give courts power to order the destruction of the intimate images.
- 53 The definition of 'sexual offences' in the *Crimes Act 1958* (Vic) should be amended to include these image-based sexual abuse offences to extend the protections for giving evidence and suppressing identities.
- 54 To reduce the risks of overcriminalising children and young people who commit image-based sexual abuse offences:
- the *Crimes Act 1958* (Vic) should specify that prosecution of perpetrators under the age of 16 should require approval from the Director of Public Prosecutions
  - Victoria Police should use its discretion to issue formal cautions for image-based sexual abuse offences, without the requirement for 'exceptional circumstances'.
- 55 Victoria Police should ensure that image-based sexual abuse is investigated by the Sexual Offences and Child Sexual Abuse Investigation Teams.
- 56 The *Crimes Act 1958* (Vic) should be amended to include transitional provisions for changes to sexual offences made by the *Crimes Amendment (Sexual Offences) Act 2016* (Vic).
- 57 The Victorian Government should implement previous recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse in relation to the 'course of conduct' charge and the offence of 'persistent sexual abuse of a child under the age of 16'.

## Chapter 15

- 58 The Victorian Government should expand the availability and accessibility of the Intermediary Pilot Program by:
- amending the *Criminal Procedure Act 2009* (Vic) to ensure that all witnesses and accused persons with communication difficulties have access to the intermediary scheme
  - expanding its availability to all venues of the County Court of Victoria, including providing the funding and resources to support an expansion.
- 59 Victoria Police should set up processes to ensure any victim, witness, offender, accused or suspect in a sexual offence case is notified of the independent third person program and given the opportunity to confirm their eligibility.
- 60 The Victorian Government should resource the independent third person program to meet current and future demand and program training needs.



- 61 The Victorian Government should review arrangements to improve access to safe language services. This should include investing in training for language services in family and sexual violence and extending the pool of trained interpreters, including through:
- a. funding and encouraging training through relevant community services
  - b. identifying ways to extend the pool of trained interpreters across Australia to address privacy concerns.

## Chapter 16

- 62 The Victorian Government should, as part of the Sexual Assault Strategy, develop measures:
- a. to extend access to forensic medical examinations across Victoria, including by the increased use of forensic nurses
  - b. to give victim survivors the option of a forensic medical examination, without requiring a report to the police.

## Chapter 17

- 63 Victoria Police should complete implementation of Recommendation 5 of the Victorian Equal Opportunity and Human Rights Commission's *Beyond Doubt* report to gain and maintain communication access accreditation based on the advice of Scope, the disability support provider.
- Police stations that specialise in sexual offences should be accredited as a matter of high priority.
- 64 The protocol for child sexual abuse referred to in Recommendation 13 should identify as a priority evidence-informed practices in child interviewing and ways to measure and improve the quality of interviews.
- 65 Victoria Police should review and strengthen its training and resources to ensure regular and ongoing professional development for specialised police dealing with sexual offences. This should include addressing:
- a. responses to children (particularly children in out-of-home care), people in contact with the justice system and people working in the sex industry
  - b. interviewing of children and the recording of VAREs
  - c. the appropriate use of interpreters
  - d. its understanding of image-based sexual abuse
  - e. the quality of evidence gathering
  - f. the quality of police prosecutions.

- 66 The Victorian Government should establish an independent and high-level panel that includes multi-disciplinary expertise to review police and prosecution decisions.

A complainant or a person acting on the complainant's behalf should have the right to request a review by this panel of decisions to discontinue or not file charges or indictments in sexual offence cases after any internal review.

This panel should have the power to make recommendations, based on its review of these decisions, to:

- a. the police and prosecution about if and how they should continue individual cases, after any internal review process has been completed
- b. the police and prosecution about how to improve the quality of their decision making
- c. the Victorian Government to address barriers to progressing sexual offence cases.

## Chapter 18

- 67 The Victorian Government and Victoria Police should review and strengthen training and practice guidance on sexual violence under the Family Violence Multi-Agency Risk Assessment and Management (MARAM) Framework, including for training to be delivered to those working in the criminal justice system.

- 68 The Law Institute of Victoria and the Victorian Bar should encourage and promote MARAM-aligned training for their members.

- 69 The Victorian Government should fund the development and delivery of a program to educate and train police, lawyers, judges and magistrates on:

- a. the nature and prevalence of sexual violence in the community
- b. the effects of trauma and how to reduce the risk of further trauma
- c. barriers to disclosure and reporting sexual violence
- d. identifying and countering misconceptions about sexual violence
- e. how to respond to diverse experiences and contexts of sexual violence
- f. effective communication with and questioning of victim survivors, including children
- g. procedures related to ground rules hearings and the role of intermediaries
- h. limits on improper questioning and judicial intervention
- i. alternative arrangements for giving evidence, and special hearings for children and people with a cognitive impairment
- j. the therapeutic treatment order system
- k. any reforms implemented from this report.

Funding for the program should be on an ongoing basis.

- 70 Data on the take up of the program in Recommendation 69 across each of these agencies should be published annually.

- 71 The Office of Public Prosecutions and Victoria Legal Aid, in consultation with relevant legal professional bodies, should take the lead on developing the requirements for specialised training based on the program in Recommendation 69. Only accredited counsel in sexual offences cases who meet the training requirements should be briefed to appear for the prosecution, or in legally aided cases.

- 72 Victoria Legal Aid and the Office of Public Prosecutions should increase fees for accredited counsel in sexual offence cases who meet the training requirements developed in Recommendation 71, in consultation with the Victorian Bar. The Victorian Government should fund the increase in fees on an ongoing basis.
- 73 All judicial officers in the Magistrates' Court of Victoria, County Court of Victoria and the Victorian Court of Appeal who sit on criminal cases or appeals involving sexual offences should be required to complete education and training in areas covered in the program in Recommendation 69.
- 74 In making future judicial appointments, the Victorian Attorney-General should consider the potential appointees' suitability for hearing cases involving sexual offences.

## Chapter 19

- 75 The Victorian Government should implement outstanding recommendations from the Victorian Law Reform Commission's *Committals* report.
- 76 Any reform in Victoria relating to tendency and coincidence evidence resulting from the adoption of the Council of Attorneys-General's Model Bill on this evidence should be evaluated by the government. The evaluation should assess whether the reforms are achieving their aims and working fairly, after three years from the reforms commencing.
- 77 The Victorian Government should review how appeals are operating in sexual offence cases to identify legal or procedural issues needing reform.

## Chapter 20

- 78 New jury directions should be introduced in the *Jury Directions Act 2015* (Vic) to address misconceptions about sexual violence on:
- an absence or presence of emotion or distress when reporting or giving evidence
  - a person's appearance (including their clothing), use of drugs and alcohol, and presence at a location
  - behaviour perceived to be flirtatious or sexual
  - the many different circumstances in which non-consensual sexual activity may take place, including between:
    - people who know one another
    - people who are married
    - people who are in an established relationship
    - a consumer of sexual content or services and the worker providing the content or services
    - people of the same or different sexual orientations or gender identities
  - counterintuitive behaviours, such as maintaining a relationship or communication with the perpetrator after non-consensual sexual activity.
- 79 The *Jury Directions Act 2015* (Vic) should be amended so that existing jury directions and jury directions on topics in Recommendation 78 can be:
- given by the judge to the jury at the earliest opportunity, such as before the evidence is adduced or as soon as practicable after it features in the trial, and
  - repeated by the judge at any time during the trial, and
  - in addition to the judge's own motion, requested by counsel before the trial or any time during the trial.

- 80 The Victorian Government should set up and maintain an independent expert panel for sexual offence trials to be used by the prosecution, defence and the court. The Commission for Sexual Safety should have a role (Recommendation 90) in setting up and maintaining the panel. To maintain experts of a high calibre, this expert panel should be subject to an approval and periodic review process.
- 81 The Judicial College of Victoria, in consultation with the County Court of Victoria, should develop written materials and training to encourage the use of integrated jury directions in sexual offence trials.
- 82 Section 63 of the *Jury Directions Act 2015* (Vic) should be amended to require that, in all sexual offence trials, explanations of 'beyond reasonable doubt' should be given as set out under section 64 of that Act.
- 83 The Victorian Government should commission ongoing research into improving juror understanding, countering misconceptions about sexual violence and supporting the jury's task in sexual offence trials.
- The research should assess the effectiveness of, and identify ways to improve, jury directions, expert evidence and other measures that aim to support the jury's task of deciding if the accused is guilty or not guilty.

## Chapter 21

- 84 To ensure complainants are respected when giving evidence in the Magistrates' Court of Victoria and County Court of Victoria, and are able to provide the best quality evidence, the *Criminal Procedure Act 2009* (Vic) should be amended to require, in the absence of the jury and before the complainant is called to give evidence, that the judicial officer, prosecution and defence counsel discuss and agree to:
- the style and parameters of questioning so that questioning is not improper or irrelevant
  - the scope of questioning including questioning on sensitive topics and evidence to reduce re-traumatisation
  - the preferences and needs of complainants.
- The treatment of complainants and their questioning should be in line with what the judicial officer determines following the discussion.
- The process can be repeated until the conclusion of the complainant's evidence.
- 85 The Victorian Government should fund the courts to strengthen measures to protect complainants in sexual offence cases by:
- ensuring that they can enter and leave courthouses safely, including, where possible, allowing them to use a separate entrance and exit
  - using appropriate means to screen complainants from the accused when giving evidence in the courtroom
  - ensuring technology is reliable to support complainants to present their best evidence.
- 86 The *Criminal Procedure Act 2009* (Vic) should be amended so that
- special hearings under Part 8.2 Division 6 for children and people with a cognitive impairment are available in the Magistrates' Court of Victoria
  - all other complainants in sexual offence trials in the County Court of Victoria and contested hearings in the Magistrates' Court of Victoria are entitled to provide the whole of their evidence as pre-recorded evidence.

- 87 In line with recommendations in the Victorian Law Reform Commission's inquiry on *The Role of Victims of Crime in the Criminal Trial Process*, the *Evidence (Miscellaneous Provisions) Act 1958* (Vic) should be amended to:
- strengthen procedural requirements to ensure that complainants can participate in decisions about applications to introduce communications made in confidence by a complainant to a medical practitioner or counsellor, either before or after the alleged sexual offending occurred (confidential communications) and have access to legal assistance
  - extend the protection of complainant's records to health information as defined by the *Health Records Act 2001* (Vic).
- 88 Procedures under Part 8.2, Division 2 of the *Criminal Procedure Act 2009* (Vic) should be amended by:
- requiring the prosecution (or informant in summary proceedings) to notify the complainant of their right to appear and the availability of legal assistance in relation to an application concerning sexual activities under section 342 of the *Criminal Procedure Act 2009* (Vic)
  - requiring the court to be satisfied that the complainant is aware of the application and has had an opportunity to obtain legal advice
  - prohibiting the court from waiving the notice requirements except where the complainant cannot be located after reasonable attempts or the complainant has provided informed consent to the waiver
  - providing complainants with standing to appear
  - permitting complainants to provide a confidential sworn or affirmed statement to the court specifying the harm they are likely to suffer if the application is granted.
- 89 The language of section 341 of the *Criminal Procedure Act 2009* (Vic) should be modernised by replacing the word 'chastity' with a neutral term.

## Chapter 22

- 90 The Victorian Government should establish an independent body, such as a Commission for Sexual Safety, following consultation on its nature and functions. This body should be responsible for preventing and reducing sexual violence, and supporting people who experience sexual violence.
- 91 The implementation of the reforms arising from this report and other sexual violence reforms should be monitored to hold the Victorian Government, people and bodies accountable for their effective implementation. The Victorian Government should:
- report annually on the progress of implementing these reforms
  - consider establishing a monitoring function for sexual violence reforms, in light of the scope of future reforms.



# CHAPTER 01

## Introduction

<u>2</u>	Our terms of reference
<u>2</u>	What we focused on
<u>3</u>	Our process
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<u>7</u>	A note on language
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# 1. Introduction

## Our terms of reference

- 1.1 The Victorian Law Reform Commission was asked to recommend ways to improve the justice system's response to sexual offences.
- 1.2 We were guided by our terms of reference (see page xvi) given to us by the former Attorney-General, the Hon. Jill Hennessy MP, on 26 March 2020.
- 1.3 On 26 November 2020, we were asked to also consider if there should be a 'grab and drag' offence. We will report on this part of the reference by 15 December 2021.

## What we focused on

- 1.4 Our terms of reference asked us to look at:
  - barriers to reporting sexual offences: what prevents people from reporting sexual violence
  - why reports of sexual violence may not proceed through the justice system
  - how to reduce the trauma of people who have experienced sexual violence, when they engage with the justice system
  - the best ways of responding to sexual offences—including alternatives to the justice system
  - how to build on previous reforms.
- 1.5 Improving the justice system's response to sexual offences has been the subject of ongoing research and reform in Victoria. The Commission previously investigated this area in 2004, in its report, *Sexual Offences*.<sup>1</sup>
- 1.6 In this report, we have chosen to focus on areas that will make a major difference:
  - making it less difficult to take the first step towards seeking justice—especially for people who face greater barriers to access than others
  - having a strong set of justice options for people who have experienced sexual violence
  - improving victim survivor experiences of the justice process
  - ensuring the justice process is evidence-informed and enables victim survivors to present their best evidence
  - having structures to ensure that the justice system responds effectively to sexual violence and keeps improving.



- 1.7 We highlight issues that have not traditionally been a priority of sexual violence reforms—such as the role of the community to believe and support people who have experienced sexual violence (see Chapter 3). We discuss ways to stop and prevent offending, which considers both accountability and therapeutic interventions (see Chapter 13).
- 1.8 The focus of our inquiry is responding to sexual violence after it happens. That said, we know how important it is to prevent sexual violence (primary prevention).<sup>2</sup>
- 1.9 A strong response to sexual violence also requires more than just a strong justice system response. The government will need to consider other systems, such as education and health, if it implements the recommendations in our report.

## Our process

### Our leadership

- 1.10 The Hon. Anthony North QC was the Commission's Chair during this inquiry.
- 1.11 We established a Division to guide and make decisions about the inquiry. All our Commissioners were Division members. Their names are listed on the inside front cover.<sup>3</sup>
- 1.12 We appointed the Hon. Marcia Neave AO as a special advisor to the inquiry.

### What we published

- 1.13 In mid-October 2020 we published eight issues papers to seek views on how the justice system was working and what could be improved.<sup>4</sup> We invited submissions by 23 December 2020.
- 1.14 Along with the issues papers, we released a consultation paper and Easy English paper aimed at people who had experienced sexual violence.

### Submissions we received

- 1.15 We received 71 written submissions (see Appendix A). We published the submissions on our website, apart from those that were confidential.

### Consultations we held

- 1.16 We held two stages of consultations. First, we held preliminary meetings with people who worked in the justice system, such as sexual violence counsellors and the courts, to help us understand the main issues and start identifying ideas for reform. We also spoke to academics who had studied this area. Along with our own research, these meetings helped us develop our issues papers.
- 1.17 Second, after the release of the issues papers, we held formal consultations with a wide range of people, including community and victim advocacy and support organisations, academics, the police, the legal profession and the courts. We met with people who could tell us about innovative justice models in other jurisdictions.<sup>5</sup>

2 Commonwealth of Australia, *Fourth Action Plan—National Plan to Reduce Violence against Women and Their Children 2010–2022* (Policy, 2019) 2 <<https://www.dss.gov.au/women-publications-articles-reducing-violence/fourth-action-plan>>.

3 The Commissioners come from varied professional backgrounds. Commissioners are required to declare any potential conflicts of interest where they may intersect with the Commission's work, including the development of recommendations. It may be appropriate for a Commissioner to recuse themselves from engaging with the decision-making around a particular issue when a potential conflict of interest arises. In this reference, Dan Nicholson, Executive Director, Criminal Law at Victoria Legal Aid, declared potential conflicts of interest and did not engage in decision-making in relation to Recommendations 45, 71 and 72. These recommendations relate to Victoria Legal Aid..

4 'Improving the Response of the Justice System to Sexual Offences: Issues Papers', *Victorian Law Reform Commission* (Web Page, 5 October 2020) <<https://www.lawreform.vic.gov.au/improving-the-response-of-the-justice-system-to-sexual-offences-issues-papers/>>.

5 See, eg, Consultations 12 (Project Restore), 37 (New Zealand District Court judges with experience on the sexual violence court pilot).

- 1.18 We held 99 of these consultations and met with some people more than once (see Appendix B). This included women and two men who had experienced sexual violence (or in a case involving an adolescent who had experienced sexual violence, their mother).
- 1.19 We organised roundtables and meetings on the experience of Aboriginal communities, people with disability, people with lived experience of mental illness or psychological distress, children and young people, people from LGBTIQ+ communities, people who work in the sex industry, people who experienced sex trafficking, people seeking asylum, care leavers and women with contact with the justice system.<sup>6</sup>
- 1.20 We had hoped to meet with community organisations representing people from migrant backgrounds, older people and men, and were grateful to receive submissions from some of them.<sup>7</sup> We relied on the work of the Royal Commission into Institutional Responses to Child Sexual Abuse to learn about the experiences of victim survivors in institutional contexts.
- 1.21 Due to coronavirus (COVID-19) restrictions, most of our consultations were online, including with people from regional Victoria, other parts of Australia and overseas. We met with members of organisations based in most of Victoria's regions this way.<sup>8</sup>
- 1.22 One of our issues papers was on the experience of people who have committed sexual offences. Many submissions addressed this topic (including one from someone who had been convicted of a sexual offence).<sup>9</sup> We held additional consultations on this topic.<sup>10</sup> We had planned to meet with people who had committed sexual offences, but the process needed to run these meetings well could not be managed in our inquiry's timeframe.
- 1.23 We received valuable informal advice and help from many people who work in the area of sexual violence or the justice system more broadly. We are grateful to the people named in Appendix C for contributing to our inquiry.
- 1.24 We extend our special thanks to all the people who have experienced sexual violence who contributed to our inquiry. We appreciate the thought and care that went into what you told us. We were struck by your strength and resilience. Your ideas and voices are in this report—we expect they will shape changes that will benefit others.

## Our broader public engagement on Engage Victoria

- 1.25 Besides submissions and consultations, people who had experienced sexual violence could tell us their views through an online form, available on the Engage Victoria website from 16 October 2020 to 23 December 2020. We released an animated video to promote the online form.
- 1.26 The form was anonymous and had 15 questions, including questions about experiences with the justice system and ideas about how to improve it. We received 67 responses we could use.<sup>11</sup>

6 See, eg, Consultations 67 (Loddon Mallee Regional Aboriginal Justice Advisory Committee), 17 (Roundtable consultation focused on the experience of women with disability), 66 (Consultation focused on people who have a lived experience of states of mental and emotional distress commonly labelled as 'mental health challenges'), 22 (First roundtable on the experience of LGBTIQ+ people), 34 (Project Respect Women's Advisory Group).

7 See, eg, Submissions 1 (Dr Catherine Barrett), 49 (inTouch Multicultural Centre Against Family Violence).

8 See, eg, Consultations 20 (Members of Barwon South West RAJAC and Barwon South West Dhek Dja Action Group), 67 (Loddon Mallee Regional Aboriginal Justice Advisory Committee).

9 Submission 46 (Name withheld).

10 Consultations 19 (Dr Frank Lambrick), 39 (Victorian Association for the Care and Resettlement of Offenders and Jesuit Social Services).

11 There were 77 responses to the form. Of those, only 75 were 'unique contributors' (meaning some people submitted the form more than once). Ten people told us that they were not an adult. These people were unable to complete the form, as we had decided it was not ethically appropriate to seek responses from people under 18. They were directed to information about available supports.

- 1.27 We gave people the option to tell us how they identify. Most people identified as female (54 responses), while six identified as male. We received most responses from people identifying as LGBTIQ+ (24 responses) followed by people with disability, people living in a rural or regional community, and people working in the sex industry (10 responses each). We received fewer responses from people identifying as migrants or refugees, Aboriginal or Torres Strait Islander or as an older person.
- 1.28 A summary on our website sets out the valuable insights we gained from the people who filled in the form.<sup>12</sup> We are grateful to everyone who responded and refer to their views throughout our report.

## Other research and data we used

- 1.29 In addition to our research, submissions and consultations, we received significant and helpful data from the Crime Statistics Agency, the County Court of Victoria, and the Office of Public Prosecutions.
- 1.30 This data gave us new insight into the justice system's response to sexual violence—such as court outcomes and the length of cases. We use it throughout our report.
- 1.31 We commissioned an analysis of transcripts of rape trials in the County Court of Victoria, which is where most rape trials take place (see box). This provided a critical window into the experience of complainants in sexual offence trials and the impact of previous trial reforms.

### Transcript analysis of County Court rape trials

Professor Luke McNamara and Dr Julia Quilter prepared a report on transcripts from 25 rape trials in the County Court of Victoria (2013–20). All the trials included evidence of complainant or accused intoxication.

The report sheds light on the experience of complainants, reliance on misconceptions about sexual violence, and the impact of previous reforms. For example, it considered:

- the nature of cross-examination of complainants, and whether the prosecution or judge intervene
- the impact of reforms to the directions judges give juries in trials
- the impact of reforms to the element of 'consent' in rape—for example, whether the focus has shifted to the accused and the steps they took to find out if the other person consented.

The study gave us valuable insight into the conduct of rape trials.<sup>13</sup> We refer to this research throughout our report.

<sup>12</sup> Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021).

<sup>13</sup> The limitations to the study are detailed in the report, which we will publish alongside this final report. For example, the sample is small and not representative—it only includes a subset of the total number of sexual offence trials in the relevant period that met the study's criteria, such as evidence of intoxication. It was also difficult to obtain complete transcripts of all parts of the trial, such as the closing addresses of the prosecution and defence. But all the transcripts analysed included the complainant's cross-examination.

## Site visits we made

- 1.32 We gained a practical understanding of how the justice system is working by viewing sexual offence proceedings in the Magistrates' Court of Victoria and County Court of Victoria. We also visited a multi-disciplinary centre in Wyndham, and a centre against sexual assault (CASA) and Orange Door in Ballarat.

## How we made sure our process was ethical

- 1.33 We developed an ethical governance framework for working with people who have experienced sexual violence. This included:
- prioritising engagement with people who face greater barriers to accessing justice
  - when meeting with people who had experienced sexual violence, asking for informed consent to use what they said and making sure they had the support they needed (such as a counsellor)
  - training and support for the policy and research team
  - including content warnings in our publications.

## What was out of scope for us

- 1.34 Our focus has been on issues that have not been recently reviewed. For example, we recently reviewed committals and the government is already progressing reforms on the law of tendency and coincidence.<sup>14</sup> The Royal Commission into Institutional Responses to Child Sexual Abuse had a strong focus on institutional contexts—we have built on their work, but also focused more on sexual violence outside institutions.
- 1.35 We also did not focus on issues that are subject to ongoing reviews. For example, in 2020 we made recommendations for reform to enable victim survivors to tell their stories.<sup>15</sup> The law has since changed,<sup>16</sup> and the Victorian Government is consulting further on the issue of identifying deceased victims of sexual offences.<sup>17</sup>
- 1.36 Our Stalking reference is looking at Personal Safety Intervention Orders closely. While defamation laws can be a barrier to reporting sexual violence to police, this is being considered by a review of model defamation laws.<sup>18</sup> Sentencing, while important, is the subject of ongoing work by the Sentencing Advisory Council.
- 1.37 We have also prioritised what the Victorian Government can do to improve the justice system's response to sexual offences. We were told about issues that sit within the Australian Government's responsibility, such as people feeling that they cannot report sexual violence because of their uncertain visa status. We note these issues in Chapters 2, 4 and 14. Given the Commonwealth controls these areas of law, they are better dealt with in the joint program of work it is leading on sexual violence.<sup>19</sup>

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14 Victorian Law Reform Commission, *Committals* (Report No 41, March 2020). In response to recommendations by the Royal Commission into Institutional Responses to Child Sexual Abuse, 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: see generally Council of Attorneys-General, 'Communiqué' (Media Release, 29 November 2019) <<https://www.ag.gov.au/sites/default/files/2020-03/Council-of-Attorneys-General-communique-November-2019.pdf>>.

15 Victorian Law Reform Commission, *Contempt of Court* (Report No 40, February 2020) Recommendations 100, 103–5.

16 *Justice Legislation Amendment (Supporting Victims and Other Matters) Act 2020* (Vic). The law made it a crime to share information that can identify a victim survivor of a sexual offence. It has since changed to define more clearly when people can consent to be identified. It is now easier for victim survivors to speak about what happened to them if they want to.

17 Department of Justice and Community Safety Victoria, 'Making It Easier for Victim-Survivors of Sexual Offences to Tell Their Stories', *Victorian Government* (Web Page, 25 June 2021) <<https://www.justice.vic.gov.au/victim-survivor-stories>>.

18 Department of Justice (NSW), *Review of Model Defamation Provisions—Stage 2* (Discussion Paper, 31 March 2021) <<https://www.justice.nsw.gov.au/443/defamationreview>>. This asks whether reports of crime to police and other statutory investigative agencies, as well as reports of sexual harassment to employers and disciplinary bodies, should be protected by an absolute rather than a qualified privilege: Questions 18–21.

19 These issues might be better dealt with in the joint program of work the Commonwealth is leading on sexual assault, sexual harassment and coercive control: Attorney-General for Australia and Minister for Industrial Relations (Cth), 'Leading a National Approach to Justice for Victims and Survivors of Sexual Assault, Harassment and Coercive Control' (Media Release, 17 May 2021) <<https://www.attorneygeneral.gov.au/media/media-releases/leading-national-approach-justice-17-may-2021>>.

## A note on language

- 1.38 In the box below, we explain some key terms that we use in this report.
- 1.39 We understand that the best terms to use can change and people often disagree about the right terms to use. For example, we used 'sexual harm' in our issues papers to refer to all sexual activity without consent. We thought this term would be recognised by a broader audience, who might not identify what they experienced as 'violence'. We received feedback that 'harm' does not convey how serious sexual assault is, so we use the term 'sexual violence' in this report.

### Terms used in this report

**Sexual offences:** A sexual offence is sexual violence that is against the law. Some sexual offences in Victorian law include rape (sexual penetration without consent) and sexual assault (sexual touching without consent).<sup>20</sup> Some sexual offences are non-contact offences, such as a threat to commit a sexual offence.

**Sexual violence:** We use this term to refer to all sexual activity that happens without consent.<sup>21</sup> It includes violence that is not a sexual offence and violence that is not physical, like sexual harassment. Sometimes we use 'sexual assault' instead of 'sexual violence' if it is easier to recognise in the context—for example, when referring to sexual assault services. We specify the type of violence, like sexual harassment, where the context needs it.

**People who have experienced sexual violence:** We mainly refer to 'people who have experienced sexual violence'. This is to recognise that sexual violence is an experience, rather than who someone is. It also recognises that people who have experienced sexual violence do not have one shared identity. We sometimes refer to people who have experienced sexual violence as 'victim survivors' (a term that recognises their resilience as well as their victimisation) or as 'complainants' (which is a legal term).<sup>22</sup>

**People who have committed a sexual offence:** We generally 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 use 'offender' if it applies in the context—for example, when referring to the Register of Sex Offenders. We also refer to people who have been charged, but not convicted, as 'the accused'. In other contexts, such as restorative justice, we refer to 'people who are responsible for sexual violence'.

20 Specific definitions are found in *Crimes Act 1958* (Vic) pt I div 1 sub-divs 8A–8FA.

21 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.

22 In Victoria, legislation and support services provided to people who have experienced sexual violence use the terminology of 'victims', including the *Victims of Crime Assistance Act 1996* (Vic) and the *Victims' Charter Act 2006* (Vic).

## Our approach to reform

- 1.40 In developing our recommendations, we were guided by our terms of reference, which define the scope of this inquiry. We also developed key principles for our reforms based on what we know about sexual violence and the justice system, past reforms, and what we know works in responding to sexual violence.

## The system needs to be more accessible and flexible

... it can feel like I'd have more chance of winning the lottery than getting someone who avoids victim blaming someone like me.—Victim survivor working in the sex industry<sup>23</sup>

- 1.41 In this inquiry, we recognise that our community is diverse and so are people's experiences of sexual violence and seeking justice. Each person who has experienced sexual violence will have different personal and structural factors that impact their experience.<sup>24</sup>
- 1.42 It is more difficult for some people and groups to access the justice system than others. They might find it harder than others to report their experience. They might find it harder than others to be heard and believed, and to get a just outcome. This might be because they did not realise what happened to them was a crime, or because the justice system has treated them unfairly in the past. It could be because our justice system is still based on the experiences of some groups, but not others.
- 1.43 Our recommendations aim to make changes to the system that would give everyone access to justice and allow it to respond flexibly to diverse needs and experiences. For example, we recommend:
- that community education is tailored to diverse audiences (Chapter 3)
  - that research focuses on hidden forms of sexual violence, especially within some communities or groups (Chapter 6)
  - initiatives to ensure that all people, no matter where they live, have good access to reporting sexual violence, including people in prison and out-of-home care (Chapters 4 and 7)
  - that Aboriginal communities are supported to co-design restorative justice programs (Chapter 9)
  - that victim advocates be introduced, giving priority to those who need them the most, including people with disability and children (Chapter 12)
  - that everyone working in the criminal justice system become more specialised so that the system is able to respond better to diverse needs and experiences (Chapter 18).
- 1.44 We have reflected these diverse needs and experiences throughout our report because we believe that an effective justice response to sexual violence must address the needs of everyone in the community. That said, Chapters 8 and 15 focus especially on pathways and supports for people with diverse needs and experiences.

<sup>23</sup> Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021).

<sup>24</sup> Elaine Wedlock and Jacki Tapley, *What Works in Supporting Victims of Crime: A Rapid Evidence Assessment* (Report, Victims' Commissioner for England and Wales and University of Portsmouth, March 2016) 8 <<https://victimscommissioner.org.uk/published-reviews/what-works-in-supporting-victims-of-crime-a-rapid-evidence-assessment/>>.



## The justice gap is real

- 1.45 Our terms of reference ask us to look at ways to address the attrition of reports of sexual violence in the justice system.

### What is attrition?

Attrition studies follow the progress of cases through the stages of the justice system. Attrition refers to the drop off in cases from the time they were reported to police. For example, a report to police might not result in charges being laid or a prosecution may not go to trial or lead to a conviction. Attrition studies may also look at the reasons cases drop off.<sup>25</sup>

As a review from England and Wales noted, attrition can occur because the complainant decides not to continue with the case, there is not enough evidence to prosecute, or the suspect is acquitted in court.<sup>26</sup>

The Crime Statistics Agency conducted an attrition study for our inquiry. The study looked at sexual offence incidents recorded by police from July 2015 to June 2017. It analysed the factors that made incidents more or less likely to progress through the system. We discuss this in more detail in Chapter 6.

The study found that charges were laid for one quarter of all incidents recorded by police. There is little attrition at the prosecution stage—90 per cent of incidents where police laid charges were heard in court. Two-thirds of incidents with charges finalised in court were proved (either from a guilty plea or a conviction after trial or contested hearing).<sup>27</sup>

- 1.46 The attrition rate highlights what researchers call the 'justice gap' for sexual violence—the gap between the number of offences reported to the police and the convictions that result.<sup>28</sup> It is helpful in highlighting how difficult it is to get a conviction from the criminal justice system. We agree that this drop off occurs.

## The attrition rate is one part of the picture

- 1.47 The justice gap is real, but a sole focus on reducing the attrition rate is not helpful. While it has been an aim of justice system reform in the past, there are many problems with focusing on reducing attrition on its own.
- 1.48 For example, it could create the wrong incentives. The conviction rate could be increased by picking cases that fit common misconceptions about sexual violence (where physical force is used, for example). This would create more disadvantage for people who experienced sexual violence who do not fit the stereotype.<sup>29</sup>

25 Attrition studies are more concerned with whether a whole case 'drops off'. They are less concerned with individual charges against an accused not being proceeded with.

26 Vivien Stern, *The Stern Review: An Independent Review into How Rape Complaints Are Handled by Public Authorities in England and Wales* (Report, Home Office (UK), 2010) 10.

27 As only 63% of matters recorded in 2017–18 had been heard in court, the study only included offences from the previous years: S Bright et al, *Attrition of Sexual Offence Incidents through the Victorian Criminal Justice System: 2021 Update* (Report, Crime Statistics Agency, 2021). The study updated an earlier attrition study that considered progress through the justice system of sexual offence incidents recorded by police between January 2009 and December 2010. Incidents were studied in both the summary and indictable jurisdictions: Melanie Millsteed and Cleave McDonald, 'Attrition of Sexual Offence Incidents across the Victorian Criminal Justice System' (Research Paper, Crime Statistics Agency Victoria, 2017) <<http://www.crimestatistics.vic.gov.au/research-and-evaluation/publications/attrition-of-sexual-offence-incidents-across-the-victorian>>. Note that while two-thirds of incidents with charges heard in court were proved guilty, in the higher courts in Victoria a guilty verdict is reached just over half the time. This is lower than in other offence type, other than cases involving fraud or deception: Australian Bureau of Statistics, *Criminal Courts, Australia, 2019–20* (Catalogue No 4513.0, 25 March 2021) <<https://www.abs.gov.au/statistics/people/crime-and-justice/criminal-courts-australia/latest-release>>.

28 Jennifer Temkin and Barbara Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing, 2008) 1.

29 Wendy Lacombe, 'Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Law' (2011) 19(1) *Feminist Legal Studies* 27, 42–3.

- 1.49 The attrition rate can be a misleading measure that does not highlight where the issues arise.<sup>30</sup> For example, the biggest drop off happens between the police report and the decision to press charges. There are barriers that prevent a report to the police in the first place, as we discuss in Chapter 2. This is an important issue that is not reflected in the attrition rate.
- 1.50 An aim of reducing attrition, especially by increasing the conviction rate, might compromise important rights such as the right to a fair trial.
- 1.51 We agree with the literature that addressing the attrition rate should not be a reform aim on its own.<sup>31</sup> Our aim is instead to identify and fix any unfair barriers to reporting and progressing sexual offence cases. As we discuss in Chapter 6, we need to understand why the drop off happens so that we can address these concerns.
- 1.52 A sole focus on addressing the attrition rate limits attention to the criminal justice system. It is also our aim to address a range of justice needs. We discuss this next.

## We need a suite of justice options

Every victim walks a unique path, and no two victims feel the same way about anything.—Witness J<sup>32</sup>

- 1.53 We know that people's experiences of sexual violence and seeking justice are diverse (see Chapter 2).
- 1.54 There is now a body of research on how victim survivors understand justice, what they expect from the justice system, and where they think the justice system has succeeded or failed. The research identifies a range of justice needs: to have information, to participate, to have a voice, to feel validated and vindicated, and for the person responsible to be accountable.<sup>33</sup> We discuss these justice needs in Chapter 2.
- 1.55 The adversarial justice system has limits. Sexual offences are prosecuted by the state with a limited role for the victim.<sup>34</sup> It is based on testing a complainant's evidence. The process can be highly traumatic.<sup>35</sup> Moreover, sexual violence is an interpersonal harm that is often committed in private, with no witnesses or physical trace.<sup>36</sup> It can be difficult to prove sexual violence to the criminal law standard of beyond reasonable doubt (see Chapter 19).<sup>37</sup>
- 1.56 Our inquiry proposes setting up a system where people who have experienced sexual violence are able to choose from a range of justice options.<sup>38</sup> These would satisfy different needs and would be available at different stages of their engagement with the justice system.
- 1.57 Figure 1 shows the spectrum of justice options that could be available to victim survivors. In this report we focus on restorative justice, truth telling, financial assistance, civil litigation, support and, of course, the criminal justice system.

30 Vivien Stern, *The Stern Review: An Independent Review into How Rape Complaints Are Handled by Public Authorities in England and Wales* (Report, Home Office (UK), 2010) 10.

31 Wendy Lacombe, 'Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Law' (2011) 19(1) *Feminist Legal Studies* 27, 29.

32 Consultation 77 (Witness J).

33 See especially Haley Clark, "'What Is the Justice System Willing to Offer?' Understanding Sexual Assault Victim/Survivors' Criminal Justice Needs' (2010) 85 *Family Matters* 28; 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. Justice needs are also referred to as justice interests: interests that a victim has 'as a citizen in a justice activity' (as opposed to a personal or therapeutic need): see *ibid* 388.

34 See generally Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016).

35 See, eg. Wendy Lacombe, 'Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Law' (2011) 19(1) *Feminist Legal Studies* 27, 37–8.

36 Haley Clark, "'What Is the Justice System Willing to Offer?' Understanding Sexual Assault Victim/Survivors' Criminal Justice Needs' (2010) 85 *Family Matters* 28, 28.

37 Victorian Law Reform Commission, *Sexual Offences* (Report No 5, July 2004) 83.

38 Kathleen Daly, Brigitte Bouhours and Australian Centre for the Study of Sexual Assault, *Conventional and Innovative Justice Responses to Sexual Violence* (Report, Australian Institute of Family Studies, 2011) 2.



**Figure 1: A suite of justice options that could be available to victim survivors**



## The experience of the process matters

I think I still would have done it even if he was not convicted. It's a slow process but if I had my time, I would still do it again.—Lucille<sup>39</sup>

- 1.58 The justice system still holds great potential to meet the justice needs of people who have experienced sexual violence. People will have many interactions with it when seeking help, reporting and going through the court. Each of these interactions is an opportunity for victim survivors to receive a supportive and validating response.<sup>40</sup>
- 1.59 Research indicates that when the legal process is fair, victims are more satisfied with it, which can be more important than the outcome of the legal process itself.<sup>41</sup> People are more satisfied if they know they have been listened to, believed and treated with respect. For some victim survivors, this will mean being kept informed of the progress of their case. Others might care more about the quality and accuracy of decisions made, and their ability to challenge them.<sup>42</sup>
- 1.60 A fair process is also important for the accused. The right of an accused not to be convicted except after a fair trial is a fundamental aspect of the justice system.<sup>43</sup> This includes rights to be presumed innocent until proved guilty, to test evidence, and to have a conviction reviewed by a higher court. These rights are reinforced by the *Charter of Human Rights and Responsibilities Act 2006* (Vic).<sup>44</sup> We treat these rights as significant and legitimate.
- 1.61 Our reforms focus on ensuring fair and supportive processes.<sup>45</sup> We make recommendations to support people who have experienced sexual violence, accused people and others involved in the justice process, like jurors (see Chapter 20).

39 Consultation 54 (Lucille Kent, a victim survivor of sexual assault).

40 Wendy Lacombe, 'Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Law' (2011) 19(1) *Feminist Legal Studies* 27, 40–2.

41 Mary Iliadis, *Adversarial Justice and Victims' Rights* (Routledge, 2020) 57. See also Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) Ch 5.

42 Mary Iliadis, *Adversarial Justice and Victims' Rights* (Routledge, 2020) 57, 64.

43 *Dietrich v The Queen* [1992] HCA 57, 177 CLR 292.

44 *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 24, 25.

45 Mary Iliadis, *Adversarial Justice and Victims' Rights* (Routledge, 2020) 57.

## Other reforms should be built upon

- 1.62 There have been many reviews of the justice system's response to sexual offences. These include reports in the United Kingdom,<sup>46</sup> Northern Ireland<sup>47</sup> and New Zealand.<sup>48</sup> In this inquiry we learnt from and built on the work of these reforms.
- 1.63 For example, we consider work in New South Wales and the Australian Capital Territory to strengthen the offence of rape by requiring a person to have taken steps to find out if the other person consented. We suggest that Victoria take the same approach (see Chapter 14). In Chapter 20 we draw on work by the New South Wales Law Reform Commission and law reform in New Zealand. We recommend more directions to the jury in sexual offence trials to counter misconceptions about sexual offences. In Chapter 12, we recommend introducing victim advocates and legal representation, based on models used or piloted in the United Kingdom.
- 1.64 We have also been influenced by other reviews that were not directly on sexual violence.<sup>49</sup> For example, family violence reforms have amplified the voices of people with lived experience in the design and delivery of services. We recommend adopting this as common practice in sexual violence reforms in Chapter 4.
- 1.65 There are many reforms underway which the government will need to consider alongside our recommendations (see Figure 2).<sup>50</sup> We have tried to complement existing reforms. For example, in Chapter 7 we use the work of royal commissions and other inquiries on residential and institutional environments to develop principles for responding to sexual violence in these contexts. In Chapter 4 we recommend a working group to support implementation.
- 1.66 Key reforms are in train that will provide useful avenues for implementing the recommendations in this report as well. The family violence reforms (see box) are an especially useful avenue. In some of our recommendations we suggest the government implement our recommendations using these reforms.

46 Vivien Stern, *The Stern Review: An Independent Review into How Rape Complaints Are Handled by Public Authorities in England and Wales* (Report, Home Office (UK), 2010); Ministry of Justice (UK), *End-to-End Rape Review Report on Findings and Actions* (Report, 18 June 2021) <<https://www.gov.uk/government/publications/end-to-end-rape-review-report-on-findings-and-actions>>.

47 John Gillen, *Gillen Review: Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (Report, 9 May 2019) <<https://www.justice-ni.gov.uk/sites/default/files/publications/justice/gillen-report-may-2019.pdf>>.

48 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>>.

49 Royal Commission report, 1 March 2021 <<https://agedcare.royalcommission.gov.au/publications/final-report>>; *Royal Commission into Victoria's Mental Health System* (Final Report, 3 February 2021) <<https://finalreport.rcvmhs.vic.gov.au/>>; Victorian Equal Opportunity and Human Rights Commission, *Beyond Doubt: The Experiences of People with Disabilities Reporting Crime—Research Findings* (Report, 2014) <<https://www.humanrights.vic.gov.au/resources/beyond-doubt-the-experiences-of-people-with-disabilities-reporting-crime-jul-2014/>>; *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Web Page, 2021) <<https://disability.royalcommission.gov.au/royal-commission-violence-abuse-neglect-and-exploitation-people-disability>>.

50 Some of these overlap in their scope with our inquiry, such as the joint program of work the Commonwealth is leading on sexual violence. This joint program will also consider issues like 'consent' in sexual offences and specialist sexual offence courts: Attorney-General for Australia and Minister for Industrial Relations (Cth), 'Leading a National Approach to Justice for Victims and Survivors of Sexual Assault, Harassment and Coercive Control' (Media Release, 17 May 2021) <<https://www.attorneygeneral.gov.au/media/media-releases/leading-national-approach-justice-17-may-2021>>.

## The family violence reforms

In Chapter 5, we talk about the relationship between family violence and sexual violence. There are clear overlaps as well as differences. Sexual violence cannot be subsumed within family violence reforms because there are many patterns of sexual violence that fall outside family violence.

But there is value in building on family violence reforms. At their core, both family and sexual violence are born out of power structures within our society, and many of the challenges are similar and rooted in the same causes. Many of the people involved in responding to sexual violence will also be involved in responding to family violence.

This will mean that the lessons learned from, and the existing investments in, family violence can be infused into our responses to sexual violence. It will also raise the profile of sexual violence within family violence reforms.

One major avenue for reform that we use in this report is the Family Violence Multi-Agency Risk Assessment and Management Framework (MARAM) framework. The MARAM Framework is a suite of policy, practice tools, training, legislation, regulation and formal reviews that aims to change the practice and culture around responses to family violence.<sup>51</sup>

The framework aims to:

- establish a system-wide shared understanding of family violence
- provide information and resources that professionals need to keep victim survivors safe, and to keep perpetrators in view and hold them accountable for their actions
- guide professionals across the continuum of service responses, across the range of presentations and spectrum of risk.<sup>52</sup>

In Chapter 18 we recommend that the MARAM framework be used to support everyone working in the criminal justice system to specialise in responding to sexual violence.

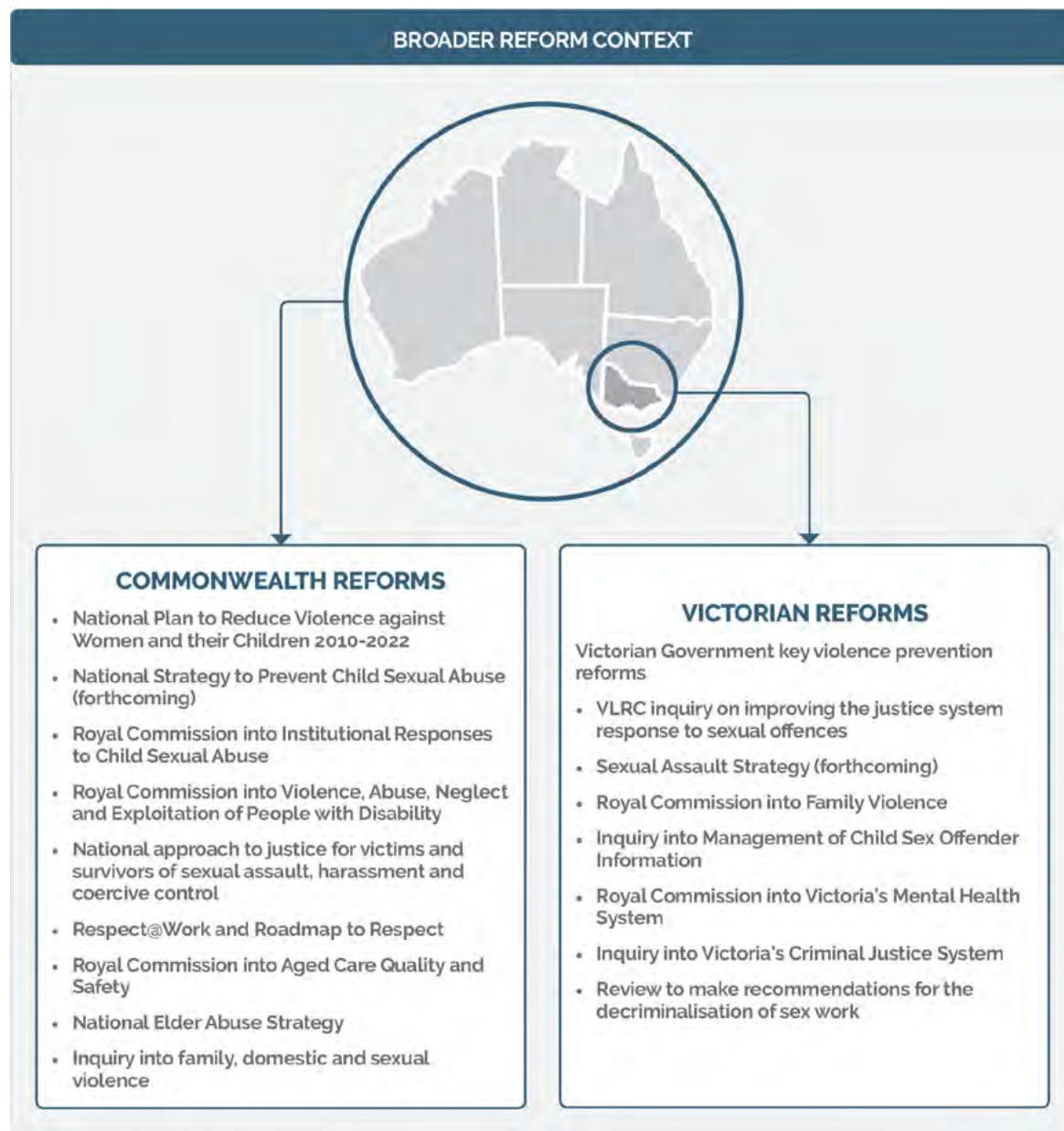
- 1.67 Another key reform is the Sexual Assault Strategy being developed by the Victorian Government. As part of its latest rolling action plan on family violence, the government announced it would develop and release a 'comprehensive sexual assault strategy, informed by victim survivors and in partnership with the sexual assault and family violence sector'.<sup>53</sup>
- 1.68 This is an opportunity to identify priorities for broader sexual violence reform and deliver changes that will improve responses to sexual violence. In a number of our recommendations, we identify the Sexual Assault Strategy as a potential avenue for implementation.

51 Family Violence Reform Implementation Monitor, *Report of the Family Violence Reform Implementation Monitor* (Report, 1 November 2019) <<https://www.fvrim.vic.gov.au/third-report-parliament-1-november-2019>>.

52 Family Safety Victoria, *Family Violence Multi-Agency Risk Assessment and Management Framework. A Shared Responsibility for Assessing and Managing Family Violence Risk* (Framework, Victorian Government, 2018) 19 <<https://www.vic.gov.au/maram-practice-guides-and-resources>>. The Framework is a legislative instrument under the *Family Violence Protection Act 2008* (Vic).

53 Victorian Government, *Family Violence Reform Rolling Action Plan 2020–2023* (Report, December 2020) 35 <<http://www.vic.gov.au/family-violence-reform-rolling-action-plan-2020-2023>>.

Figure 2: Broader reform context



## Reform needs to be implemented well

- 1.69 To help our recommendations succeed, we have ensured that they are evidence-informed and we have thought hard about their implementation. The recommendations are possible and practical.<sup>54</sup>
- 1.70 We have given thought to the sequencing of our recommendations. For example, people should only be encouraged to report if doing so results in the support and justice they need.<sup>55</sup> Informing people about these improvements might also encourage reporting. Therefore, we suggest that many of the criminal justice system reforms be done first (see Chapters 19–21).
- 1.71 We also believe that measuring the impact of our recommendations is critical. We propose implementation of our recommendations be monitored and evaluated (in Chapters 6 and 22).

## The process from here

- 1.72 Following an extension of our deadline, our report is due to the Attorney-General by 20 September 2021. Within 14 sitting days of receiving our report, the government must put it before the Victorian Parliament.
- 1.73 It is up to the Victorian Government or the organisations called on to act to decide what they will do in response to our report. We hope that the Victorian Government and these organisations take the opportunity to change the way Victoria responds to sexual violence.

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54 Michelle L Macvean et al, *Implementation of Recommendations Arising from Previous Inquiries of Relevance to the Royal Commission into Institutional Responses to Child Sexual Abuse* (Report, Parenting Research Centre, 2015) xvi, 85, 86.

55 Wendy Lacombe, 'Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Law' (2011) 19(1) *Feminist Legal Studies* 27, 42.



# CHAPTER 02

## PART ONE: SEXUAL VIOLENCE, JUSTICE AND THE COMMUNITY

# Sexual violence and justice

- 18** Overview
- 18** Sexual violence is serious, widespread and gendered
- 20** People experience sexual violence in different ways
- 22** Some communities experience sexual violence at even higher rates
- 26** There are many barriers to reporting
- 29** What do victim survivors want from a justice process?

## 2. Sexual violence and justice

### Overview

- Our work has been shaped by what we know about sexual violence. This chapter discusses its nature and characteristics.
- Sexual violence is a widespread harm. It can have serious and long-term negative impacts. Women and girls are more likely to have experienced sexual violence.
- Sexual violence occurs in a range of relationships and locations. People's experiences of sexual violence are different. Some people experience sexual violence at higher rates than others.
- This chapter also identifies the many reasons why people may not report sexual violence. We aim to address these through our reforms.
- We summarise the substantial research on what victim survivors want or need from justice processes. Our recommendations have focused on meeting these needs.

### Sexual violence is serious, widespread and gendered

The instant that I was first abused by my stepfather, I felt that who I had been born to be had been murdered. I was totally destroyed.—Cecilia<sup>1</sup>

- 2.1 Sexual violence can have serious and long-term negative impacts for people who experience it.
- 2.2 It can cause serious emotional and psychological distress. Fear, anxiety and depression, as well as physical harm, are some of its impacts.<sup>2</sup> It can affect people's relationships, sense of wellbeing and lifestyle. It can change how much they trust others.<sup>3</sup> Sexual violence can impact people's ability to engage in education, work and their financial status.<sup>4</sup>

<sup>1</sup> Consultation 56 (Cecilia, a victim survivor of sexual assault).

<sup>2</sup> Cameron Boyd and Australian Centre for the Study of Sexual Assault, *The Impacts of Sexual Assault on Women* (ACSSA Resource Sheet, Australian Institute of Family Studies (Cth), April 2011) 2–4; Australian Institute of Health and Welfare (Cth), *Sexual Assault in Australia* (In Focus Report, 28 August 2020) 6–7 <<https://www.aihw.gov.au/reports/domestic-violence/sexual-assault-in-australia/contents/summary>>.

<sup>3</sup> Cameron Boyd and Australian Centre for the Study of Sexual Assault, *The Impacts of Sexual Assault on Women* (ACSSA Resource Sheet, Australian Institute of Family Studies (Cth), April 2011) 5.

<sup>4</sup> Ibid 6; Australian Institute of Health and Welfare (Cth), *Sexual Assault in Australia* (In Focus Report, 28 August 2020) 7 <<https://www.aihw.gov.au/reports/domestic-violence/sexual-assault-in-australia/contents/summary>>.



- 2.3 Sexual violence is widespread in the Victorian and Australian community. It is estimated that one in five women (18 per cent) in Australia have experienced sexual violence since they were 15 years old. For men, the figure is one in 20 (five per cent).<sup>5</sup>
- 2.4 Children and young people also experience high rates of sexual violence. A national study suggests that almost eight per cent of adults have experienced child sexual abuse before they were 15, but the rate may be higher.<sup>6</sup>
- 2.5 Research suggests that up to 26.8 per cent of girls may have experienced some form of sexual abuse.<sup>7</sup> Young women (aged 15–19 years) feature more in police records of sexual assault than other age cohorts.<sup>8</sup>
- 2.6 These figures probably understate how common sexual violence is in the community.<sup>9</sup> This is because sexual violence is seriously under-reported to police (discussed below). It is also underestimated in data sources. For example, the Personal Safety Survey, a key national survey in Australia, does not include people living in institutional contexts. There is also limited data on the rate of sexual violence experienced by some groups, such as children, people with disability and Aboriginal communities (see Chapter 6).<sup>10</sup>
- 2.7 Sexual violence is also difficult to disclose because of unsupportive community attitudes and feelings of shame (discussed below). All of these factors mean that sexual violence is 'a particularly hidden type of violence'.<sup>11</sup>
- 2.8 As one victim survivor told us, when she started speaking about her story, she found that most women had experienced their own version of 'something that went too far' with a boyfriend or a one-night stand but had not received justice for it.<sup>12</sup>

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5 Australian Institute of Health and Welfare (Cth), *Sexual Assault in Australia* (In Focus Report, 28 August 2020) 14–5 <<https://www.aihw.gov.au/reports/domestic-violence/sexual-assault-in-australia/contents/summary>>. This data is from the 2016 Personal Safety Survey, a national self-report survey that measures people's experiences of violence in the last 12 months. These rates include sexual assault and/or sexual threat. Sexual assault includes 'rape, attempted rape, sexual assault with a weapon, indecent assault, penetration by objects, forced sexual activity that did not end in penetration, attempts to force a person into sexual activity' and the threat of sexual activity: *ibid* 2.

6 *Ibid* 11.

7 This research summary separates out estimates of penetrative abuse (experienced by up to 12% of girls) and non-penetrative abuse (experienced by up to 26.8% of girls): Australian Institute of Family Studies (Cth), *The Prevalence of Child Abuse and Neglect* (CFCA Resource Sheet, 4 April 2017) <<https://aifs.gov.au/cfca/publications/prevalence-child-abuse-and-neglect>>. See also *Royal Commission into Institutional Responses to Child Sexual Abuse: Final Report* (Report, December 2017) vol 2, 69 <<https://www.childabuseroyalcommission.gov.au/final-report>>; Antonia Quadara et al., *Conceptualising the Prevention of Child Sexual Abuse* (Research Report No 33, Australian Institute of Family Studies (Cth), June 2015) 2 <<https://aifs.gov.au/publications/conceptualising-prevention-child-sexual-abuse>>.

8 Their reported rate of victimisation was 661.9 per 100,000 people in this age and sex group, followed by girls who were 10–14 years old, who had a reported rate of victimisation of 542.8. The rates for other age cohorts are significantly lower: Australian Institute of Health and Welfare (Cth), *Family, Domestic and Sexual Violence in Australia* (Report, 28 February 2018) 52–3, particularly Figure 5.5 <<https://www.aihw.gov.au/reports/domestic-violence/family-domestic-sexual-violence-in-australia-2018/contents/table-of-contents>>. See also Australian Institute of Health and Welfare (Cth), *Sexual Assault in Australia* (In Focus Report, 28 August 2020) 5 <<https://www.aihw.gov.au/reports/domestic-violence/sexual-assault-in-australia/contents/summary>>.

9 See, eg, Cindy Tarczon and Antonia Quadara, *The Nature and Extent of Sexual Assault and Abuse in Australia* (ACSSA Resource Sheet, Australian Institute of Family Studies (Cth), December 2012) 1–3. See also Denise Lievore, *Non-Reporting and Hidden Recording of Sexual Assault: An International Literature Review* (Report, Australian Institute of Criminology (Cth), 15 June 2003) 116 <<https://aic.gov.au/publications/archive/non-reporting-and-hidden-recording-of-sexual-assault>>.

10 Australian Institute of Health and Welfare (Cth), *Sexual Assault in Australia* (In Focus Report, 28 August 2020) 3, 11, 14 <<https://www.aihw.gov.au/reports/domestic-violence/sexual-assault-in-australia/contents/summary>>; Trishima Mitra-Kahn, Carolyn Newbiggin and Sophie Hardefeldt, *Invisible Women, Invisible Violence: Understanding and Improving Data on the Experiences of Domestic and Family Violence and Sexual Assault for Diverse Groups of Women* (Landscapes State of Knowledge Paper Issue No DD01, ANROWS Australia's National Research Organisation for Women's Safety, December 2016) 12, 25 <<http://anrows.org.au/publications/landscapes/invisible-women-invisible-violence-understanding-and-improving-data-the>>.

11 Cindy Tarczon and Antonia Quadara, *The Nature and Extent of Sexual Assault and Abuse in Australia* (ACSSA Resource Sheet, Australian Institute of Family Studies (Cth), December 2012) 1, 3.

12 Consultation 54 (Lucille Kent, a victim survivor of sexual assault).

- 2.9 Sexual violence is overwhelmingly experienced by women and girls.<sup>13</sup> But it can affect people of any gender or sexual orientation. As with adults, girls experience sexual violence more often than boys, although boys do experience sexual violence at high rates in certain contexts (like institutional settings, see below).<sup>14</sup> Males are much more likely to be perpetrators of sexual violence—men were most commonly recorded as offenders in recent police data.<sup>15</sup>
- 2.10 Sexual violence is widely acknowledged as a way one person exerts power and control over another.<sup>16</sup> While the causes of sexual violence are complex, research indicates a relationship with gender inequality and beliefs and norms that discriminate (for example, that minimise sexual violence).<sup>17</sup> In Chapter 3 we highlight how important it is to change social attitudes to sexual violence.
- 2.11 In this inquiry our focus is on making the justice system respond better to this serious and widespread harm. This chapter discusses what we know about sexual violence and justice, including the barriers to reporting and views of justice. This research and data shape the recommendations in our report.

## People experience sexual violence in different ways

- 2.12 It is common for people to think that sexual violence is committed by strangers in public places at night. In reality, sexual violence takes place in a range of relationships and environments. It can:
- *be perpetrated by a range of different people.* Most sexual violence is committed by someone the victim survivor knows. For example, former or current partners, parents or siblings (in relation to child sexual abuse especially), friends, and colleagues.<sup>18</sup> Men and boys are more likely than women to be sexually assaulted by strangers.<sup>19</sup> Boys are also more likely than girls to be sexually assaulted in institutions, like a church or school.<sup>20</sup>
  - *happen in private as well as public places.* Even though the community focus is often on sexual violence in public by strangers, it mostly occurs in private locations

13 Recent police-recorded data shows that women in Australia were the victims of 83% of recorded sexual assaults: Australian Bureau of Statistics, *Recorded Crime—Victims, Australia, 2019* (Catalogue No 4510.0, 9 July 2020).

14 Australian Institute of Family Studies (Cth), *The Prevalence of Child Abuse and Neglect* (CFCA Resource Sheet, 4 April 2017) <<https://aifs.gov.au/cfca/publications/prevalence-child-abuse-and-neglect>>; Antonia Quadara et al, *Conceptualising the Prevention of Child Sexual Abuse* (Research Report No 33, Australian Institute of Family Studies (Cth), June 2015) 2–3 <<https://aifs.gov.au/publications/conceptualising-prevention-child-sexual-abuse>>. In relation to boys, research suggests that up to 12% of boys experience some form of sexual abuse (again, this is an overall figure, although studies distinguish between penetrative and non-penetrative abuse): Australian Institute of Family Studies (Cth), *The Prevalence of Child Abuse and Neglect* (CFCA Resource Sheet, 4 April 2017) <<https://aifs.gov.au/cfca/publications/prevalence-child-abuse-and-neglect>>.

15 In 2018–2019, the Australian Bureau of Statistics found that 97% of offenders recorded by police were male: Australian Institute of Health and Welfare (Cth), *Sexual Assault in Australia* (In Focus Report, 28 August 2020) 1, 8 <<https://www.aihw.gov.au/reports/domestic-violence/sexual-assault-in-australia/contents/summary>>.

16 For a useful summary: see Clare McGlynn, 'Rape, Torture and the European Convention on Human Rights' (2009) 58(3) *International and Comparative Law Quarterly* 565, 583–4. See also Haley Clark, Antonia Quadara and Australian Institute of Family Studies, *Insights into Sexual Assault Perpetration: Giving Voice to Victim/Survivors' Knowledge* (Research Report No 18, Australian Institute of Family Studies (Cth), December 2010) 4, 8–9 <<https://aifs.gov.au/publications/insights-sexual-assault-perpetration>>.

17 See, in relation to violence against women generally, Australian Government, 'What Is Violence against Women?', *National Plan to Reduce Violence against Women and Their Children* (Web Page) <<https://plan4womenssafety.dss.gov.au/resources/what-is-violence-against-women/>>; Kim Webster and Michael Flood, *Framework Foundations 1: A Review of the Evidence on Correlates of Violence against Women and What Works to Prevent It* (Companion Document, Our Watch, ANROWS Australia's National Research Organisation for Women's Safety and VicHealth, 2015) 12, 21.

18 Australian Institute of Health and Welfare (Cth), *Sexual Assault in Australia* (In Focus Report, 28 August 2020) 8–9 <<https://www.aihw.gov.au/reports/domestic-violence/sexual-assault-in-australia/contents/summary>>; Australian Institute of Health and Welfare (Cth), *Family, Domestic and Sexual Violence in Australia: Continuing the National Story 2019* (Report, 5 June 2019) 8 <<https://www.aihw.gov.au/reports/domestic-violence/family-domestic-sexual-violence-australia-2019>>; Antonia Quadara et al, *Conceptualising the Prevention of Child Sexual Abuse* (Research Report No 33, Australian Institute of Family Studies (Cth), June 2015) 8 <<https://aifs.gov.au/publications/conceptualising-prevention-child-sexual-abuse>>. See also Australian Bureau of Statistics, *Personal Safety, Australia, 2016* (Catalogue No 4906.0, 8 November 2017) Table 3.1.

19 Antonia Quadara et al, *Conceptualising the Prevention of Child Sexual Abuse* (Research Report No 33, Australian Institute of Family Studies (Cth), June 2015) 2, 10 <<https://aifs.gov.au/publications/conceptualising-prevention-child-sexual-abuse>>; Cindy Tarczon and Antonia Quadara, *The Nature and Extent of Sexual Assault and Abuse in Australia* (ACSSA Resource Sheet, Australian Institute of Family Studies (Cth), December 2012) 9.

20 Antonia Quadara et al, *Conceptualising the Prevention of Child Sexual Abuse* (Research Report No 33, Australian Institute of Family Studies (Cth), June 2015) 8, 10 <<https://aifs.gov.au/publications/conceptualising-prevention-child-sexual-abuse>>. Based on available data, the Royal Commission into Institutional Responses to Child Sexual Abuse reported that around 11.2% of males (who experienced child sexual abuse before they were 15 years old) were abused by a doctor, teacher or minister of religion, in comparison to 2.7% of females. In the past, most victim survivors abused in institutions have been male: *Royal Commission into Institutional Responses to Child Sexual Abuse: Final Report* (Report, December 2017) vol 2, 71, 85–6 (see also chs 3–4 generally). <<https://www.childabuseroyalcommission.gov.au/final-report>>.

such as people's homes.<sup>21</sup> It also happens in organisations, committed by someone known to the victim survivor or in a position of trust.<sup>22</sup>

- *occur once or many times.* It can be an incident that someone perpetrates once, or they can repeat the violence as part of a pattern.<sup>23</sup> Victim survivors may experience sexual violence many times in their life by different people.<sup>24</sup>
- *occur together with other violence.* Women and children often experience sexual violence together with other abuse, such as physical and emotional abuse.<sup>25</sup> Sexual violence is a common element of family violence and intimate partner violence (see Kelly's experience below).
- *take different forms.* Technology-facilitated sexual violence (such as image-based abuse) can occur on its own or together with in-person sexual violence. Both can cause serious harm.<sup>26</sup>

[W]hen he had been aggressive, he would reassure me, that it would help his stress ... I could only say no inside my head.—Kelly<sup>27</sup>

2.13 Responses to sexual violence need to take all these different contexts (see Figure 3) into account. In Chapter 1 we discuss how important it is for the justice system's response to be flexible.

**Figure 3: Sexual violence in the community<sup>28</sup>**

**Of all sexual assault victims recorded by police in 2017:**



21 Australian Bureau of Statistics, *Recorded Crime—Victims, Australia, 2019* (Catalogue No 4510.0, 9 July 2020); Australian Institute of Health and Welfare (Cth), *Sexual Assault in Australia* (In Focus Report, 28 August 2020) 6 <<https://www.aihw.gov.au/reports/domestic-violence/sexual-assault-in-australia/contents/summary>>.

22 The Royal Commission into Institutional Responses to Child Sexual Abuse revealed the extent of child sexual abuse in institutions: *Royal Commission into Institutional Responses to Child Sexual Abuse: Final Report* (Report, December 2017) vol 2, 65 <<https://www.childabuseroyalcommission.gov.au/final-report>>.

23 See, eg, Haley Clark, Antonia Quadara and Australian Institute of Family Studies, *Insights into Sexual Assault Perpetration: Giving Voice to Victim/Survivors' Knowledge* (Research Report No 18, Australian Institute of Family Studies (Cth), December 2010) ch 3 <<https://aifs.gov.au/publications/insights-sexual-assault-perpetration>>.

24 Mary Stathopoulos, *Sexual Revictimisation: Individual, Interpersonal and Contextual Factors* (ACSSA Research Summary, Australian Institute of Family Studies (Cth), May 2014) 1–5 <<https://apo.org.au/node/39622>>.

25 *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016) vol 2, 213 <<http://rcfv.archive.royalcommission.vic.gov.au/Report-Recommendations.html>>; Australian Institute of Family Studies (Cth), *The Prevalence of Child Abuse and Neglect* (CFCA Resource Sheet, 4 April 2017) <<https://aifs.gov.au/cfca/publications/prevalence-child-abuse-and-neglect>>; Submission 56 (Domestic Violence Victoria). The Australian Bureau of Statistics reports that 37% of recorded sexual assaults in Victoria were family/domestic violence-related: Australian Bureau of Statistics, *Recorded Crime—Victims, Australia, 2019* (Catalogue No 4510.0, 9 July 2020).

26 Anastasia Powell and Nicola Henry, 'Policing Technology-Facilitated Sexual Violence against Adult Victims: Police and Service Sector Perspectives' (2018) 28(3) *Policing and Society* 291, 292, 299–300.

27 Submission 26 (Northern CASA). On sexual violence in family violence situations, see also Submission 19 (Anonymous).

28 Australian Institute of Health and Welfare (Cth), *Family, Domestic and Sexual Violence in Australia: Continuing the National Story 2019* (Report, 5 June 2019) 21 <<https://www.aihw.gov.au/reports/domestic-violence/family-domestic-sexual-violence-australia-2019>>.

## Some communities experience sexual violence at even higher rates

Almost all of our clients have experienced sexual abuse.—Elizabeth Morgan House<sup>29</sup>

- 2.14 Some communities might experience sexual violence at much higher rates than others. For example, Aboriginal women are estimated to experience sexual violence at a rate three times greater than non-Aboriginal women and even higher rates of family violence.<sup>30</sup>
- 2.15 These higher rates are connected with broad structures of discrimination or marginalisation.<sup>31</sup> The historical context of dispossession, child removal and trauma shapes Aboriginal people's experience of sexual violence. These experiences themselves involved sexual violence and continue to make violence against Aboriginal women invisible.<sup>32</sup>

In the context of systemic racism, where they are feeling targeted, Aboriginal women fear that that their non-Aboriginal partner will be believed instead of them ... We're the underdogs, and if there's someone from another culture or more articulate or with a better lifestyle, they are more likely to be believed.  
—Djirra<sup>33</sup>

- 2.16 Women with disability experience very high rates of sexual violence, within and outside care relationships.<sup>34</sup> They are especially likely to experience specific types of violence (such as reproductive coercion) and more serious sexual violence.<sup>35</sup>

29 Consultation 53 (Elizabeth Morgan House and a victim survivor of sexual assault).

30 Trishima Mitra-Kahn, Carolyn Newbiggin and Sophie Hardefeldt, *Invisible Women, Invisible Violence: Understanding and Improving Data on the Experiences of Domestic and Family Violence and Sexual Assault for Diverse Groups of Women* (Landscapes State of Knowledge Paper Issue No DD01, ANROWS Australia's National Research Organisation for Women's Safety, December 2016) 12, 20 <<http://anrows.org.au/publications/landscapes/invisible-women-invisible-violence-understanding-and-improving-data-the>>; Janya McCalman et al, 'Responding to Indigenous Australian Sexual Assault: A Systematic Review of the Literature' (2014) *SAGE Open* 1, 1 <<https://doi.org/10.1177/2158244013518931>>; Harry Blagg, Nicole Bluett-Boyd and Emma Williams, *Innovative Models in Addressing Violence against Indigenous Women* (Landscapes State of Knowledge Paper Issue No 8, ANROWS Australia's National Research Organisation for Women's Safety, August 2015) 6 <<https://www.anrows.org.au/publication/innovative-models-in-addressing-violence-against-indigenous-women-state-of-knowledge-paper/>>.

31 Trishima Mitra-Kahn, Carolyn Newbiggin and Sophie Hardefeldt, *Invisible Women, Invisible Violence: Understanding and Improving Data on the Experiences of Domestic and Family Violence and Sexual Assault for Diverse Groups of Women* (Landscapes State of Knowledge Paper Issue No DD01, ANROWS Australia's National Research Organisation for Women's Safety, December 2016) 12, 31 <<http://anrows.org.au/publications/landscapes/invisible-women-invisible-violence-understanding-and-improving-data-the>>.

32 Ibid 12, 19–20; Bronwyn Carlson, Kelly Richards and Lorana Bartels, 'No Public Outrage, No Vigils: Australia's Silence at Violence against Indigenous Women', *The Conversation* (Web Page, 16 April 2021) <<https://theconversation.com/no-public-outrage-no-vigils-australias-silence-at-violence-against-indigenous-women-158875>>; Larissa Behrendt, 'Aboriginal Women and the Criminal Justice System' (2002) 14(6) *Judicial Officers' Bulletin* 41, 41.

33 Consultation 30 (Djirra).

34 Leanne Dowse, 'Worlds Apart and Still No Closer to Justice: Recognition and Redress in Gendered Disability Violence' in Peter Aggleton, Alex Broom and Jeremy Moss (eds), *Practical Justice: Principles, Practice and Social Change* (Routledge, Taylor & Francis Group, 1st ed, 2019) 38, 40–1; Centre of Research Excellence in Disability and Health, *Nature and Extent of Violence, Abuse, Neglect and Exploitation against People with Disability in Australia* (Research Report, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, March 2021) 10–11, 14.

35 Trishima Mitra-Kahn, Carolyn Newbiggin and Sophie Hardefeldt, *Invisible Women, Invisible Violence: Understanding and Improving Data on the Experiences of Domestic and Family Violence and Sexual Assault for Diverse Groups of Women* (Landscapes State of Knowledge Paper Issue No DD01, ANROWS Australia's National Research Organisation for Women's Safety, December 2016) 26 <<http://anrows.org.au/publications/landscapes/invisible-women-invisible-violence-understanding-and-improving-data-the>>; Centre of Research Excellence in Disability and Health, *Nature and Extent of Violence, Abuse, Neglect and Exploitation against People with Disability in Australia* (Research Report, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, March 2021) 16.

- 2.17 Their experience of sexual violence and the barriers they face to reporting also reflect the fact that people with disability are treated unequally in society.<sup>36</sup> For example, women can experience sexual abuse while having their basic support needs met, if care staff take advantage of their position of power.

People with disabilities ... are very used to saying yes to arrangements (such as housing) and systems where they have very little choice.—Roundtable consultation focused on the experience of women with disability<sup>37</sup>

- 2.18 Women with contact with the justice system also experience high rates of sexual violence. This indicates a troubling link between experiences of (often unaddressed) sexual violence and contact with the justice system. A widely used estimate is that 60–90 per cent of women in prison have experienced sexual, physical or emotional harm.<sup>38</sup>

[W]omen [in prison] don't even think of reporting because sexual violence is such a prevalent experience.—Consultation focused on people who have a lived experience of states of mental and emotional distress commonly labelled as 'mental health challenges'<sup>39</sup>

- 2.19 Children and young people in contact with the justice system have also experienced serious disadvantage and trauma, including sexual violence.<sup>40</sup>
- 2.20 The experiences of these groups are sometimes 'invisible' or 'forgotten'.<sup>41</sup> In Chapter 6 we discuss how their experiences need to be addressed in research and data. We also suggest reforms throughout this report to improve the justice system's response to these experiences.

36 Leanne Dowse, 'Worlds Apart and Still No Closer to Justice: Recognition and Redress in Gendered Disability Violence' in Peter Aggleton, Alex Broom and Jeremy Moss (eds), *Practical Justice: Principles, Practice and Social Change* (Routledge, Taylor & Francis Group, 1st ed, 2019) 38, 40–4.

37 Consultation 17 (Roundtable consultation focused on the experience of women with disability).

38 Australia's National Research Organisation for Women's Safety (ANROWS), *Women's Imprisonment and Domestic, Family and Sexual Violence: Research Synthesis* (Report, 2020) 5; Mary Stathopoulos et al, *Addressing Women's Victimisation Histories in Custodial Settings* (ACSSA Issues No 13, Australian Institute of Family Studies (Cth), December 2012) 1–5, 16 <<https://aifs.gov.au/sites/default/files/publication-documents/i13.pdf>>.

39 Consultation 66 (Consultation focused on people who have a lived experience of states of mental and emotional distress commonly labelled as 'mental health challenges').

40 One recent Victorian study suggests that 21% of children in contact with both the criminal justice system and child protection have been subject to child sexual abuse: Sentencing Advisory Council (Vic), 'Crossover Kids': *A Comparison of Two Studies* (Factsheet, 13 December 2019) 3 <[https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-12/Crossover\\_Kids\\_Comparison\\_of\\_Two\\_Studies.pdf](https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-12/Crossover_Kids_Comparison_of_Two_Studies.pdf)>. See also Catia G Malvaso, Paul H Delfabbro and Andrew Day, 'Adverse Childhood Experiences in a South Australian Sample of Young People in Detention' (2019) 52(3) *Australian and New Zealand Journal of Criminology* 411, 413, 425; *Royal Commission into Institutional Responses to Child Sexual Abuse: Final Report* (Report, December 2017) vol 15, 10–11 <<https://www.childabuseroyalcommission.gov.au/final-report>>.

41 See generally Trishima Mitra-Kahn, Carolyn Newbiggin and Sophie Hardefeldt, *Invisible Women, Invisible Violence: Understanding and Improving Data on the Experiences of Domestic and Family Violence and Sexual Assault for Diverse Groups of Women* (Landscapes State of Knowledge Paper Issue No DD01, ANROWS Australia's National Research Organisation for Women's Safety, December 2016) <<http://anrows.org.au/publications/landscapes/invisible-women-invisible-violence-understanding-and-improving-data-the>>; Andrew Day et al, *The Forgotten Victims: Prisoner Experience of Victimisation and Engagement with the Criminal Justice System* (Research Report No 1, ANROWS Australia's National Research Organisation for Women's Safety, August 2018) <<https://www.anrows.org.au/publications/horizons/the-forgotten-victims-prisoner-experience-victimisation-and-engagement-the>>. See also Consultation 22 (First roundtable on the experience of LGBTIQ+ people).



2.21 Other hidden groups of victim survivors include:

- women from migrant and refugee backgrounds, who experience notable rates of family violence and sexual violence.<sup>42</sup> Their experience of violence can also be shaped by the challenges of moving to a new country (like isolation).<sup>43</sup>
- people from LGBTIQ+ communities, who are likely to experience higher rates of sexual violence than others.<sup>44</sup> This can remain hidden because sexual violence is usually understood as heterosexual violence.<sup>45</sup> Broader social discrimination against LGBTIQ+ communities can also make it harder to seek assistance or report (for example, if services or the justice system are not responsive to people's experiences).<sup>46</sup>

You can also end up being the guinea pig or non-consensual educator. Services say, 'we've never worked with a trans-person, you can help us work out processes?'—Roundtable consultation with Transgender Victoria, Bisexual Alliance and Drummond Street Services<sup>47</sup>

- people who work in the sex industry—including people from LGBTIQ+ communities and migrant backgrounds—who experience sexual violence during and outside work.<sup>48</sup> Their experiences of sexual violence might not be recognised because of the nature of their work.

I figure as long as the enforcers of the law ... still don't recognize the difference between me going to work and having consensual sex vs me being attacked and not listened to by a specific individual ... and having my consent violated (whether at work or not ...) then I feel like what's the point of even trying.<sup>49</sup>

42 Trishima Mitra-Kahn, Carolyn Newbigin and Sophie Hardefeldt, *Invisible Women, Invisible Violence: Understanding and Improving Data on the Experiences of Domestic and Family Violence and Sexual Assault for Diverse Groups of Women* (Landscapes State of Knowledge Paper Issue No DD01, ANROWS Australia's National Research Organisation for Women's Safety, December 2016) 12, 22 <<http://anrows.org.au/publications/landscapes/invisible-women-invisible-violence-understanding-and-improving-data-the>>; Cathy Vaughan et al, *Multicultural and Settlement Services Supporting Women Experiencing Violence: The MuSeS Project* (Research Report No 11, ANROWS Australia's National Research Organisation for Women's Safety, 25 May 2020) 11 <<https://apo.org.au/node/305778>>; Cathy Vaughan et al, *Promoting Community-Led Responses to Violence against Immigrant and Refugee Women in Metropolitan and Regional Australia. The ASPIRE Project: Research Report* (Horizons Research Report No 7, ANROWS Australia's National Research Organisation for Women's Safety, December 2016) 48–9. See also Submission 55 (Springvale Monash Legal Service).

43 Cathy Vaughan et al, *Multicultural and Settlement Services Supporting Women Experiencing Violence: The MuSeS Project* (Research Report No 11, ANROWS Australia's National Research Organisation for Women's Safety, 25 May 2020) 11 <<https://apo.org.au/node/305778>>.

44 Australian Institute of Health and Welfare (Cth), *Sexual Assault in Australia* (In Focus Report, 28 August 2020) 3 <<https://www.aihw.gov.au/reports/domestic-violence/sexual-assault-in-australia/contents/summary>>.

45 Monica Campo and Sarah Tayton, *Intimate Partner Violence in Lesbian, Gay, Bisexual, Trans, Intersex and Queer Communities: Key Issues* (Child Family Community Australia Practitioner Resource, Australian Institute of Family Studies (Cth), December 2015) 1–2 <<https://aifs.gov.au/cfca/publications/intimate-partner-violence-lgbtqi-communities>>; Trishima Mitra-Kahn, Carolyn Newbigin and Sophie Hardefeldt, *Invisible Women, Invisible Violence: Understanding and Improving Data on the Experiences of Domestic and Family Violence and Sexual Assault for Diverse Groups of Women* (Landscapes State of Knowledge Paper Issue No DD01, ANROWS Australia's National Research Organisation for Women's Safety, December 2016) 29 <<http://anrows.org.au/publications/landscapes/invisible-women-invisible-violence-understanding-and-improving-data-the>>.

46 Monica Campo and Sarah Tayton, *Intimate Partner Violence in Lesbian, Gay, Bisexual, Trans, Intersex and Queer Communities: Key Issues* (Child Family Community Australia Practitioner Resource, Australian Institute of Family Studies (Cth), December 2015) 4–6 <<https://aifs.gov.au/cfca/publications/intimate-partner-violence-lgbtqi-communities>>.

47 Consultation 40 (Roundtable consultation with Transgender Victoria, Bisexual Alliance and Drummond Street Services).

48 Antonia Quadara, *Sex Workers and Sexual Assault in Australia: Prevalence, Risk and Safety* (ACSSA Issues No 8, Australian Institute of Family Studies (Cth), April 2008) 4–10 <<https://apo.org.au/node/985>>. Red Files explained to us that they had received 10,377 reports of violence and exploitation of sex workers through their national confidential industry-run reporting platform: Submission 30 (Red Files Inc.).

49 Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021).

- 2.22 There are, of course, many more communities whose experiences matter. For example, several recent Victorian inquiries call attention to the high rates of sexual violence experienced by children and young people in out-of-home care.<sup>50</sup>
- 2.23 Two recent royal commissions have also focused on the experiences of people with lived experience of mental illness or psychological distress and people in aged care.<sup>51</sup> There is a need to address the experiences of older women (outside and inside care contexts) and the high rates of sexual violence experienced by women with lived experience of mental illness or psychological distress.<sup>52</sup>

People with mental health issues are often seen as 'serial reporters'. But there is no recognition that their increased vulnerability to sexual assault means that they may have experienced sexual assault on multiple occasions.—Consultation focused on people who have a lived experience of states of mental and emotional distress commonly labelled as 'mental health challenges'<sup>53</sup>

- 2.24 The communities we discuss here are themselves diverse. People do not just belong to one group or another.<sup>54</sup> In practice, people's experience of sexual violence might be influenced by different parts of their identity. For example, women from migrant and refugee backgrounds in regional and remote locations face greater barriers to reporting sexual violence. They may not have easy access to culturally appropriate services or interpreters.<sup>55</sup>

A woman in the sex industry who is from a CaLD background is less likely to understand her rights within the booking, due to language barriers ... Language barriers may also prevent women from being able to safely negotiate a booking or refuse a client ... they are less likely to report any acts of sexual harassment and violence as a result of these barriers and cultural differences, including shame.—Project Respect<sup>56</sup>

- 2.25 Responses to sexual violence need to provide people with support and options based on their diverse needs and experiences (see Chapter 1).

50 See, eg, Commission for Children and Young People (Vic), *Out of Sight: Systemic Inquiry into Children and Young People Who Are Absent or Missing from Residential Care* (Report, 2021) 18 <<https://ccyp.vic.gov.au/assets/Publications-inquiries/Out-of-sight-inquiry-report-Web.pdf>>; Commission for Children and Young People (Vic), "... As a Good Parent Would ..." (Final Report, August 2015) 10–11 <<https://ccyp.vic.gov.au/upholding-childrens-rights/systemic-inquiries/as-a-good-parent-would/>>. See also Victorian Ombudsman, *Investigation into Complaints about Assaults of Five Children Living in Child Protection Residential Care Units* (Investigation Report PP No 177, 29 October 2020) 6 <<https://www.ombudsman.vic.gov.au/our-impact/investigation-reports/investigation-into-complaints-about-assaults-of-five-children-living-in-child-protection-residential-care-units-1/>>.

51 *Royal Commission into Victoria's Mental Health System* (Final Report, 3 February 2021) <<https://finalreport.rcvmhs.vic.gov.au/>>; *Royal Commission into Aged Care Quality and Safety* (Final Report, 1 March 2021) <<https://agedcare.royalcommission.gov.au/publications/final-report>>.

52 See, eg, Bianca Fileborn, 'Sexual Assault and Justice for Older Women: A Critical Review of the Literature' (2017) 18(5) *Trauma, Violence, and Abuse* 496; Submission 1 (Dr Catherine Barrett); Toni Ashmore, Jo Spangaro and Lorna McNamara, 'I Was Raped by Santa Claus': Responding to Disclosures of Sexual Assault in Mental Health Inpatient Facilities' (2015) 24(2) *International Journal of Mental Health Nursing* 139; Mental Health Complaints Commissioner (Vic), *The Right to Be Safe: Ensuring Sexual Safety in Acute Mental Health Inpatient Units* (Sexual Safety Project Report, March 2018) <<https://www.mhcc.vic.gov.au/sites/default/files/2021-01/The-right-to-be-safe-sexual-safety-project-report.pdf>>.

53 Consultation 66 (Consultation focused on people who have a lived experience of states of mental and emotional distress commonly labelled as 'mental health challenges').

54 Trishima Mitra-Kahn, Carolyn Newbigin and Sophie Hardefeldt, *Invisible Women, Invisible Violence: Understanding and Improving Data on the Experiences of Domestic and Family Violence and Sexual Assault for Diverse Groups of Women* (Landscapes State of Knowledge Paper Issue No DD01, ANROWS Australia's National Research Organisation for Women's Safety, December 2016) 18 <<http://anrows.org.au/publications/landscapes/invisible-women-invisible-violence-understanding-and-improving-data-the>>.

55 Ibid 21; Cathy Vaughan et al, *Multicultural and Settlement Services Supporting Women Experiencing Violence: The MuSeS Project* (Research Report No 11, ANROWS Australia's National Research Organisation for Women's Safety, 25 May 2020) 12 <<https://apo.org.au/node/305778>>. This is referred to as 'compounded disadvantage'. Trishima Mitra-Kahn, Carolyn Newbigin and Sophie Hardefeldt, *Invisible Women, Invisible Violence: Understanding and Improving Data on the Experiences of Domestic and Family Violence and Sexual Assault for Diverse Groups of Women* (Landscapes State of Knowledge Paper Issue No DD01, ANROWS Australia's National Research Organisation for Women's Safety, December 2016) 18 <<http://anrows.org.au/publications/landscapes/invisible-women-invisible-violence-understanding-and-improving-data-the>>.

56 Submission 50 (Project Respect).

## There are many barriers to reporting

- 2.26 Even though sexual violence is common, it is one of the most under-reported crimes. As we discuss in Chapter 7, about 87 per cent of people who experience sexual violence do not report it to the police.<sup>57</sup> Only about half even seek support from someone (usually from friends and family).<sup>58</sup>
- 2.27 Our terms of reference ask us to identify barriers to reporting and reforms to address them. These barriers were a focus of many of our consultations, especially with community groups and support services.
- 2.28 The reasons why someone might not report sexual violence are complex. For example, they relate to its invasive and interpersonal nature, community attitudes towards sexual violence and the justice system's response. These reasons are discussed in Table 1.<sup>59</sup>

**Table 1: A sample of barriers to reporting**

Barrier	Discussion and examples
Identifying sexual violence	People might not know that what they have experienced is a sexual offence. <sup>60</sup> For example, people may not know that technology-facilitated sexual violence is a crime. <sup>61</sup> People from migrant and refugee backgrounds might not know that sexual violence, even in marriage, is a crime. <sup>62</sup>
Feelings of shame, embarrassment and shock	As an extreme violation of someone's privacy and control, sexual violence is difficult to discuss. People can experience a sense of shame and embarrassment. <sup>63</sup> But sexual violence is never a victim survivor's fault.
Feelings of guilt or blame	The person responsible for the sexual violence or the views of society can make victim survivors feel like they are responsible for what happened or to blame. <sup>64</sup> For example, this can occur in situations of family violence or when children are sexually abused by an adult.

57 Australian Institute of Health and Welfare (Cth), *Family, Domestic and Sexual Violence in Australia: Continuing the National Story 2019* (Report, 5 June 2019) 17 <<https://www.aihw.gov.au/reports/domestic-violence/family-domestic-sexual-violence-australia-2019>>. See also *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report* (Executive Summary and Parts I–II, 2017) 165.

58 Australian Institute of Health and Welfare (Cth), *Family, Domestic and Sexual Violence in Australia: Continuing the National Story 2019* (Report, 5 June 2019) 17 <<https://www.aihw.gov.au/reports/domestic-violence/family-domestic-sexual-violence-australia-2019>>.

59 For a detailed discussion of barriers to disclosing child sexual abuse: see *Royal Commission into Institutional Responses to Child Sexual Abuse: Final Report* (Report, December 2017) vol 4 <<https://www.childabuseroyalcommission.gov.au/final-report>>.

60 Denise Lievore, *Non-Reporting and Hidden Recording of Sexual Assault: An International Literature Review* (Report, Australian Institute of Criminology (Cth), 15 June 2003) 29 <<https://aic.gov.au/publications/archive/non-reporting-and-hidden-recording-of-sexual-assault>>.

61 Consultation 5 (Associate Professors Anastasia Powell and Asher Flynn).

62 Trishima Mitra-Kahn, Carolyn Newbigin and Sophie Hardefeldt, *Invisible Women, Invisible Violence: Understanding and Improving Data on the Experiences of Domestic and Family Violence and Sexual Assault for Diverse Groups of Women* (Landscapes State of Knowledge Paper Issue No DD01, ANROWS Australia's National Research Organisation for Women's Safety, December 2016) 24 <<http://anrows.org.au/publications/landscapes/invisible-women-invisible-violence-understanding-and-improving-data-the>>.

63 Liz Wall, *The Many Facets of Shame in Intimate Partner Sexual Violence* (Report, Australian Institute of Family Studies (Cth), 30 January 2012) 1, 7 <<https://apo.org.au/node/28185>>. See also Trishima Mitra-Kahn, Carolyn Newbigin and Sophie Hardefeldt, *Invisible Women, Invisible Violence: Understanding and Improving Data on the Experiences of Domestic and Family Violence and Sexual Assault for Diverse Groups of Women* (Landscapes State of Knowledge Paper Issue No DD01, ANROWS Australia's National Research Organisation for Women's Safety, December 2016) 21, 24 <<http://anrows.org.au/publications/landscapes/invisible-women-invisible-violence-understanding-and-improving-data-the>>; Consultation 7 (Associate Professor Nicola Henry).

64 Australian Institute of Family Studies (Cth) and Victoria Police, *Challenging Misconceptions about Sexual Offending: Creating an Evidence-based Resource for Police and Legal Practitioners* (Report, 2017) 3, 12 <<https://www.police.vic.gov.au/sites/default/files/2019-01/For-Internet--Challenging-Misconceptions-Report.pdf>>; Denise Lievore, *Non-Reporting and Hidden Recording of Sexual Assault: An International Literature Review* (Report, Australian Institute of Criminology (Cth), 15 June 2003) 29 <<https://aic.gov.au/publications/archive/non-reporting-and-hidden-recording-of-sexual-assault>>.



Barrier	Discussion and examples
Social stereotypes of 'real rape' and 'ideal victims'	The social misconceptions about what sexual violence looks like might discourage people from reporting, even though they do not fit the majority of situations. For example, the misconception that sexual violence is perpetrated by strangers, even though it is often perpetrated by someone known (see above). <sup>65</sup>
Responses of friends and family	People will often disclose first to friends and family, but they might receive disbelieving or dismissive responses. <sup>66</sup> This might stop them from disclosing again or taking further action. <sup>67</sup>
Responses of others (such as mainstream services and carers)	People will also disclose to a trusted service or professional, such as a doctor or carer. Again, the response they get can support or discourage someone from accessing support and reporting options. <sup>68</sup>
Lack of information on support, reporting and justice options	People might not know that there is support available to help them decide what to do. They might not understand what reporting involves and what other options they have (such as victims of crime compensation). <sup>69</sup> For example, children in out-of-home care or children without a support network might not know who they can talk to or where they can get support. <sup>70</sup>
Lack of trust in the justice system or authorities	People's relationships with the justice system are shaped by their broader experiences of it. People who have faced discrimination from authorities or had their behaviour criminalised may not see the justice system as a source of support. <sup>71</sup> For example, LGBTIQ+ communities, Aboriginal communities, people who work in the sex industry and women with contact with the justice system.

- 65 Denise Lievore, *Non-Reporting and Hidden Recording of Sexual Assault: An International Literature Review* (Report, Australian Institute of Criminology (Cth), 15 June 2003) 29–30 <<https://aic.gov.au/publications/archive/non-reporting-and-hidden-recording-of-sexual-assault>>; Nicole M Heath et al, 'Rape Myth Acceptance Impacts the Reporting of Rape to the Police: A Study of Incarcerated Women' (2013) 19(9) *Violence Against Women* 1065, 1066–7.
- 66 See, eg, S Caroline Taylor and Caroline Norma, 'The Ties That Bind: Family Barriers for Adult Women Seeking to Report Childhood Sexual Assault in Australia' (2013) 37 *Women's Studies International Forum* 114, 122–3.
- 67 Denise Lievore, *No Longer Silent: A Study of Women's Help-Seeking Decisions and Service Responses to Sexual Assault* (Report, Australian Institute of Criminology (Cth), June 2005) 38 <<https://aic.gov.au/publications/archive/no-longer-silent>>.
- 68 Ibid 32; Submission 15 (Danielle); Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021).
- 69 Trishima Mitra-Kahn, Carolyn Newbigin and Sophie Hardefeldt, *Invisible Women, Invisible Violence: Understanding and Improving Data on the Experiences of Domestic and Family Violence and Sexual Assault for Diverse Groups of Women* (Landscapes State of Knowledge Paper Issue No DD01, ANROWS Australia's National Research Organisation for Women's Safety, December 2016) 24–5, 27 <<http://anrows.org.au/publications/landscapes/invisible-women-invisible-violence-understanding-and-improving-data-the>>; JaneMaree Maher et al, *Women, Disability and Violence—Barriers to Accessing Justice* (Horizons Research Report No 02/2018, ANROWS Australia's National Research Organisation for Women's Safety, April 2018) 31 <<https://apo.org.au/node/173826>>; Consultations 31 (Geraldine, Deputy Chairperson of the Victim Survivors' Advisory Council), 59 (Ashleigh Rae, Nicole Lee, Penny).
- 70 Consultation 68 (Youthlaw).
- 71 See, eg, Submissions 9 (Djirra), 30 (Red Files Inc.); Consultation 22 (First roundtable on the experience of LGBTIQ+ people); Monica Campo and Sarah Tayton, *Intimate Partner Violence in Lesbian, Gay, Bisexual, Trans, Intersex and Queer Communities: Key Issues* (Child Family Community Australia Practitioner Resource, Australian Institute of Family Studies (Cth), December 2015) 5–6 <<https://aifs.gov.au/cfca/publications/intimate-partner-violence-lgbtq-communities>>; Andrew Day et al, *The Forgotten Victims: Prisoner Experience of Victimisation and Engagement with the Criminal Justice System* (Research Report No 1, ANROWS Australia's National Research Organisation for Women's Safety, August 2018) 31, 67 <<https://www.anrows.org.au/publications/horizons/the-forgotten-victims-prisoner-experience-victimisation-and-engagement-the>>; Bianca Fileborn, 'Gender, Violence and Criminal Justice' in Laura J Shepherd (ed), *Handbook on Gender and Violence* (Edward Elgar Publishing, 2019) 377, 379; Trishima Mitra-Kahn, Carolyn Newbigin and Sophie Hardefeldt, *Invisible Women, Invisible Violence: Understanding and Improving Data on the Experiences of Domestic and Family Violence and Sexual Assault for Diverse Groups of Women* (Landscapes State of Knowledge Paper Issue No DD01, ANROWS Australia's National Research Organisation for Women's Safety, December 2016) 21 <<http://anrows.org.au/publications/landscapes/invisible-women-invisible-violence-understanding-and-improving-data-the>>.

Barrier	Discussion and examples
Consequences of reporting	People might be scared of the other consequences of reporting. For example, they might be worried that child protection will become involved or that they (or the person responsible) will lose their visa to stay in Australia. <sup>72</sup>
Fear of not being believed	People might worry about not being believed. This can be based on the experience (their own or other people's) of not being believed. <sup>73</sup> People can also fear not being believed if the person responsible is in a position of authority. <sup>74</sup>
Experiences of discrimination	Some people still experience or fear discrimination when they report to the police. <sup>75</sup> For example, people with cognitive and communication disabilities and people with lived experience of mental illness or psychological distress may be not be believed when they report. <sup>76</sup>
Concerns about the justice system process	People might not want to go through the justice system process because it is lengthy and traumatic. <sup>77</sup> It can take many years. The adversarial process also involves testing their account through processes of investigation and cross-examination. <sup>78</sup>
Not wanting a criminal justice outcome	People may not want the person responsible to be charged or go to prison. For example, this might be a barrier for children to report sexual violence committed by their parents or for parents to report sexual violence committed by their partner or one of their children against another. <sup>79</sup>

- 72 Submissions 12 (Women's Legal Service Victoria), 40 (Law Institute of Victoria); Consultations 20 (Members of Barwon South West RAJAC and Barwon South West Dhelek Dja Action Group), 72 (Asylum Seeker Resource Centre).
- 73 Denise Lievore, *Non-Reporting and Hidden Recording of Sexual Assault: An International Literature Review* (Report, Australian Institute of Criminology (Cth), 15 June 2003) 28 <<https://aic.gov.au/publications/archive/non-reporting-and-hidden-recording-of-sexual-assault>>; Consultation 68 (Youthlaw) (2 February 2021).
- 74 *Royal Commission into Institutional Responses to Child Sexual Abuse: Final Report* (Report, December 2017) vol 4, 12, 124-5 <<https://www.childabuseroyalcommission.gov.au/final-report>>.
- 75 Monica Campo and Sarah Tayton, *Intimate Partner Violence in Lesbian, Gay, Bisexual, Trans, Intersex and Queer Communities: Key Issues* (Child Family Community Australia Practitioner Resource, Australian Institute of Family Studies (Cth), December 2015) 5-6 <<https://aifs.gov.au/cfca/publications/intimate-partner-violence-lgbtqi-communities>>; Trishima Mitra-Kahn, Carolyn Newbigin and Sophie Hardefeldt, *Invisible Women, Invisible Violence: Understanding and Improving Data on the Experiences of Domestic and Family Violence and Sexual Assault for Diverse Groups of Women* (Landscapes State of Knowledge Paper Issue No DD01, ANROWS Australia's National Research Organisation for Women's Safety, December 2016) 25 <<http://anrows.org.au/publications/landscapes/invisible-women-invisible-violence-understanding-and-improving-data-the>>.
- 76 Trishima Mitra-Kahn, Carolyn Newbigin and Sophie Hardefeldt, *Invisible Women, Invisible Violence: Understanding and Improving Data on the Experiences of Domestic and Family Violence and Sexual Assault for Diverse Groups of Women* (Landscapes State of Knowledge Paper Issue No DD01, ANROWS Australia's National Research Organisation for Women's Safety, December 2016) 27 <<http://anrows.org.au/publications/landscapes/invisible-women-invisible-violence-understanding-and-improving-data-the>>; JaneMaree Maher et al, *Women, Disability and Violence—Barriers to Accessing Justice* (Horizons Research Report No 02/2018, ANROWS Australia's National Research Organisation for Women's Safety, April 2018) 30 <<https://apo.org.au/node/173826>>; Consultation 66 (Consultation focused on people who have a lived experience of states of mental and emotional distress commonly labelled as 'mental health challenges').
- 77 Australian Institute of Family Studies (Cth) and Victoria Police, *Challenging Misconceptions about Sexual Offending: Creating an Evidence-based Resource for Police and Legal Practitioners* (Report, 2017) 3 <<https://www.police.vic.gov.au/sites/default/files/2019-01/For-Internet--Challenging-Misconceptions-Report.pdf>>; Bianca Fileborn, 'Gender, Violence and Criminal Justice' in Laura J Shepherd (ed), *Handbook on Gender and Violence* (Edward Elgar Publishing, 2019) 377, 379; Denise Lievore, *Non-Reporting and Hidden Recording of Sexual Assault: An International Literature Review* (Report, Australian Institute of Criminology (Cth), 15 June 2003) 32-3 <<https://aic.gov.au/publications/archive/non-reporting-and-hidden-recording-of-sexual-assault>>.
- 78 See, eg, Haley Clark, "What Is the Justice System Willing to Offer?" *Understanding Sexual Assault Victim/Survivors' Criminal Justice Needs* (2010) 85 *Family Matters* 28, 36.
- 79 Consultation 23 (Sexual Assault Services Victoria Specialist Children's Services); Submission 40 (Law Institute of Victoria).

Barrier	Discussion and examples
Barriers to accessing justice	Some people and communities still face serious barriers to accessing the justice system. For example, people with cognitive and communication disabilities or people who communicate in a language other than English may not have their communication needs met. <sup>80</sup> People living in rural and remote locations may not have access to a police station or the support they need. <sup>81</sup>

- 2.29 Not all of these barriers can be addressed through law reform. But we propose important reforms for those that can. These include:
- public education to improve community knowledge and attitudes (Chapter 3). This should help people identify sexual violence when it happens and know how to respond to it. It also aims to create a community culture where victim survivors are believed and supported.
  - 'front-end' reforms to improve access to the justice system (see Chapters 7 and 8)—for example, more information and options on reporting. These can address barriers caused by a lack of information or trust in the justice system.
  - 'back-end' reforms to improve people's experience of the justice system itself—for example, more supports for people to engage with the justice system (see Chapter 12). This should help shift barriers due to poor treatment by the justice system or concerns about its process.
- 2.30 These proposed reforms aim to make sure that everyone has access to reporting and justice options (if they want) and to improve their experience of seeking justice.

## What do victim survivors want from a justice process?

### People have justice needs

- 2.31 Our terms of reference ask us to consider reforms to justice processes that are consistent with victim survivors' interests and the interests of justice.
- 2.32 There is now a significant body of research that tells us what victim survivors might require or want from a justice process (criminal, legal or otherwise).<sup>82</sup>
- 2.33 These are different from other needs someone might have such as for medical or psychological care, housing or financial support.<sup>83</sup> We discuss how we have used people's justice needs as a framework for reform in Chapter 1.

80 Consultations 11 (Family violence and sexual assault practitioners focusing on disability inclusion), 17 (Roundtable consultation focused on the experience of women with disability); Trishima Mitra-Kahn, Carolyn Newbigin and Sophie Hardefeldt, *Invisible Women, Invisible Violence: Understanding and Improving Data on the Experiences of Domestic and Family Violence and Sexual Assault for Diverse Groups of Women* (Landscapes State of Knowledge Paper Issue No DD01, ANROWS Australia's National Research Organisation for Women's Safety, December 2016) 25, 27 <<http://anrows.org.au/publications/landscapes/invisible-women-invisible-violence-understanding-and-improving-data-the>>.

81 Monica Campo and Sarah Tayton, *Domestic and Family Violence in Regional, Rural and Remote Communities: An Overview of Key Issues* (Child Family Community Australia Practitioner Resource, Australian Institute of Family Studies (Cth), December 2015) 5 <<https://aifs.gov.au/cfca/publications/domestic-and-family-violence-regional-rural-and-remote-communities>>.

82 See, eg, Haley Clark, "What Is the Justice System Willing to Offer?" Understanding Sexual Assault Victim/Survivors' Criminal Justice Needs' (2010) 85 *Family Matters* 28; 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; Nicole Bluett-Boyd and Bianca Fileborn, *Victim/Survivor-Focused Justice Responses and Reforms to Criminal Court Practice* (Research Report No 27, Australian Institute of Family Studies (Cth), April 2014) <<https://aifs.gov.au/publications/victim-survivor-focused-justice-responses-and-reforms-criminal-court-practice>>; Clare McGlynn and Nicole Westmarland, 'Kaleidoscopic Justice: Sexual Violence and Victim-Survivors' Perceptions of Justice' (2019) 28(2) *Social and Legal Studies* 179.

83 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, 389.

- 2.34 Different people may prioritise different justice needs. In Chapter 1 we discuss how victim survivors should be able to choose from a suite of options, which might satisfy different justice needs.<sup>84</sup>

### People need information

- 2.35 People's first need may be for *information*. This means having plain-language, easily accessible information about how the justice system works, what people within the criminal justice system do, and what the main turning points and likely outcomes are.<sup>85</sup> Lucille, a victim survivor, told us that the court system is made up of processes and requirements that she could never understand.

I wish they had explained a little bit more and given a heads up.—Lucille<sup>86</sup>

- 2.36 Information can provide victim survivors with realistic expectations of what to expect from the justice system.<sup>87</sup> For example, if they understand how difficult it is to prove sexual violence in court, they might also understand that their case not going to trial reflects problems with the justice system. It does not mean they lack credibility.<sup>88</sup>

### People want to participate

- 2.37 A second need is for *participation*. This has some overlap with 'information' needs. Victim survivors need to know how their case is progressing, any decisions made, and their role in the process.<sup>89</sup>
- 2.38 Participation also covers victim survivors' interests in being part of or having their interests represented in proceedings, for example in the questions that are asked of an accused.<sup>90</sup>

As a victim you don't have the power to object to any of these things. The barrister said I had an affair when it was a sexual assault. You don't get to contest these statements. I did get assistance to write a victim impact statement so it didn't get thrown out. But you don't have power in this position. You as a person gets utterly erased.—Nicole<sup>91</sup>

84 Daly writes of a 'menu of options': *ibid* 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) 9–10 <<https://cij.org.au/research-projects/sexual-offences/>>.

85 Haley Clark, "What Is the Justice System Willing to Offer?" *Understanding Sexual Assault Victim/Survivors' Criminal Justice Needs* (2010) 85 *Family Matters* 28, 31–2.

86 Consultation 54 (Lucille Kent, a victim survivor of sexual assault).

87 Haley Clark, "What Is the Justice System Willing to Offer?" *Understanding Sexual Assault Victim/Survivors' Criminal Justice Needs* (2010) 85 *Family Matters* 28, 31–2.

88 *Ibid* 32.

89 *Ibid* 31–2; 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.

90 Haley Clark, "What Is the Justice System Willing to Offer?" *Understanding Sexual Assault Victim/Survivors' Criminal Justice Needs* (2010) 85 *Family Matters* 28, 35; 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.

91 Consultation 59 (Ashleigh Rae, Nicole Lee, Penny).

## Having a voice is powerful

- 2.39 Third, people want *voice*, which means telling their full story in their own words.<sup>92</sup>

I spoke to all of these women and they were practically all victim survivors. Almost all had been assaulted. And they all use the same language. It's really striking ... They want to be heard and they said 'I was raped' and they need to be valued and heard.—Danielle<sup>93</sup>

- 2.40 The focus here is on the opportunity for victim survivors to tell their full story of what happened to them, rather than limiting their account to what is legally relevant.<sup>94</sup> It is also important that victim survivors are able to tell their story in a 'significant setting' (such as in a justice process or hearing), where it is publicly and officially acknowledged.<sup>95</sup> Several victim survivors we spoke with made positive comments about the opportunity to share their story with us.<sup>96</sup>

Having my experience acknowledged and validated would feel more like justice than what I got.—Nicole<sup>97</sup>

## Validation is important

- 2.41 Fourth is the need for *validation*—for people to have their story believed as well as just heard.
- 2.42 Victim survivors would like justice officials to believe their account and react with empathy to the injustice they have experienced.<sup>98</sup>

... whether the perpetrator was jailed was often not the most important factor to victim survivors, who were often more interested in being believed.—Family violence and sexual assault practitioners focusing on disability inclusion<sup>99</sup>

- 2.43 These responses are seen to counter the reluctance of society to acknowledge sexual violence. They also reflect that the justice system has a special and respected status in acknowledging harm.
- 2.44 Validation might also come from having a concrete outcome from their report (such as police pressing charges or a conviction in their case).<sup>100</sup> One victim survivor told us that her approach was that if the perpetrator experienced some form of consequence, he would not be able to harm other people he saw (as a doctor).<sup>101</sup>

92 Haley Clark, "What Is the Justice System Willing to Offer?" Understanding Sexual Assault Victim/Survivors' Criminal Justice Needs' (2010) 85 *Family Matters* 28, 33–34.

93 Consultation 81 (Danielle, a victim survivor).

94 Haley Clark, "What Is the Justice System Willing to Offer?" Understanding Sexual Assault Victim/Survivors' Criminal Justice Needs' (2010) 85 *Family Matters* 28, 34; 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.

95 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.

96 See, eg, Consultations 31 (Geraldine, Deputy Chairperson of the Victim Survivors' Advisory Council), 69 (Deborah, a victim survivor of sexual assault); Submission 26 (Northern CASA).

97 Consultation 59 (Ashleigh Rae, Nicole Lee, Penny).

98 Haley Clark, "What Is the Justice System Willing to Offer?" Understanding Sexual Assault Victim/Survivors' Criminal Justice Needs' (2010) 85 *Family Matters* 28, 32; 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.

99 Consultation 11 (Family violence and sexual assault practitioners focusing on disability inclusion).

100 Haley Clark, "What Is the Justice System Willing to Offer?" Understanding Sexual Assault Victim/Survivors' Criminal Justice Needs' (2010) 85 *Family Matters* 28, 32–3.

101 Consultation 69 (Deborah, a victim survivor of sexual assault).

## Denouncing sexual violence and accountability are important

- 2.45 Fifth, people want sexual violence to be clearly condemned and those responsible to face consequences. There needs to be *vindication*: a response from the community or the law that denounces the violence and stands with the victim.<sup>102</sup> This can include the punishment of the person responsible for the violence, financial compensation for victim survivors or other official responses (such as an apology).
- 2.46 People responsible also need to be *held to account*—for example, by facing consequences for their actions, undertaking treatment and accepting responsibility for their actions and making amends.<sup>103</sup>

## People see support as justice

- 2.47 Sixth, people might want *support*, which can include counselling and support during court hearings.<sup>104</sup> One victim survivor explained that he ‘wouldn’t be here’ without his independent support person.<sup>105</sup> Many victim survivors spoke to us about the lack of support they received. We discuss the link between support and justice in Chapter 12.

I had no protection getting to or leaving court ... It was me and my ... counsellor who were the ones who had to think about my safety, and how to manage that, no one else was thinking about it.—Cecilia<sup>106</sup>

You need someone beside you who is walking you through the system so you're not repeating yourself.—Safe Pathways to Healing Working Group<sup>107</sup>

## Justice is more than the justice system

- 2.48 Any ‘form of justice ... is an approximation; it’s the best or the closest you can come to acknowledging the depth of damage from the original wrongdoing’.<sup>108</sup>
- 2.49 Pursuing justice for sexual violence is a crucial but complex goal. In our inquiry, people shared with us their broader views on justice. In words similar to those of one victim survivor quoted above, some people said that the injustice of sexual violence can never be fixed through the criminal justice process.

What’s happened has happened, I can’t see that it [reporting to the police] would really change anything other than causing me unnecessary and drawn out distress.<sup>109</sup>

- 2.50 Others told us that justice was more than making someone legally accountable. For example, justice may mean being moved to safe accommodation, having the violence

102 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.

103 Haley Clark, ‘“What Is the Justice System Willing to Offer?” Understanding Sexual Assault Victim/Survivors’ Criminal Justice Needs’ (2010) 85 *Family Matters* 28, 30; 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.

104 Nicole Bluett-Boyd and Bianca Fileborn, *Victim/Survivor-Focused Justice Responses and Reforms to Criminal Court Practice* (Research Report No 27, Australian Institute of Family Studies (Cth), April 2014) 27 <<https://aifs.gov.au/publications/victim-survivor-focused-justice-responses-and-reforms-criminal-court-practice>>.

105 Consultation 77 (Witness J).

106 Consultation 56 (Cecilia, a victim survivor of sexual assault).

107 Consultation 29 (Safe Pathways to Healing Working Group (North Metropolitan Aboriginal Sexual Assault Prevention and Healing Advisory Group)).

108 A victim survivor, quoted in Haley Clark, ‘“What Is the Justice System Willing to Offer?” Understanding Sexual Assault Victim/Survivors’ Criminal Justice Needs’ (2010) 85 *Family Matters* 28, 30.

109 Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021).



stop or being supported to address the negative impacts of the harm.<sup>110</sup>

- 2.51 One roundtable participant said that justice was not an outcome, but an experience that might occur at 'different points in the system'.<sup>111</sup> They explained that justice might be found in the experience of 'being believed by the police' or feeling safe during counselling.
- 2.52 Clare McGlynn and Nicole Westmarland use the term 'kaleidoscopic justice' to describe the complex, shifting and multi-dimensional nature of 'justice' for sexual violence. Through their interviews with victim survivors, they show how 'justice' can mean different things for different people, and how people's views of justice can change over time.<sup>112</sup>
- 2.53 Others who have experienced sexual violence do have important reasons for seeking a criminal justice response. These can be for a social aim, including to prevent further harm to others; to denounce and expose someone's harmful behaviour; and a sense of social responsibility (or 'the right thing to do').<sup>113</sup>

If I can make a change through the justice system, hopefully this won't happen again. I have a granddaughter who is three years old and I look at her and think, 'how could this happen?' I don't want something like what happened to me to happen to her.—Cecilia<sup>114</sup>

- 2.54 Based on this view, S. Caroline Taylor and Caroline Norma argue, a victim survivor's decision to go through the criminal justice process can be a form of 'symbolic protest'—a call for the justice system to appropriately respond to sexual violence.<sup>115</sup> This call should be met, they believe, with a focus on reforms to ensure the criminal justice system can meet their expectations.

Unless the outcomes are better, there will be no real changes for victims of sexual assault ... The truths about our legal system are uncomfortable truths but they need to be spoken about.—Kelly<sup>116</sup>

- 2.55 Our work focuses on the criminal justice system and other justice options for people who have experienced sexual violence. As discussed above, victim survivors and the community share an interest in denouncing sexual violence and holding people to account. Our recommendations recognise that justice and accountability might be found in process as well as outcome, and in restorative justice as well as criminal justice.
- 2.56 However, we also acknowledge that justice might mean something much more expansive for some people. For some, justice will only ever be 'an approximation'.

110 See, eg, Consultations 50 (End Rape on Campus), 56 (Cecilia, a victim survivor of sexual assault), 66 (Consultation focused on people who have a lived experience of states of mental and emotional distress commonly labelled as 'mental health challenges'); Submission 21 (Victorian Aboriginal Child Care Agency).

111 Consultation 22 (First roundtable on the experience of LGBTIQ+ people).

112 Clare McGlynn and Nicole Westmarland, 'Kaleidoscopic Justice: Sexual Violence and Victim-Survivors' Perceptions of Justice' (2019) 28(2) *Social and Legal Studies* 179, 196–7.

113 See S Caroline Taylor and Caroline Norma, 'The "Symbolic Protest" Behind Women's Reporting of Sexual Assault Crime to Police' (2012) 7(1) *Feminist Criminology* 24, 25, 45, 33–43. See also Oona Brooks-Hay, 'Doing the "Right Thing"? Understanding Why Rape Victim-Survivors Report to the Police' (2020) 15(2) *Feminist Criminology* 174, 182–7; Haley Clark, 'What Is the Justice System Willing to Offer?' Understanding Sexual Assault Victim/Survivors' Criminal Justice Needs' (2010) 85 *Family Matters* 28, 30. People might also report in order to create a record that supports the case of other victim survivors who later report: see S Caroline Taylor and Caroline Norma, 'The "Symbolic Protest" Behind Women's Reporting of Sexual Assault Crime to Police' (2012) 7(1) *Feminist Criminology* 24, 33.

114 Consultation 56 (Cecilia, a victim survivor of sexual assault).

115 S Caroline Taylor and Caroline Norma, 'The "Symbolic Protest" Behind Women's Reporting of Sexual Assault Crime to Police' (2012) 7(1) *Feminist Criminology* 24, 45.

116 Submission 26 (Northern CASA).





# CHAPTER 03

## A community that stands against sexual violence

36 Overview

36 Sexual violence requires a community response

38 Sexual violence is not well understood—this contributes to a culture that silences people who experience it

39 There should be a commitment to public education about sexual violence

46 Employers and other groups must do more

### 3. A community that stands against sexual violence

#### Overview

- Sexual violence is a social problem that calls for a community-wide response. People who experience sexual violence should not have to suffer in silence and on their own—too many do.
- Taking collective responsibility for sexual violence means that everyone should be able to identify it and respond appropriately when it happens.
- Confused or mistaken views about sexual violence are widespread. Education is needed to improve the public's understanding of what sexual violence is, when and how it happens, and how to respond if someone discloses sexual violence.
- A community response to sexual violence requires stronger obligations on organisations like clubs, schools, employers and local government. There should be penalties for failure to comply with the existing duty to take steps to eliminate sexual harassment.
- We also need a new duty to take steps to eliminate sexual violence.

#### Sexual violence requires a community response

- 3.1 Sexual violence is not caused by a handful of wayward people on society's fringe.<sup>1</sup> It is endemic and 'systemic', which means it is supported by 'policies, practices and attitudes that are entrenched' in society.<sup>2</sup>
- 3.2 The effects of sexual violence can be devastating and lasting. Often, they are experienced alone and in silence. To reduce sexual violence, the community must take more responsibility for it. We need to challenge cultures where sexual violence thrives.
- 3.3 This requires action to promote gender equality.<sup>3</sup> Gender inequality contributes to sexual violence and makes it worse.<sup>4</sup> For example, it produces economic inequality that prevents women from leaving abusive relationships.<sup>5</sup> It can help make male sexual

1 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020) 141 <<https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>>.

2 For the definition of a 'systemic' problem, see Julian Gardner, *An Equality Act for a Fairer Victoria* (Equal Opportunity Review Final Report, Department of Justice (Vic), June 2008) 8. See below for sources supporting the argument that sexual violence is systemic.

3 Submissions 17 (Sexual Assault Services Victoria), 27 (Victoria Legal Aid), 55 (Springvale Monash Legal Service).

4 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020) 26 <<https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>>; Royal Commission into Family Violence: *Report and Recommendations* (Final Report, March 2016) vol 1, 2, 11, Recommendation 187 <<http://rcfv.archive.royalcommission.vic.gov.au/Report-Recommendations.html>>; VicHealth, *Violence against Women in Australia: An Overview of Research and Approaches to Primary Prevention* (Report, 2017) <<https://www.vichealth.vic.gov.au/-/media/ResourceCentre/PublicationsandResources/PVAW/Violence-Against-Women-Research-Overview.pdf>>; Victorian Equal Opportunity and Human Rights Commission, Submission to the Australian Human Rights Commission, *National Inquiry into Sexual Harassment in Australian Workplaces* (February 2019) 140–142 <[https://www.humanrights.vic.gov.au/static/f72f3b7bf8c99ca4911c6f76ba5abcc1/Submission-National\\_inquiry\\_sexual\\_harassment-Feb\\_2019.pdf](https://www.humanrights.vic.gov.au/static/f72f3b7bf8c99ca4911c6f76ba5abcc1/Submission-National_inquiry_sexual_harassment-Feb_2019.pdf)>; Victorian Government, *Safe and Strong: A Victorian Gender Equality Strategy* (Report, 2016) 7 <<http://www.vic.gov.au/safe-and-strong-victorian-gender-equality>>; World Health Organisation, *Promoting Gender Equality to Prevent Violence against Women* (Report, 2009).

5 Christine Chinkin, 'Gender and Economic, Social, and Cultural Rights' in Eibe Riedel, Gilles Giacca and Christophe Golay (eds), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (Oxford University Press, 2014) 134, 144.

aggression and treating women as sex objects seem normal.<sup>6</sup> Work is already being done to advance gender equality nationally and in Victoria.<sup>7</sup>

- 3.4 Work is also under way in Victoria to reduce family violence.<sup>8</sup> Some state agencies are investigating whether family violence initiatives could work for sexual violence outside the family.<sup>9</sup> The sexual assault strategy being developed by the Victorian Government (see Chapter 1) will build on this work.
- 3.5 In this inquiry, people told us about the importance of 'primary prevention' initiatives.<sup>10</sup> The Royal Commission into Family Violence and the Royal Commission into Institutional Responses to Child Sexual Abuse also highlighted the urgent need to support primary prevention programs.<sup>11</sup> The Commission endorses their recommendations about primary prevention.
- 3.6 However, this inquiry deals with the response of the justice system to sexual violence, rather than on the ways that sexual violence can be prevented in the first place. In this chapter we focus on building community knowledge about sexual violence. This is important for overcoming barriers to reporting sexual violence and making sure victim survivors receive the support they need, which is a focus of our terms of reference.
- 3.7 A society that understands sexual violence is better able to support people who experience it. It creates an environment where they can speak up and seek justice. We know that if victim survivors receive a supportive response when they first disclose sexual violence, they are more likely to take the next step to seek support or report to police.<sup>12</sup>
- 3.8 If the community has a good understanding of sexual violence, that will also improve the justice system's response to sexual offences. Jurors in sexual offence trials and people involved in criminal and other justice processes are all members of the community.<sup>13</sup>
- 3.9 We can improve the community response to sexual violence by strengthening legal obligations on certain people and groups, including people who provide goods and services, clubs, industrial organisations, employers and education providers. They should support people who have experienced sexual violence and challenge cultures where sexual violence thrives.

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6 Our Watch, *Putting the Prevention of Violence against Women into Practice: How to Change the Story* (Report, 2017) 27, 80 <<https://media-cdn.ourwatch.org.au/wp-content/uploads/sites/2/2019/11/07042017/Putting-prevention-into-practice-AA-web.pdf>>.

7 Nationally, this includes the 'Change the story' initiative: 'Change the Story', *Our Watch* (Web Page, 2021) <<https://www.ourwatch.org.au/change-the-story/>>; Australian Government, *A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces* (Report, 8 April 2021) <<https://www.ag.gov.au/rights-and-protections/publications/roadmap-for-respect>>. In Victoria, it includes 'Safe and Strong: Victoria's Gender Equality Strategy': Victorian Government, *Safe and Strong: A Victorian Gender Equality Strategy* (Report, 2016) <<http://www.vic.gov.au/safe-and-strong-victorian-gender-equality>>; Family Violence Reform Implementation Monitor, *Report of the Family Violence Reform Implementation Monitor* (Report, 1 November 2020) 10–11 <<http://www.fvrim.vic.gov.au/fourth-report-parliament-1-november-2020-tabled-may-2021>>.

8 See Family Violence Reform Implementation Monitor, *Report of the Family Violence Reform Implementation Monitor* (Report, 1 November 2020) <<http://www.fvrim.vic.gov.au/fourth-report-parliament-1-november-2020-tabled-may-2021>>. Agencies involved include Family Safety Victoria and Respect Victoria. Although the focus has not been on sexual violence, there is growing understanding that sexual violence often occurs in the context of family violence and family violence responses need to be responsive to this: Consultations 73 (Family Safety Victoria (No 1)), 75 (Family Safety Victoria (No 2)).

9 Consultations 73 (Family Safety Victoria (No 1)), 75 (Family Safety Victoria (No 2)).

10 Submissions 7 (Dr Bianca Fileborn, Dr Rachel Loney-Howes, Dr Tully O'Neill and Sophie Hindes), 15 (Danielle), 17 (Sexual Assault Services Victoria), 21 (Victorian Aboriginal Child Care Agency), 22 (knowmore legal service), 24 (Jesuit Social Services), 27 (Victoria Legal Aid), 39 (Rape & Domestic Violence Services Australia), 44 (Dr Patrick Tidmarsh and Dr Gemma Hamilton), 65 (Aboriginal Justice Caucus).

11 *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016) Recommendations 187–9, see also vol 1, 11, 38–9, vol 6 <<http://rcfv.archive.royalcommission.vic.gov.au/Report-Recommendations.html>>; *Royal Commission into Institutional Responses to Child Sexual Abuse: Final Report* (Report, December 2017) Recommendations 6.1–6.6, 13.7, 13.8 <<https://www.childabuseroyalcommission.gov.au/final-report>>.

12 A study by Lievore highlighted 'the instrumental role of informal social networks and health providers in facilitating further help-seeking from formal sources, including police': Denise Lievore, *No Longer Silent: A Study of Women's Help-Seeking Decisions and Service Responses to Sexual Assault* (Report, Australian Institute of Criminology (Cth), June 2005) v <<https://aic.gov.au/publications/archive/no-longer-silent>>.

13 Submission 44 (Dr Patrick Tidmarsh and Dr Gemma Hamilton). A respondent to our online survey also suggested there is a need to educate 'lawyers on gender-based violence before they are qualified': Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021).

## Sexual violence is not well understood—this contributes to a culture that silences people who experience it

- 3.10 Many people who experience sexual violence do not speak about it or get the help they need. The nationwide Personal Safety Survey found that only half of all women who had been assaulted reached out for advice or support after their most recent experience of sexual assault by a male.<sup>14</sup>
- 3.11 Children find it very difficult to tell someone or get help if they have been sexually abused. Usually, they will take time before telling someone.<sup>15</sup> Most do not disclose the abuse at all until they are adults.<sup>16</sup>
- 3.12 We discuss why most people do not report sexual violence to the police in Chapter 2. Reasons include feeling ashamed, and being afraid they will not be believed. It is clear that misconceptions about sexual violence are common and people receive mixed responses when they speak about it.<sup>17</sup> Nationwide research indicates that:
- Around one-third of Australians believe that rape results from men being unable to control their need for sex.<sup>18</sup>
  - Almost one in five Australians (19 per cent) don't know that non-consensual sex in marriage is against the law.<sup>19</sup>
  - In 2021, more than one in five Australians (22 per cent) disagreed with the statement that sexual assault allegations are almost always true. Another 18 per cent were neutral or did not know what they thought about the statement.<sup>20</sup>
  - This suggests that 40 per cent of adult Australians either do not know or do not believe that false allegations of sexual assault are very rare. Research indicates that no more than 5 per cent of all reported allegations are false.<sup>21</sup>

14 Australian Institute of Health and Welfare (Cth), *Sexual Assault in Australia* (In Focus Report, 28 August 2020) 4–5 <<https://www.aihw.gov.au/reports/domestic-violence/sexual-assault-in-australia/contents/summary>>. Respondents were asked about whether they sought advice after 'their most recent sexual assault', recognising that some respondents had been sexually assaulted more than once. These figures represent a decline in help-seeking from 2013, when six out of 10 women who had experienced a sexual offence sought advice or help from others: Australian Institute of Family Studies (Cth) and Victoria Police, *Challenging Misconceptions about Sexual Offending: Creating an Evidence-based Resource for Police and Legal Practitioners* (Report, 2017) 4 <<https://www.police.vic.gov.au/sites/default/files/2019-01/For-Internet--Challenging-Misconceptions-Report.pdf>>.

15 Australian Institute of Family Studies (Cth) and Victoria Police, *Challenging Misconceptions about Sexual Offending: Creating an Evidence-based Resource for Police and Legal Practitioners* (Report, 2017) 4, 17 <<https://www.police.vic.gov.au/sites/default/files/2019-01/For-Internet--Challenging-Misconceptions-Report.pdf>>.

16 Ibid. The Royal Commission into Institutional Responses to Child Sexual Abuse found the average delay for reporting child abuse that happened in an institution such as a school or religious setting was 23.9 years: Royal Commission into Institutional Responses to Child Sexual Abuse, *Identifying and Disclosing Child Sexual Abuse* (Final Report) 33. Note that the figure of 22 years is often cited. This comes from the earlier report of the Royal Commission: Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation* (Report, Royal Commission into Institutional Responses to Child Sexual Abuse, September 2015) 444 <<https://www.childabuseroyalcommission.gov.au/redress-and-civil-litigation>>.

17 See, eg, Denise Lievore, *No Longer Silent: A Study of Women's Help-Seeking Decisions and Service Responses to Sexual Assault* (Report, Australian Institute of Criminology (Cth), June 2005) vi <<https://aic.gov.au/publications/archive/no-longer-silent>>. This issue is not confined to Australia. In Northern Ireland, the Gillen review found there was a 'crucial' need for 'well-funded public and school campaigns to debunk [common] myths' about sexual violence: John Gillen, *Gillen Review: Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (Report, 9 May 2019) 14 <<https://www.justice-ni.gov.uk/sites/default/files/publications/justice/gillen-report-may-2019.pdf>>. Many of the misconceptions we discuss below have also been identified in the United Kingdom: Crown Prosecution Service (UK), 'Rape and Sexual Offences—Annex A: Tackling Rape Myths and Stereotypes', *Legal Guidance, Sexual Offences* (Web Page, 21 May 2021) <<https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-annex-tackling-rape-myths-and-stereotypes>>.

18 Results of the National Community Attitudes towards Violence against Women survey 2017. Note that this survey canvasses attitudes among Australians aged 16 and over: Australian Institute of Health and Welfare (Cth), *Sexual Assault in Australia* (In Focus Report, 28 August 2020) 4 <<https://www.aihw.gov.au/reports/domestic-violence/sexual-assault-in-australia/contents/summary>>.

19 Results of the National Community Attitudes towards Violence against Women survey 2017: *ibid*.

20 Lucy Sweeney and Sally Sara, 'Grace Tame Says Change Is a Marathon Effort. But Australia Talks Data Shows Our Perception of Sexual Assault Is Changing', *ABC News* (online, 10 June 2021) <<https://www.abc.net.au/news/2021-06-10/grace-tame-australia-talks-believing-sexual-assault-allegations/100155474>>. Statistics from the 'Australia Talks National Survey 2021', research conducted by ABC in partnership with Vox Pop Labs. Respondents to the survey were people who had participated previously in the ABC's Vote Compass Surveys.

21 Submission 44 (Dr Patrick Tidmarsh and Dr Gemma Hamilton); Australian Institute of Family Studies (Cth) and Victoria Police, *Challenging Misconceptions about Sexual Offending: Creating an Evidence-based Resource for Police and Legal Practitioners* (Report, 2017) 9 <<https://www.police.vic.gov.au/sites/default/files/2019-01/For-Internet--Challenging-Misconceptions-Report.pdf>>; Lucy Sweeney and Sally Sara, 'Grace Tame Says Change Is a Marathon Effort. But Australia Talks Data Shows Our Perception of Sexual Assault Is Changing', *ABC News* (online, 10 June 2021) <<https://www.abc.net.au/news/2021-06-10/grace-tame-australia-talks-believing-sexual-assault-allegations/100155474>>.

- 3.13 We heard in this inquiry that many people who experience sexual violence, or want to help someone who has experienced it, do not know:
- what support services, including specialised sexual assault counselling and medical services, are available or how to access them
  - what should be done to preserve evidence of a sexual assault
  - the reporting options
  - what is involved in making a police report, and in a police investigation, including how the police take statements
  - what is involved in a criminal prosecution, including:
    - the role of the victim in a prosecution (as a witness for the prosecution, not a party to the proceedings)
    - how sexual offences are charged and sometimes withdrawn
    - possible outcomes of a prosecution
  - other justice options (for example, civil litigation and financial assistance for victims of crime) and how to access them.<sup>22</sup>
- 3.14 Other inquiries and research also highlight these gaps in knowledge.<sup>23</sup>
- 3.15 In Chapter 7 we discuss how best to provide the information that people need if they experience sexual violence.

## There should be a commitment to public education about sexual violence

- 3.16 Since the rise of #MeToo, a powerful movement has grown demanding action to prevent sexual violence and support people who experience it. A call for action to improve the community's knowledge about sexual violence was made repeatedly in this inquiry.<sup>24</sup>
- 3.17 We hear this call. Its momentum should be harnessed.<sup>25</sup> As has happened with family violence, the Victorian Government should commit to educating the community about sexual violence. Preventing sexual violence must become 'everybody's business'.<sup>26</sup>

## How should public education be delivered?

- 3.18 Community education about sexual violence should be ongoing and well resourced.<sup>27</sup> It should be up to date and informed by evidence from the behavioural sciences about how to achieve lasting cultural change. The following things will be important:
- expanding support services before launching awareness raising education, so that when more people come forward seeking support, they can access it
  - using community-level strategies as well as mass media

22 See, eg, Submissions 32 (A victim survivor of sexual assault (name withheld)), 37 (Madison), 44 (Dr Patrick Tidmarsh and Dr Gemma Hamilton); Consultations 25 (CASA senior counsellor/advocates), 50 (End Rape on Campus), 81 (Danielle, a victim survivor); Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021).

23 See, eg, Australian Law Reform Commission, *Family Violence—A National Legal Response* (Report No 114, October 2010) <<https://www.alrc.gov.au/publication/family-violence-a-national-legal-response-alrc-report-114/>>.

24 See, eg, Submissions 38 (Bravehearts), 39 (Rape & Domestic Violence Services Australia), 44 (Dr Patrick Tidmarsh and Dr Gemma Hamilton), 49 (inTouch Multicultural Centre Against Family Violence); Consultation 50 (End Rape on Campus).

25 The Royal Commission into Family Violence pointed to similar momentum in support of action on family violence at the time it released its final report, and highlighted the importance of harnessing this momentum through community engagement: *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016) vol 1, 13 <<http://rcfv.archive.royalcommission.vic.gov.au/Report-Recommendations.html>>.

26 Family Violence Reform Implementation Monitor, *Report of the Family Violence Reform Implementation Monitor* (Report, 1 November 2020) 9 <<http://www.fvrim.vic.gov.au/fourth-report-parliament-1-november-2020-tabled-may-2021>>.

27 Velleman and Northover stress the importance of long-term engagement and adequate resourcing. They cite a 'global study of the effectiveness of mass-media interventions for HIV prevention between 1986 and 2013 [which] found that the longest campaigns, stretching over four years, were approximately three times more effective in encouraging condom use than those that lasted a year, and 10 times more effective than short bursts of a few days': Yael Velleman and Henry Northover, *Mass Behaviour Change Campaigns: What Works and What Doesn't* (Briefing Paper, WaterAid, October 2017) 4. See also *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016) vol 1, 11 <<http://rcfv.archive.royalcommission.vic.gov.au/Report-Recommendations.html>>.

- tailoring communications for diverse audiences
- building on positive behaviour rather than focusing only on what is going wrong
- using peers and leaders to champion good behaviour.<sup>28</sup>

Efforts to raise awareness of the legal system or to define practices as unlawful cannot rely on a single community to be the one source of information, it requires diverse communication and different language.<sup>29</sup>

- 3.19 In Chapter 7 we recommend a website that provides the public with information about sexual violence and the support and justice options available. In Chapter 22, we recommend a new Commission for Sexual Safety which could guide and coordinate the commitment to public education discussed here.

### What information about sexual violence needs to become common knowledge?

If we're talking about improving access [to justice], we have to include increasing awareness about what is sexual abuse, and what the process looks like if you want to do something about it.— Elizabeth Morgan House<sup>30</sup>

- 3.20 Public education should achieve the following aims:
- People who experience sexual violence:
    - should be able to identify and name the violence. Children and people with cognitive impairments should know what kinds of touching or behaviour is not appropriate.
    - should know their rights under the law
    - should know what their support and justice options are. Children and people with cognitive impairments should know where they can get reliable, safe help.
    - should feel confident accessing support
    - should feel confident exploring their justice options.<sup>31</sup>
  - People who experience sexual violence should be able to make informed choices about how they want to address the violence.<sup>32</sup>
  - People in the community should respond constructively to disclosures of sexual violence.<sup>33</sup>

<sup>28</sup> See Sara Rafael Almeida et al, *Insights from Behavioural Sciences to Prevent and Combat Violence against Women – Literature Review* (Science for Policy Report, European Commission Joint Research Centre, 2016); Iseult Cremen and Tiina Likki, 'How to Stop Sexual Harassment as a Bystander', *Behavioural Insights Team (BIT)* (Blog Post, 24 September 2019) <<https://www.bi.team/blogs/how-to-stop-sexual-harassment-as-a-bystander/>>; Tiina Likki and Leonie Nicks, 'More than a Few Bad Apples? What Behavioural Science Tells Us about Reducing Sexual Harassment', *Behavioural Insights Team (BIT)* (Blog Post, 6 March 2020) <<https://www.bi.team/blogs/more-than-a-few-bad-apples-what-behavioural-science-tells-us-about-reducing-sexual-harassment/>>.

<sup>29</sup> Consultation 46 (Safer Families Research Centre and Monash Social Inclusion Centre).

<sup>30</sup> Consultation 53 (Elizabeth Morgan House and a victim survivor of sexual assault).

<sup>31</sup> See, eg. Submissions 44 (Dr Patrick Tidmarsh and Dr Gemma Hamilton), 49 (inTouch Multicultural Centre Against Family Violence); Consultation 81 (Danielle, a victim survivor).

<sup>32</sup> See, eg. Submission 44 (Dr Patrick Tidmarsh and Dr Gemma Hamilton).

<sup>33</sup> Ibid.



- 3.21 Identifying and naming the violence includes understanding image-based sexual abuse, harmful sexual behaviour among children, child abuse, and sexual violence within intimate partner relationships.<sup>34</sup> It involves knowing that these are sexual offences.
- 3.22 Public education should challenge and correct common misconceptions about sexual violence (see Table 2).

**Table 2: Common misconceptions about sexual violence**

Misconception	Reality
Sexual violence usually involves penetrative sex.	There are many different forms of sexual violence.
Sexual assault always involves obvious physical aggression. There will be visible signs of the violence afterwards.	Not all sexual assaults involve physical contact or obvious physical aggression. <sup>35</sup>
If a person is being sexually assaulted, they will resist and fight back. They will probably scream or call out for help.	People who are sexually assaulted often 'freeze' or cooperate rather than fight back. <sup>36</sup>
If a person has been sexually assaulted, they will call the police or tell someone else as soon as they can get away.	It is very common for a person who has experienced sexual violence to take time to tell other people about it. <sup>37</sup> Many people never tell anyone else. <sup>38</sup>
Most people are sexually assaulted by strangers.	Sexual violence is most often committed by someone the victim knows. <sup>39</sup>
If a person is sexually assaulted by someone they know, they won't stay in a relationship, or continue to be friends, or act politely when they run into them.	People who have been sexually assaulted may maintain contact with the person who assaulted them. For example, they may do so to reduce the risk of being assaulted again. <sup>40</sup>

- 34 Submission 15 (Danielle); Australian Institute of Health and Welfare (Cth), *Sexual Assault in Australia* (In Focus Report, 28 August 2020) 2 <<https://www.aihw.gov.au/reports/domestic-violence/sexual-assault-in-australia/contents/summary>>.
- 35 Australian Institute of Family Studies (Cth) and Victoria Police, *Challenging Misconceptions about Sexual Offending: Creating an Evidence-based Resource for Police and Legal Practitioners* (Report, 2017) 6 <<https://www.police.vic.gov.au/sites/default/files/2019-01/For-Internet--Challenging-Misconceptions-Report.pdf>>; Crown Prosecution Service (UK), 'Rape and Sexual Offences—Annex A: Tackling Rape Myths and Stereotypes', *Legal Guidance, Sexual Offences* (Web Page, 21 May 2021) <<https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-annex-tackling-rape-myths-and-stereotypes>>.
- 36 Australian Institute of Family Studies (Cth) and Victoria Police, *Challenging Misconceptions about Sexual Offending: Creating an Evidence-based Resource for Police and Legal Practitioners* (Report, 2017) 7 <<https://www.police.vic.gov.au/sites/default/files/2019-01/For-Internet--Challenging-Misconceptions-Report.pdf>>; Lori Haskell and Melanie Randall, *The Impact of Trauma on Adult Sexual Assault Victims* (Report, 2019) 10 <<http://www.deslibris.ca/ID/10103348>>.
- 37 Australian Institute of Family Studies (Cth) and Victoria Police, *Challenging Misconceptions about Sexual Offending: Creating an Evidence-based Resource for Police and Legal Practitioners* (Report, 2017) 4 <<https://www.police.vic.gov.au/sites/default/files/2019-01/For-Internet--Challenging-Misconceptions-Report.pdf>>; Lori Haskell and Melanie Randall, *The Impact of Trauma on Adult Sexual Assault Victims* (Report, 2019) 10 <<http://www.deslibris.ca/ID/10103348>>.
- 38 Australian Institute of Family Studies (Cth) and Victoria Police, *Challenging Misconceptions about Sexual Offending: Creating an Evidence-based Resource for Police and Legal Practitioners* (Report, 2017) 4 <<https://www.police.vic.gov.au/sites/default/files/2019-01/For-Internet--Challenging-Misconceptions-Report.pdf>>; Lori Haskell and Melanie Randall, *The Impact of Trauma on Adult Sexual Assault Victims* (Report, 2019) 10 <<http://www.deslibris.ca/ID/10103348>>.
- 39 Australian Institute of Family Studies (Cth) and Victoria Police, *Challenging Misconceptions about Sexual Offending: Creating an Evidence-based Resource for Police and Legal Practitioners* (Report, 2017) 12 <<https://www.police.vic.gov.au/sites/default/files/2019-01/For-Internet--Challenging-Misconceptions-Report.pdf>>; Crown Prosecution Service (UK), 'Rape and Sexual Offences—Annex A: Tackling Rape Myths and Stereotypes', *Legal Guidance, Sexual Offences* (Web Page, 21 May 2021) <<https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-annex-tackling-rape-myths-and-stereotypes>>.
- 40 Australian Institute of Family Studies (Cth) and Victoria Police, *Challenging Misconceptions about Sexual Offending: Creating an Evidence-based Resource for Police and Legal Practitioners* (Report, 2017) 12, 17 <<https://www.police.vic.gov.au/sites/default/files/2019-01/For-Internet--Challenging-Misconceptions-Report.pdf>>; Crown Prosecution Service (UK), 'Rape and Sexual Offences—Annex A: Tackling Rape Myths and Stereotypes', *Legal Guidance, Sexual Offences* (Web Page, 21 May 2021) <<https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-annex-tackling-rape-myths-and-stereotypes>>.

Misconception	Reality
If a person is sexually assaulted, they will remember what happened in vivid detail. They will be able to describe what happened clearly. If their description changes, they are probably lying.	In everyday life, it is normal for people to have inconsistent memories or memories without much detail. This is also true in relation to sexual assault. <sup>41</sup>

- 3.23 If the community knows these things, people who have experienced sexual violence will feel that they can speak up and seek support or justice if they want to. If people know what will happen when they report sexual violence, they may find it easier to take the first step.<sup>42</sup> We discuss this and the information people need about their support and justice options in Chapter 7.

## What groups and settings should be a focus?

### Families and friends are often the first to know

- 3.24 When people disclose that they have been sexually assaulted, the first person they usually turn to is a family member or friend. The 2016 Personal Safety Survey indicated that seven out of 10 women who were sexually assaulted by a man and who reached out for support turned to a family member or friend.<sup>43</sup>
- 3.25 Some family and friends can be 'patently unsupportive and unhelpful'.<sup>44</sup> But even those who want to be helpful may find it difficult. One study found that most 'wanted to help but were ... unsure about what to do or say'.<sup>45</sup> They may not know about support or justice options. Some may share the common misconceptions about sexual violence.
- 3.26 One victim survivor told us that if the friend she spoke to after her assault had been 'educated on how to respond', she might not have 'waited 15 years to get counselling'.<sup>46</sup>
- 3.27 Many victim survivors who responded to our online form said that they spoke to family or friends about their assault but did not seek any other support or report the assault.<sup>47</sup> This may be because their family and friends were not well informed about other support or justice options.
- 3.28 Depending on that first reaction, a person who has experienced sexual violence may not get the help they need and may not report to police. Because many people disclose sexual violence to family and friends, everyone needs to be educated on how to react in these circumstances.

41 Australian Institute of Family Studies (Cth) and Victoria Police, *Challenging Misconceptions about Sexual Offending: Creating an Evidence-based Resource for Police and Legal Practitioners* (Report, 2017) 8 <<https://www.police.vic.gov.au/sites/default/files/2019-01/For-Internet--Challenging-Misconceptions-Report.pdf>>.

42 Marta Garnero et al, *Applying Behavioral Insights to Intimate Partner Violence: Improving Services for Survivors in Latin America and the Caribbean* (Report, Behavioural Insights Ltd, 2019) 25–6.

43 Australian Institute of Health and Welfare (Cth), *Sexual Assault in Australia* (In Focus Report, 28 August 2020) 4–5 <<https://www.aihw.gov.au/reports/domestic-violence/sexual-assault-in-australia/contents/summary>>.

44 Denise Lievore, *No Longer Silent: A Study of Women's Help-Seeking Decisions and Service Responses to Sexual Assault* (Report, Australian Institute of Criminology (Cth), June 2005) vi <<https://aic.gov.au/publications/archive/no-longer-silent>>.

45 Ibid.

46 Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021).

47 Ibid.



## Schools and higher education are important contexts

- 3.29 Schools and tertiary education providers are important settings for addressing sexual violence. Children and young people are more likely to experience sexual violence than older people. In 2018, the rate of police-recorded sexual assaults:
- against children aged 0–14 was nearly twice that of people in older age brackets<sup>48</sup>
  - against young people aged 15–19 years was higher than for any older age brackets.<sup>49</sup>
- 3.30 Another reason to focus on educating young people is that their understanding of sexual violence has declined over time. In 2017, it was lower than all other age groups.<sup>50</sup>
- 3.31 A victim survivor told us she had not recognised that what happened to her was sexual assault. She said the concept of 'consent needs to be pushed harder in schools'. She thought this could have helped her recognise what happened and made her 'more willing to go to someone straightaway'.<sup>51</sup>
- 3.32 Another person who had been sexually assaulted stressed the importance of better education in schools:

Education could help provide 'awareness in the back of your mind, to call things out, to be able to think or trust your instinct, "this isn't good behaviour", or, "what should I do here?", "maybe I should go and see someone about that"'.—Danielle<sup>52</sup>

- 3.33 In Victoria, the Respectful Relationships Education program takes a public health approach to family and sexual violence.<sup>53</sup> The curriculum is based on building respectful, non-violent relationships.<sup>54</sup>
- 3.34 For older students, education can cover issues such as what consent to sexual activity involves and how to find out if someone is consenting. It discusses navigating sexual encounters and alcohol, sexual offences, pornography, and sexting. It explains how to react if a friend or someone else discloses sexual violence or abuse.<sup>55</sup>
- 3.35 Respectful Relationships Education can be tailored to the needs of different schools. It works best when implemented through a 'whole of school' approach.<sup>56</sup> This is about making sure that respectful relationships are a part of all aspects of how schools are run. For example, there should be efforts to achieve gender equity in staff leadership roles. The 'whole of school' approach is effective at reducing gender-based and sexual violence—if it is well resourced and implemented.<sup>57</sup>
- 3.36 The national anti-violence organisation, Our Watch is developing resources for higher education settings and working with Australian universities to develop a consistent

48 Australian Institute of Health and Welfare (Cth), *Sexual Assault in Australia* (In Focus Report, 28 August 2020) 1 <<https://www.aihw.gov.au/reports/domestic-violence/sexual-assault-in-australia/contents/summary>>.

49 Ibid 5.

50 'National Community Attitudes towards Violence against Women Survey (NCAS)', *ANROWS Australia's National Research Organisation for Women's Safety* (Web Page) <<https://www.anrows.org.au/research-program/ncas/>>. The survey defines young people as those aged 16–24; children younger than sixteen years old were not included.

51 Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021).

52 Consultation 81 (Danielle, a victim survivor).

53 Consultation 51 (Associate Professor Debbie Ollis and Professor Amanda Keddie); Department of Education and Training (Vic), *Respectful Relationships Whole School Approach* (Web Page, 2020) <<https://www.education.vic.gov.au/443/school/teachers/teachingresources/discipline/capabilities/personal/Pages/respectfulrelapproach.aspx>>.

54 Department of Education and Training (Vic), 'Resilience, Rights and Respectful Relationships—Teaching Resources', *FUSE* (Web Page) <<https://fuse.education.vic.gov.au/ResourcePackage/ByPin?pin=2JZX4R>>.

55 Department of Education and Training (Vic), *Resilience, Rights and Respectful Relationships: Level 11–12 Learning Materials* (Report, 2018); Debbie Ollis, *Building Respectful Relationships—Stepping out against Gender-Based Violence* (Report, Department of Education and Training (Vic), 2018) <<https://fuse.education.vic.gov.au/ResourcePackage/ByPin?pin=H9WQYK>>.

56 Family Violence Reform Implementation Monitor, *Report of the Family Violence Reform Implementation Monitor* (Report, 1 November 2020) 25 <<http://www.fvrim.vic.gov.au/fourth-report-parliament-1-november-2020-tabled-may-2021>>; Sarah Kearney, Cara Gleeson and Loksee Leung, *Respectful Relationships Education in Schools: The Beginnings of Change* (Final Evaluation Report, Department of Premier and Cabinet and Department of Education and Training (Vic), February 2016).

57 Sarah Kearney, Cara Gleeson and Loksee Leung, *Respectful Relationships Education in Schools: The Beginnings of Change* (Final Evaluation Report, Department of Premier and Cabinet and Department of Education and Training (Vic), February 2016).

approach.<sup>58</sup> The need for better knowledge about sexual violence in higher education was highlighted by Dr Patrick Tidmarsh and Dr Gemma Hamilton and End Rape on Campus in our inquiry.<sup>59</sup> The Australian Human Rights Commission and the Tertiary Education and Quality Standards Agency have found high rates of sexual violence in higher education and inadequate reporting and response mechanisms.<sup>60</sup>

3.37 Other organisations are playing a role in educating children and young people about sexual violence. Victoria Legal Aid provides a training module for high school students: Sex, Young People, and the Law. Djirra discusses issues of sexual violence and consent in its Young Luv program for 13–18-year-olds.<sup>61</sup>

3.38 We have identified opportunities to improve education for children and young people about sexual violence:

- *Increase the take up of Respectful Relationships Education.* The Royal Commission into Family Violence recommended that Respectful Relationships Education be introduced to all Victorian government schools.<sup>62</sup> As of November 2020, 75 per cent of government schools had adopted it.<sup>63</sup> A much lower percentage of Catholic and independent schools had adopted it.<sup>64</sup>
- *Increase the focus on sexual violence.* There is a need for a greater focus on sexual violence, as the current emphasis is on family violence.<sup>65</sup>
- *Increase the focus on diverse needs and experiences.* Young people with cognitive impairments and other disabilities are not receiving age-appropriate education about sexual violence.<sup>66</sup> There is a need to tailor education about sexual violence for children and young people from diverse communities.<sup>67</sup>

## Health providers should be a focus

3.39 Health providers such as maternal and child health services and general practitioners are widely accessible. After family and friends, people who choose to disclose a sexual assault most often turn to a general practitioner or other health professional.<sup>68</sup>

3.40 Without specific training and education, many health providers share 'the systemic blindness we have as a community' about sexual violence.<sup>69</sup> Interactions with these providers can be 'lost opportunities' to identify sexual or family violence.<sup>70</sup> When people do disclose violence, the response they receive is sometimes unhelpful.<sup>71</sup>

58 Consultation 51 (Associate Professor Debbie Ollis and Professor Amanda Keddie).

59 Submission 44 (Dr Patrick Tidmarsh and Dr Gemma Hamilton); Consultation 50 (End Rape on Campus).

60 Universities Australia commissioned the Australian Human Rights Commission to conduct a nationwide survey of university students, which found that one in five (21%) had been sexually harassed in a university setting in 2016: Australian Human Rights Commission, *Change the Course: National Report on Sexual Assault and Sexual Harassment at Australian Universities* (Report, 2017) 34 <<https://humanrights.gov.au/our-work/sex-discrimination/publications/change-course-national-report-sexual-assault-and-sexual-harassment>>. See also Tertiary Education Quality and Standards Agency (TEQSA) (Cth), *Report to the Minister for Education: Higher Education Sector Response to the Issue of Sexual Assault and Sexual Harassment* (Report, January 2019) <<https://apo.org.au/node/220121>>. TEQSA is working with tertiary education providers to improve their sexual violence prevention and response frameworks: Tertiary Education Quality and Standards Agency (TEQSA) (Cth), *Preventing and Responding to Sexual Assault and Sexual Harassment in the Australian Higher Education Sector* (Good Practice Note, July 2020) <<https://apo.org.au/node/306861>>.

61 Submissions 9 (Djirra), 27 (Victoria Legal Aid).

62 *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016) Recommendation 18g <<http://rcfv.archive.royalcommission.vic.gov.au/Report-Recommendations.html>>.

63 Family Violence Reform Implementation Monitor, *Report of the Family Violence Reform Implementation Monitor* (Report, 1 November 2020) 25 <<http://www.fvrvm.vic.gov.au/fourth-report-parliament-1-november-2020-tabled-may-2021>>.

64 As of term 1, 2020, 59 of approximately 220 independent schools and 220 of 497 Catholic schools in Victoria had introduced Respectful Relationships teaching: Lauren Roberts, 'Push to Introduce Mandatory, Unified Sexual Consent Lessons in Australian Schools', *ABC News* (online, 29 February 2020) <<https://www.abc.net.au/news/2020-02-29/australian-schools-on-how-they-teach-kids-consent/11969964>>. Figures for total numbers of independent and Catholic schools are taken from 'About Us', *Independent Schools Victoria* (Web Page) <<https://is.vic.edu.au/about-us/>>; Catholic Education Commission of Victoria Ltd, *Victorian Catholic Schools Statistics at a Glance 2019* (Report, 2019) 2 <<https://www.cecv.catholic.edu.au/getmedia/b2396ba8-3735-40fa-bce7-4f920771e548/Statistics-at-a-Glance-2019.aspx?ext=.pdf>>.

65 Consultation 51 (Associate Professor Debbie Ollis and Professor Amanda Keddie). See also Consultation 65 (Commission for Children and Young People).

66 Consultation 49 (Victoria Legal Aid).

67 This has been a focus of recent work by Our Watch: Consultation 51 (Associate Professor Debbie Ollis and Professor Amanda Keddie).

68 Australian Institute of Health and Welfare (Cth), *Sexual Assault in Australia* (In Focus Report, 28 August 2020) 5 <<https://www.aihw.gov.au/reports/domestic-violence/sexual-assault-in-australia/contents/summary>>.

69 Karen Williams, 'A Plea from the Frontline of Violence against Women: You Can't End It without Our Help', *The Age* (online, 4 July 2021) <<https://www.theage.com.au/national/a-plea-from-the-frontline-of-violence-against-women-you-can-t-end-it-without-our-help-20210621-p582ui.html>>. This article discusses both sexual and family violence.

70 Ibid.

71 Denise Lievore, *No Longer Silent: A Study of Women's Help-Seeking Decisions and Service Responses to Sexual Assault* (Report, Australian Institute of Criminology (Cth), June 2005) vi <<https://aic.gov.au/publications/archive/no-longer-silent>>.

- 3.41 Victim survivors who responded to our online form told us how important it is to receive good support from health professionals. A few said doctors need training in trauma-informed care and responding to sexual violence. One described disclosing a sexual assault to a health care professional who did not provide a referral to any sexual assault support services.
- 3.42 Another reported that, while her doctor was supportive, harmful comments by another doctor at the same practice had stopped her from talking about the experience. Another said she was asked 'victim-blaming questions' by doctors. A person we met with had a more positive experience. She said that after her sexual assault:

The person that really helped me was my GP. After the forensic examination, I had a follow up with my GP two days later, who provided support for my mental well-being.<sup>72</sup>

- 3.43 Given how accessible they are and how common it is for them to receive sexual violence disclosures, it important that health providers react constructively to disclosures of sexual violence.
- 3.44 Community organisations told us that all service providers should be responsive to the needs of diverse communities.<sup>73</sup> This includes thinking about how to engage effectively with adolescents as a group distinct from children:
- In my experience working with young people, usually the ages of 12 and above, I have commonly heard 'I'm not a kid' ... Services aimed at children which have child friendly environments with children's toys, games, etc can make young people feel that they don't belong and the service is not aimed at them. Although child friendly environments are necessary, ensuring spaces which promote the inclusion of both children and young people can remove barriers to young people engaging.<sup>74</sup>
- 3.45 Constructive responses from health providers will make it more likely that victim survivors get the help and access to justice that they need. Health professionals could be supported to access family and sexual violence training and professional development including under the MARAM framework (see Chapters 1 and 18).<sup>75</sup> In Chapter 18, we recommend a review of guidance and training under family violence reforms to strengthen the profile of sexual violence. This would involve training all those who respond to family violence, including health and education providers.
- 3.46 Regulatory regimes can also protect against and respond to sexual violence. These include regulations and codes of conduct in areas such as mental health, aged care and disability services. In Chapter 4 we recommend a working group of regulators to develop and implement best practice in responding to sexual violence.

<sup>72</sup> Consultation 63 (A victim survivor of sexual assault, name withheld).

<sup>73</sup> See, eg, Submissions 49 (inTouch Multicultural Centre Against Family Violence), 65 (Aboriginal Justice Caucus).

<sup>74</sup> Consultation 85 (Roundtable on the experience of children and young people).

<sup>75</sup> Family Violence Reform Implementation Monitor, *Report of the Family Violence Reform Implementation Monitor* (Report, 1 November 2020) 141–2 <<http://www.fvrim.vic.gov.au/fourth-report-parliament-1-november-2020-tabled-may-2021>>; Kelsey Hegarty, 'Confronting the Nature of Abuse and Violence' (2021) April (14) *InSight+* <<https://insightplus.mja.com.au/2021/14/confronting-the-nature-of-abuse-and-violence/>>.

## Recommendations

- 1 The Victorian Government should resource and support ongoing public education about sexual violence, including on:
  - a. identifying its many different forms
  - b. common misconceptions about sexual violence
  - c. sexual offences, with a focus on the law of consent
  - d. the available support options
  - e. the available justice options and what to expect from these.The content of public education should:
  - a. be informed by research and evidence on how best to generate lasting social change
  - b. be accessible and up to date
  - c. be tailored to reach all groups in the community
  - d. equip family and friends and health and other service providers to respond constructively to disclosures
  - e. include a focus on children and young people.
- 2 The Victorian Government should review the content and implementation of Victoria's Respectful Relationships Education and sexuality education with a view to:
  - a. improving its uptake by all schools, including independent and Catholic as well as government schools
  - b. increasing the focus on sexual violence
  - c. tailoring education to address diverse needs and experiences.

## Employers and other groups must do more

### The response to sexual harassment places a heavy burden on individuals

The individual complaints system does not prevent future sexual harassment or harm.

Outcomes in sexual harassment complaints rarely require ... preventative systemic action, and complaints often resolve confidentially [so they do not] act as a deterrent to others.<sup>76</sup> — Victoria Legal Aid

- 3.47 Sexual harassment is unwelcome sexual behaviour, such as a sexual advance or request for sexual favours, that is offensive, humiliating or intimidating.<sup>77</sup> It is a form of sexual violence.<sup>78</sup> It is not criminal but is banned by state and federal laws in many public settings, including workplaces, schools, tertiary education, clubs, industrial organisations and in the provision of goods and services.<sup>79</sup>
- 3.48 People who have experienced sexual harassment may seek redress under either federal or state law, but not both.<sup>80</sup> They can make a complaint to the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) or the Australian Human Rights Commission (AHRC),<sup>81</sup> which can investigate and try to resolve complaints.
- 3.49 An application alleging sexual harassment can also be made to the Victorian Civil and Administrative Tribunal (VCAT).<sup>82</sup> VCAT can make orders for financial compensation or other forms of redress, such as a written apology.<sup>83</sup>
- 3.50 If a complaint to the AHRC cannot be resolved, the person alleging harassment can take the matter to the Federal Court of Australia or the Federal Circuit Court for determination.
- 3.51 As with other forms of sexual violence, most people who experience sexual harassment do not report it.<sup>84</sup> People who do report sexual harassment are often targeted for speaking up. As the Australian Human Rights Commission observed:
- Almost one in five people who made a formal report or complaint were labelled as a troublemaker (19 per cent), were ostracised, victimised or ignored by colleagues (18 per cent) or resigned (17 per cent).<sup>85</sup>

### Victoria has a systemic response to sexual harassment, but it does not go far enough

- 3.52 In Victoria there is an obligation under section 15 of the *Equal Opportunity Act 2010* (Vic) to 'take reasonable and proportionate measures' to eliminate sexual harassment 'as far as possible'. This is a positive duty to take active steps to eliminate sexual harassment. It applies to a range of people and groups in the public settings listed earlier, including workplaces, schools and clubs (see paragraph 3.47).<sup>86</sup>

<sup>77</sup> *Equal Opportunity Act 2010* (Vic) s 92(1); *Sex Discrimination Act 1984* (Cth) s 28.

<sup>78</sup> Australian Bureau of Statistics, *Defining the Data Challenge for Family, Domestic and Sexual Violence* (Catalogue No 4529.0, 7 February 2013) <<https://www.abs.gov.au/statistics/people/crime-and-justice/defining-data-challenge-family-domestic-and-sexual-violence/latest-release>>. See also Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020) 25 <<https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>>; WorkSafe Victoria, *Work-Related Gendered Violence Including Sexual Harassment: A Guide for Employers* (Guide, March 2020) 1 <<https://content.api.worksafe.vic.gov.au/sites/default/files/2020-03/ISBN-Work-related-gendered-violence-including-sexual-harassment-2020-03.pdf>>.

<sup>79</sup> Laws banning sexual harassment include the *Sex Discrimination Act 1984* (Cth), the *Equal Opportunity Act 2010* (Vic), fair work laws, and workplace health and safety provisions. Employers are obliged under the *Occupational Health and Safety Act 2004* (Vic) to 'provide and maintain a work environment that is safe and without risk to the health of their employees, so far as is reasonably practicable'. There is no explicit duty in relation to sexual harassment, but WorkSafe Victoria says 'sexual harassment is a common and known cause of physical and mental injury' and as such, employers have an obligation to address the risk of sexual harassment. This is supplementary to their obligations under the *Equal Opportunity Act 2010* (Vic): WorkSafe Victoria, *Work-Related Gendered Violence Including Sexual Harassment: A Guide for Employers* (Employers' Guide, March 2020) <<https://content.api.worksafe.vic.gov.au/sites/default/files/2020-03/ISBN-Work-related-gendered-violence-including-sexual-harassment-2020-03.pdf>>.

<sup>80</sup> Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020) 28 <<https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>>.

<sup>81</sup> *Equal Opportunity Act 2010* (Vic) pt 8; *Australian Human Rights Commission Act 1986* (Cth) pt IIB.

<sup>82</sup> *Equal Opportunity Act 2010* (Vic) s 122.

<sup>83</sup> *Ibid* s 125.

<sup>84</sup> Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (Report, 2018) 9 <<https://humanrights.gov.au/our-work/sex-discrimination/publications/everyones-business-fourth-national-survey-sexual>>.

<sup>85</sup> *Ibid*.

<sup>86</sup> *Equal Opportunity Act 2010* (Vic) s 15(1)–(2).

- 3.53 VEOHRC has identified six standards that organisations must meet to comply with the positive duty:
- *knowledge*—Organisations should understand their obligations under the Equal Opportunity Act and have up-to-date knowledge about sexual harassment. Leaders and supervisors should understand how to identify and respond to sexual harassment.
  - *a prevention plan*—Organisations should develop and implement a sexual harassment prevention plan. It should be documented and regularly updated, with input from staff or members.
  - *organisational capability*—Expectations of respectful behaviour should be clearly communicated. Leaders should model and drive a culture of respect.
  - *risk management*—Risks of sexual harassment should be identified, with input from staff or members. The aim should be to build a culture of safety and address risk regularly.
  - *reporting and response*—Sexual harassment should be addressed consistently and confidentially to hold harassers to account. Responses should put the victim survivor at the centre.
  - *monitoring and evaluation*—Outcomes and strategies should be reviewed and evaluated regularly, and improvements based on evaluation.<sup>87</sup>
- 3.54 Every duty holder must address the minimum standards, but the specific measures or actions depend on an organisation's size and resources. The legislation requires that in deciding whether a measure is 'reasonable and proportionate', the following factors must be considered:
- the size of the person's business or operations
  - the nature and circumstances of the person's business or operations
  - the person's resources
  - the person's business and operational priorities
  - the practicability and the cost of the measures.<sup>88</sup>
- 3.55 An example of action to meet the duty to take steps to eliminate sexual harassment is bystander training. VEOHRC provides bystander education and training as part of its 'Raise It! Conversations about workplace equality and sexual harassment' program.<sup>89</sup>

87 Victorian Equal Opportunity and Human Rights Commission, *Preventing and Responding to Workplace Sexual Harassment—Complying with the Equal Opportunity Act 2010* (Guideline, August 2020) 12 <<https://www.humanrights.vic.gov.au/resources/sexual-harassment-guideline/>>; Victorian Public Sector Commission, *Guide for the Prevention of Sexual Harassment in the Workplace* (Guide, November 2018) ch 5.

88 *Equal Opportunity Act 2010* (Vic) s 15(6)(a)–(e).

89 'Raise It! Conversations about Sexual Harassment and Workplace Equality', *Victorian Equal Opportunity and Human Rights Commission* (Web Page) <<https://www.humanrights.vic.gov.au/education/raise-it/>>. Vic Health has also developed a guide to help organisations introduce bystander initiatives: VicHealth and Behavioural Insights Team, *Take Action: Empowering Bystanders to Act on Sexist and Sexually Harassing Behaviours* (Report, Victorian Health Promotion Foundation, October 2019) <[https://www.vichealth.vic.gov.au/-/media/ResourceCentre/PublicationsandResources/PVAW/Take-Action-Bystander\\_Oct2019.pdf?la=en&hash=D3150832DDE6E645A0B854AC2CD57B119E03BD22](https://www.vichealth.vic.gov.au/-/media/ResourceCentre/PublicationsandResources/PVAW/Take-Action-Bystander_Oct2019.pdf?la=en&hash=D3150832DDE6E645A0B854AC2CD57B119E03BD22)>.



### What is bystander training?

Many people who are sexually harassed find it hard to confront the perpetrator directly because that person is in a position of power (for example, they are a boss, supervisor, or more experienced colleague).

Intervention by a third party or 'bystander' who witnesses or hears about the harassment can be helpful.

Research shows that when a third party steps in, it can discourage the person responsible and emotionally support the person targeted.<sup>90</sup> By speaking up, bystanders contribute to a culture that condemns sexual harassment.<sup>91</sup>

Forms of bystander intervention can include 'giving a disapproving look, speaking out or reporting the behaviour'.<sup>92</sup> It can also include checking in with the person who was the target of sexual harassment and seeing what support they need.<sup>93</sup>

- 3.56 VEOHRC's role includes educating organisations about eliminating sexual harassment. It can also investigate serious and systemic issues, such as a reluctance to discipline people for sexual harassment. It can ask for information and apply to VCAT for an order compelling someone to provide the information.<sup>94</sup> Following an investigation, it can do a range of things, including reporting the matter to the Attorney-General or referring it to VCAT.<sup>95</sup>

## The duty to take steps to eliminate sexual harassment should be enforceable

Obligations are more effective when they are backed by a threat of punishment for non-compliance.<sup>96</sup> — Victoria Legal Aid

- 3.57 The failure to take steps to eliminate sexual harassment is a problem in many settings, such as workplaces and tertiary education. Despite repeated public calls to action, efforts to reduce sexual harassment have been patchy.<sup>97</sup> There is a need for strong enforcement. But VEOHRC's enforcement role is limited to encouraging compliance using its education and investigative functions.

90 Victorian Government, 'How to Be an Active Bystander', *VicHealth* (Web Page, 24 September 2019) <<http://www.vichealth.vic.gov.au/media-and-resources/publications/bystander-research-project>>.

91 Ibid.

92 VicHealth and Behavioural Insights Team, *Take Action: Empowering Bystanders to Act on Sexist and Sexually Harassing Behaviours* (Report, Victorian Health Promotion Foundation, October 2019) 3 <[https://www.vichealth.vic.gov.au/-/media/ResourceCentre/PublicationsandResources/PVAW/Take-Action-Bystander\\_Oct2019.pdf?la=en&hash=D3150832DDE6E645A0B854AC2CD57B119E03BD22](https://www.vichealth.vic.gov.au/-/media/ResourceCentre/PublicationsandResources/PVAW/Take-Action-Bystander_Oct2019.pdf?la=en&hash=D3150832DDE6E645A0B854AC2CD57B119E03BD22)>.

93 Ibid 5.

94 *Equal Opportunity Act 2010* (Vic) ss 127, 130, 131.

95 Ibid s 139. If a matter is referred to VCAT, the Tribunal must conduct an inquiry into the matter and if it is satisfied that there has been a breach of the duty, it can order that the person stop breaching the duty or take action to fix the situation: *ibid* s 141(1).

96 Submission 27 (Victoria Legal Aid). In its submission, Victoria Legal Aid makes this point in relation to workplace health and safety laws, but it applies more generally. This is clear in the work of the 'responsive regulation' scholars who are cited by Victoria Legal Aid: see Ian Ayres and John Braithwaite (1992) *Responsive Regulation: Transcending the Deregulation Debate*, Oxford University Press.

97 In relation to workplaces: see Department of Justice and Community Safety (Vic), *Addressing Sexual Harassment in Victorian Workplaces* (Consultation Paper, 2021). Nationwide in 2019, less than half of all TAFEs and independent education providers collected data on incident reports or offered face-to-face training on responding to sexual assault or harassment. A quarter did not offer people who reported sexual harassment or assault any form of counselling: Tertiary Education Quality and Standards Agency (TEQSA) (Cth), *Report to the Minister for Education: Higher Education Sector Response to the Issue of Sexual Assault and Sexual Harassment* (Report, January 2019) <<https://apo.org.au/node/220121>>. See also Australian Human Rights Commission, *Change the Course: National Report on Sexual Assault and Sexual Harassment at Australian Universities* (Report, 2017) <<https://humanrights.gov.au/our-work/sex-discrimination/publications/change-course-national-report-sexual-assault-and-sexual>>.

- 3.58 In its *Respect@Work* report, the AHRC recommended the Federal Government amend the *Sex Discrimination Act 1984* (Cth) to introduce a duty on all employers to take reasonable and proportionate measures to eliminate sexual harassment, discrimination, and victimisation. This would parallel the existing duty in Victoria.<sup>98</sup>
- 3.59 The AHRC recommended that it have the power to enforce the duty by issuing compliance notices.<sup>99</sup> Compliance notices set out the details of the unlawful behaviour and the necessary steps to prevent it. A notice may require the organisation to create and monitor an action plan.<sup>100</sup>
- 3.60 Victoria Legal Aid told us that the duty in Victoria should be similarly enforceable.<sup>101</sup> VEOHRC made the same point in a submission to the AHRC's sexual harassment inquiry. It described the duty to take steps to eliminate sexual harassment as 'a critical tool to encourage employers and others to proactively prevent sexual harassment, rather than simply react to complaints':
- If accompanied by appropriate enforcement powers, which are currently missing ... the positive duty would help to deliver systemic change and alleviate the present burden on victims/survivors.<sup>102</sup>
- 3.61 Giving VEOHRC stronger enforcement powers would be a clear signal that the Victorian Government takes sexual violence seriously. It would ensure there is community responsibility for the problem. Enforcing compliance would push people and groups that are resistant towards positive action. Enforcement processes are public, so enforcement would expose and reject organisational cultures that allow sexual violence.
- 3.62 VEOHRC could be empowered to issue compliance notices for persistent failures to comply. People and groups that are trying to do better would have a chance to act in line with the compliance notice. If they still do not comply, the process could escalate.
- 3.63 The Equal Opportunity Act could be amended to allow VEOHRC to apply to VCAT for a declaration that there has been a failure to comply and an order requiring payment of a financial penalty. Alternatively, a new offence of failure to comply with a compliance notice could be created. Like the existing offences under part 12 of the Equal Opportunity Act, it could be prosecuted summarily by VEOHRC or a person authorised by it, or by the police.<sup>103</sup>
- The current legal framework does not adequately encourage employers to create and enforce harassment-free workplaces ... [better enforcement] could include ... ensuring employers ... are compelled to proactively address the issue or face penalties for breaching their duties.<sup>104</sup>
- 3.64 The Victorian Government is already considering penalising employers under workplace health and safety laws for failure to provide a workplace free of sexual harassment.<sup>105</sup> Our recommendation would address the need for broader action outside the workplace.

98 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020) Recommendation 17 <<https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>>.

99 Ibid Recommendation 18.

100 Julian Gardner, *An Equality Act for a Fairer Victoria* (Equal Opportunity Review Final Report, Department of Justice (Vic), June 2008) 130–1. In Victoria, VEOHRC can conduct 'reviews of compliance' with Equal Opportunity Act obligations at the request of an organisation. Where it has conducted a review, it can provide an action plan for how the organisation should achieve compliance, but there is no sanction for a failure by the organisation to comply with the action plan: *Equal Opportunity Act 2010* (Vic) ss 151–153.

101 Submission 27 (Victoria Legal Aid).

102 Victorian Equal Opportunity and Human Rights Commission, Submission to the Australian Human Rights Commission, *National Inquiry into Sexual Harassment in Australian Workplaces* (February 2019) 2 <[https://www.humanrights.vic.gov.au/static/f72f3b7bf8c99ca4911c6f76ba5abcc1/Submission-National\\_inquiry\\_sexual\\_harassment-Feb\\_2019.pdf](https://www.humanrights.vic.gov.au/static/f72f3b7bf8c99ca4911c6f76ba5abcc1/Submission-National_inquiry_sexual_harassment-Feb_2019.pdf)>.

103 *Equal Opportunity Act 2010* (Vic) ss 180, 181.

104 Department of Justice and Community Safety (Vic), *Addressing Sexual Harassment in Victorian Workplaces* (Consultation Paper, 2021) 2, 5.

105 Australian Government, *A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces* (Report, 8 April 2021) 5 <<https://www.ag.gov.au/rights-and-protections/publications/roadmap-for-respect>>.



## There should be an enforceable duty to take steps to eliminate sexual violence

- 3.65 People and groups who have a duty to take steps to eliminate sexual harassment should have a parallel duty in relation to other forms of sexual violence. They should be required to take reasonable and proportionate measures to eliminate sexual violence as far as possible. Like sexual harassment, educating the community about broader sexual violence and improving responses to it should be a shared responsibility. Creating a new duty would play an important communicative role. It would signal that sexual violence is a widespread social problem and it is 'everybody's business' to address it.<sup>106</sup>
- 3.66 The duty to take steps to eliminate sexual violence should apply to the same people and groups, and be enforced in the same way, as the duty to eliminate sexual harassment. The new Commission for Sexual Safety we recommend in Chapter 22 could work with VEOHRC to educate people about the new duty.
- 3.67 People and groups under the duty should be required to comply with the six standards identified by VEOHRC above:
- knowledge
  - a prevention plan
  - organisational capability
  - risk management
  - reporting and response
  - monitoring and evaluation.
- 3.68 While some of the behaviours targeted by the existing sexual harassment duty fall within the broader category of sexual violence, the new duty would go further than the sexual harassment duty.
- 3.69 The new duty would require activities and training on issues such as the diverse forms of sexual violence, sexual offences and the meaning of 'consent', and common misconceptions. These topics are not usually covered by strategies to eliminate sexual harassment. Any dedicated disclosure officers or 'first responders' would need this special training too.
- 3.70 The processes for responding to disclosures of criminal sexual violence would also be different. They might include providing referrals to specialist sexual violence support services or information about justice options.
- 3.71 What we heard in this inquiry underscored the need for a duty like this. A victim survivor who responded to our online form called for mandatory training in workplaces.<sup>107</sup> In relation to the higher education sector, Dr Patrick Tidmarsh and Dr Gemma Hamilton pointed out that:
- where one might expect a well informed population, it is notable how little is still understood of what constitutes sexual offending, what avenues of reporting are available, and what the processes and consequences of reporting may be.<sup>108</sup>
- 3.72 A new duty would help, in a practical way, to build an understanding of sexual violence and how best to respond to it.

<sup>106</sup> Our proposed new duty is not unprecedented. Since 2016, many organisations in Victoria have had a duty to take steps to prevent child abuse by applying 'child safe standards'. The Commission for Children and Young People has powers to assess and enforce compliance: *Child Wellbeing and Safety Act 2005* (Vic) pt 6.

<sup>107</sup> Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021).

<sup>108</sup> Submission 44 (Dr Patrick Tidmarsh and Dr Gemma Hamilton).

## Recommendations

- 3 The Victorian Government should amend the *Equal Opportunity Act 2010* (Vic) to give the Victorian Equal Opportunity and Human Rights Commission the power to enforce the duty in section 15 of that Act to take reasonable and proportionate measures to eliminate sexual harassment as far as possible.
- 4 The Victorian Government should create an enforceable duty to take reasonable and proportionate measures to eliminate sexual violence as far as possible. The duty should apply to existing duty holders under section 15 of the *Equal Opportunity Act 2010* (Vic).

# CHAPTER 04

## PART TWO: STRENGTHENING THE SYSTEM

# Rebuilding the system for responding to sexual violence

- 54** Overview
- 54** The response to sexual violence needs rebuilding
- 55** What is the first step to strengthen the system for responding to sexual violence?
- 59** How can the system be rebuilt?
- 61** A revised governance framework is a priority
- 74** A multi-agency protocol should translate law and policy into practice
- 81** We need accountability for the experiences of victims of crime

## 4. Rebuilding the system for responding to sexual violence

### Overview

- The 'system' for responding to sexual violence is under strain. The first, and most urgent, step in improving the system's response is to invest in the services that respond to sexual violence.
- The next step should be to rebuild the system. While each part has made genuine progress, they need to be connected more closely.
- The right structure need to be set up so that everyone in the system who responds to sexual violence has a shared understanding of what it is and how best to respond to it.
- This structure should include a senior statewide group representing those within and outside government to lead the system and regional groups. The structure should include at its heart those who have experienced sexual violence.
- This structure should include a working group of regulators.
- The ways these structures are to work together should be embedded through a model multi-agency protocol.
- We recommend strengthening the *Victims' Charter Act 2006* (Vic) to extend rights for people who have experienced sexual violence. This will increase the oversight powers of the Victims of Crime Commissioner.

### The response to sexual violence needs rebuilding

[T]his inquiry offers an opportunity for a 're-boot' of the systems and protocols that were developed as a result of the 2004 inquiry report [by the Commission on sexual offences], with a view to ensuring that these become a mandatory part of Victoria's response to sexual offences rather than optional guidance ... —Sexual Assault Services Victoria<sup>1</sup>

- 4.1 In this inquiry, we have been impressed by the commitment, care and effort of many people and organisations who work to respond to sexual violence. We have been encouraged to hear of the progress since we last reported on sexual offences in 2004.
- 4.2 There have been clear improvements in the way people work together to respond to sexual violence, especially in multi-disciplinary centres (MDCs). MDCs bring together specialist sexual assault services, police and child protection. The Child Witness Service (see Chapter 12) and intermediaries (see Chapter 15) are significant steps forward.

- 4.3 But we have seen that those people and organisations responding to sexual violence are not supported by an effective overarching structure. They are not connected closely enough to achieve shared goals. They share a commitment, but their individual goals and measures often differ.
- 4.4 There is no high-level forum where organisations meet regularly to identify needs, develop strategies, measure progress and resolve disputes. Feedback from one part of the system does not flow through to others. While there are examples of good practice in many places, there are significant variations across the state.

The systems need to be better aligned to each other and not rely on the relationships that workers build at the local/ground level. There needs to be mandatory pathways created so that workers supporting the person knows who/where to go to.—Anonymous member of the Aboriginal community<sup>2</sup>

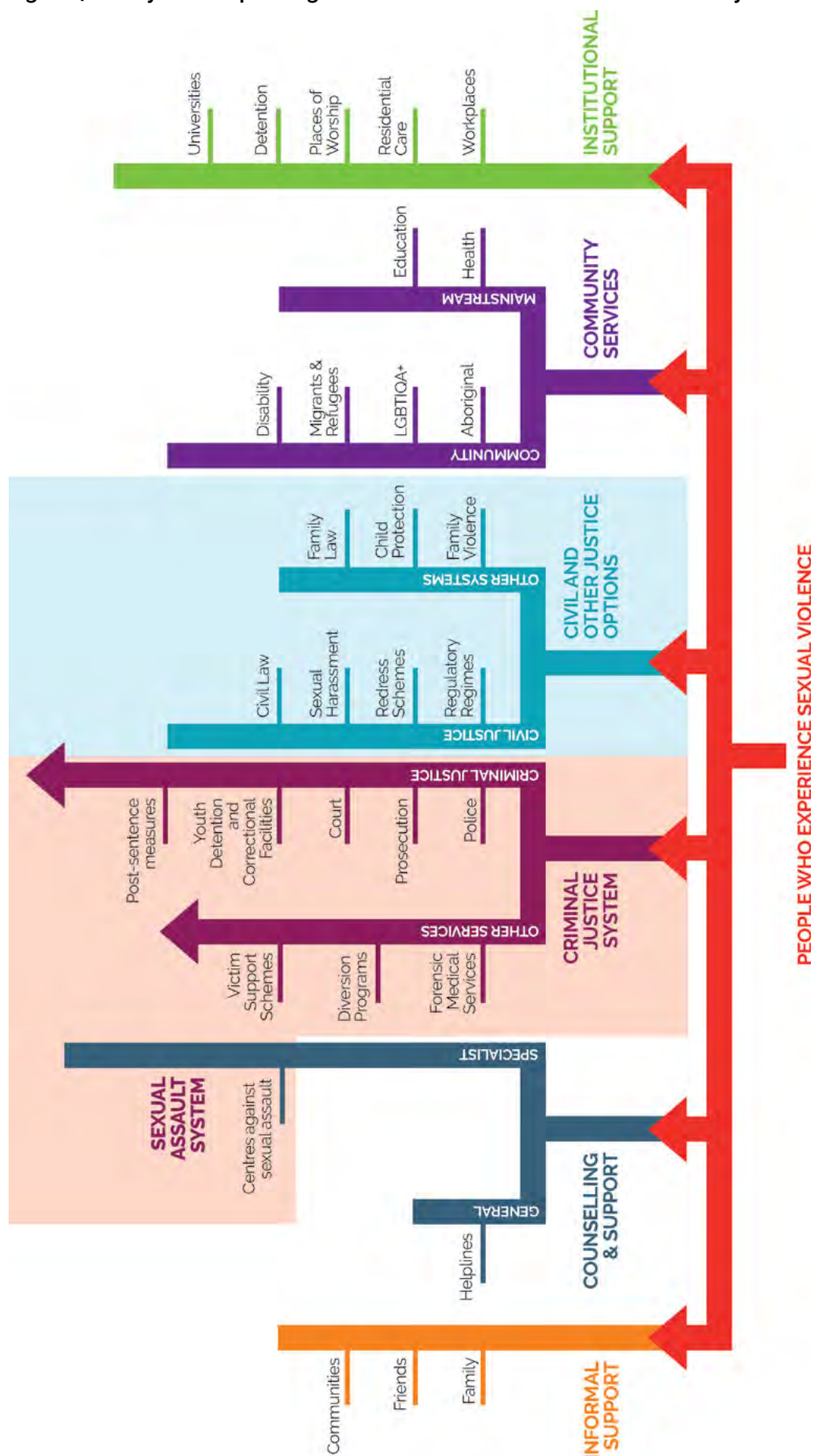
- 4.5 Now is the time to rebuild the system. Improving the way the system works as a whole will make the responses to sexual violence more consistent, collaborative and supportive. This should reduce the trauma that people experience and make it more likely that people stay engaged with the system.
- 4.6 Setting up a structure that will drive improvement and bring people together to identify and address issues across the system will improve the ability of the justice system to respond to sexual offences.
- 4.7 There are four critical things that need to be done:
- strengthen the ability of specialist sexual assault services to play a more central role
  - address tensions and differences in power between organisations
  - ensure that everyone is, and feels like, a valued partner in a system that works together
  - refocus on the goals and wishes of the people who experience sexual violence.
- 4.8 As discussed in Chapter 1, the Victorian Government has recently committed to a statewide Sexual Assault Strategy. This is an excellent opportunity for developing a structure that supports everyone to work together towards the same goals.
- 4.9 We should build on what we have learnt through other major reforms, such as Victoria's family violence reforms, and build a system that embraces the work in preventing as well as responding to sexual violence. Although the focus of our inquiry is not primary prevention, we discuss its importance and make recommendations designed to reduce it in Chapter 3.
- 4.10 This chapter sets out the architecture for rebuilding the system. Chapter 5 then focuses on key interactions within the system, including how partners work together at a more practical level and with other key systems, such as family violence and child protection.

## **What is the first step to strengthen the system for responding to sexual violence?**

### **What is the system for responding to sexual violence?**

- 4.11 This chapter focuses on the 'system for responding to sexual violence' (the system). We use this term to refer to the networks of organisations that specialise in responding to sexual violence, including counselling services and those involved in the criminal justice response (see Figure 4). Chapters 3 and 8 discuss how this system relates to other systems and services.

Figure 4: The system responding to sexual violence and other services and systems



## The system is under strain

- 4.12 A healthy system depends on the health of each of its parts. Throughout this inquiry, we heard that each part of the system was stretched (see box).
- 4.13 In Chapter 12, we discuss the strain on sexual assault services and victim support services. We heard of other victim support services, police, lawyers and prosecutors carrying high caseloads. There are also significant backlogs in courts (see Chapter 19).

### What people told us about the system

The forensic doctor was amazing but so overworked. She had to leave me to assist someone else. The whole system is so overworked. ... most of the police I spoke to had good intentions, but they were so overworked. [The specialised police] handle 10–15 cases each at any one time.<sup>3</sup>

Police are so overworked so while the officer was nice they did make errors. They have 20 cases or so at once.—Penny<sup>4</sup>

The investigators are overwhelmed by the sheer enormity of being confronted with so many new cases daily so they can only do the bare minimum of work on each case. This re-victimizes the survivors all over again because we are let down by an overloaded system and it is demoralizing.<sup>5</sup>

No one from the [Office of Public Prosecutions] was available to meet before the committal hearing, or the scheduled date of the trial, only on the day itself. The OPP staff are always rushed and don't have time to think about the significance of a case for victim survivors—how it is their life.—Cecilia<sup>6</sup>

Deborah had 'felt sorry for the young barristers in her case because they seemed worn out. This was something she observed generally, and she also heard them swapping tips in the lift about how they help themselves sleep at night.'  
—Deborah<sup>7</sup>

- 4.14 The coronavirus (COVID-19) pandemic has made the situation worse. A greater risk of family violence (including sexual violence) came when social services had to redesign the way they worked.<sup>8</sup> Many systems, including the criminal justice system, were also hit hard, resulting in backlogs.
- 4.15 The first step in strengthening our responses to sexual violence must be to invest more resources. It takes time and effort to deliver a high-quality experience for people who have experienced sexual violence, so that they feel safer and able to stay engaged with the criminal justice system. This needs to be properly resourced.
- 4.16 Our recommendations rely on having a stronger system in place. Chapter 3 discusses community awareness and responses, and Chapter 8 discusses pathways to justice. It would be risky to encourage people to identify sexual violence, and seek support or justice, if the system cannot deliver when they need it. The reforms need to be sequenced so that it is ready to respond to an increase in demand.

3 Consultation 63 (A victim survivor of sexual assault, name withheld).

4 Consultation 59 (Ashleigh Rae, Nicole Lee, Penny).

5 Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021).

6 Consultation 56 (Cecilia, a victim survivor of sexual assault).

7 Consultation 69 (Deborah, a victim survivor of sexual assault).

8 Family Violence Reform Implementation Monitor, *Report of the Family Violence Reform Implementation Monitor* (Report, 1 November 2020) 113, 119–20 <<http://www.fvrim.vic.gov.au/fourth-report-parliament-1-november-2020-tabled-may-2021>>.



- 4.17 Reforms demand resources and time so that people can change their ways of working. These changes also will take place at a time when there are many reforms happening across related systems, including family violence, aged care, and mental health (see Chapter 1).<sup>9</sup>

## Partnership should be a focus

- 4.18 A strong system needs strong foundations. For it to work effectively, organisations need to see each other as partners, and be strong enough to engage fully with each other as partners in the system.
- 4.19 There is, however, a missing partner in the current system. The role of health and human services, including specialist sexual assault services, needs to be strengthened. In other states, such as New South Wales and Queensland, the Department of Health plays a key role in partnership models between government agencies. This role includes responsibility for specialist sexual assault services, forensic medical examinations and education about sexual violence.<sup>10</sup> These health and human services are key parts of our responses to sexual violence, but their importance is not reflected within the current system.
- 4.20 The Department of Families, Fairness and Housing is now responsible for specialist sexual assault services and is leading the work on Victoria's sexual assault strategy. We welcome this as an opportunity to strengthen the focus on health and human services as part of a broader strategy on sexual violence and we consider that this Department should be recognised as a key partner in the system.
- 4.21 We also consider that specialist sexual assault services need to be resourced so they can play a stronger role within the system. These services are at the heart of Victoria's response to sexual violence, but they are funded mainly to deliver therapeutic services. They do not have nearly enough funding to play a more systemic role. Their newly formed peak body, Sexual Assault Services Victoria (SAS Victoria), told us that it and its members would need funding 'to implement in a systemic way education, advocacy, system and community awareness building, and continuous quality improvement'.<sup>11</sup>
- 4.22 Forensic medical examinations (see Chapter 16) are also a health service. In other states and territories they are funded as a health service and are the responsibility of the Department of Health.<sup>12</sup> The Victorian Institute of Forensic Medicine (VIFM), which conducts forensic medical examinations in Victoria, is instead contracted on a fee-for-service basis by Victoria Police.<sup>13</sup>
- 4.23 Associate Professor Gall, a clinical forensic physician, expressed concern that there was a 'very clear' conflict of interest for the justice system to be 'the health carer of the complainant as well as the investigator'.<sup>14</sup> Similar concerns in the United Kingdom led to forensic clinical services being transferred to the health system.<sup>15</sup> In Chapter 16, we also discuss expanding forensic medical examinations. This may be easier to do within the health system.

9 *Royal Commission into Aged Care Quality and Safety* (Final Report, 1 March 2021) <<https://agedcare.royalcommission.gov.au/publications/final-report>>; *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016) <<http://rcfv.archive.royalcommission.vic.gov.au/Report-Recommendations.html>>; *Royal Commission into Victoria's Mental Health System* (Final Report, 3 February 2021) <<https://finalreport.rcvmhs.vic.gov.au/>>.

10 See, eg, Queensland Government, *Response to Sexual Assault: Queensland Government Interagency Guidelines for Responding to People Who Have Experienced Sexual Assault* (Report, June 2014) <<https://www.publications.qld.gov.au/dataset/1f7ea4ec-bec8-4428-ab60-0a6c119ac70d/resource/3b3958c9-504f-4698-a64d-e56ca7e5248e/download/qld-govt-guidelines-for-responding-to-sexual-assault.pdf>>; 'The Joint Child Protection Response Program (JCPRP)', *Communities and Justice (NSW)* (Web Page, 24 December 2020) <<https://www.facs.nsw.gov.au/providers/children-families/child-protection-services/joint-child-protection-response>>.

11 Submission 17 (Sexual Assault Services Victoria).

12 See, eg, Daniele Bird (Acting Auditor-General), *Delivering Forensic Services* (Report No 21 2018–19, Queensland Audit Office, 27 June 2019) 53.

13 Submission 61 (Victorian Institute of Forensic Medicine).

14 Submission 11 (Associate Professor John AM Gall).

15 Her Majesty's Inspectorate of Constabulary in Scotland, *Strategic Overview of Provision of Forensic Medical Services to Victims of Sexual Crime* (Report, March 2017) <<https://www.hmics.scot/sites/default/files/publications/HMICS%20Strategic%20Overview%20of%20Provision%20of%20Forensic%20Medical%20Services%20to%20Victims%20of%20Sexual%20Crime.pdf>>; Vivien Stern, *The Stern Review: An Independent Review into How Rape Complaints Are Handled by Public Authorities in England and Wales* (Report, Home Office (UK), 2010) 19.



- 4.24 While it is beyond the scope of this inquiry to address the departmental responsibilities for these services and the funding of health and human services, they affect the sustainability of our recommendations in this report. We therefore recommend that they should be reviewed, ideally as part of the Sexual Assault Strategy.

## Recommendation

- 5 The Victorian Government should:
- a. address as a priority the need for resourcing of key partners responding to sexual violence, including specialist sexual assault services, the police, and prosecution
  - b. review the role of health and human services in Victoria's response to sexual violence, including the capacity of specialist sexual assault services and forensic services to play their role as key partners in the system.

## How can the system be rebuilt?

### Parts need to connect to make a healthy system

- 4.25 A healthy system is more than the sum of its parts. In a healthy system, each part of the system recognises and respects their obligations to each other. They share a vision and an understanding of what they are trying to prevent and respond to. They are focused on meeting not just their own goals, but shared goals. The members of a healthy system provide information, data and feedback to each other to improve their processes.
- 4.26 In a healthy system, processes govern and monitor the interactions between the parts, and make sure that they are accountable to each other. Good practice is shared and embedded through protocols so that it becomes consistent everywhere. When challenges or disputes arise, a healthy system has structures in place to resolve them in a spirit of partnership.

- 4.27 In this inquiry, we identified multiple issues that are relevant to making a healthy system (see Table 3). We discuss further systemic issues below.

**Table 3: Systemic issues identified in this report**

Issue	Chapters
Organisations need to work together more collaboratively, including in child sexual abuse.	5
Needs for data and research are not identified and addressed, and data is not used to improve performance.	6
Information and guidance are dispersed across parts of the system.	7
Community organisations need to be better connected to the system for responding to sexual violence.	8
People who experience sexual violence need more continuous support in navigating systems.	12
There needs to be a coordinated approach to preventing sexual offending.	13
There is a need for more specialised training for those working within the criminal justice system.	18

## There is an 'urgent need' to strengthen governance

- 4.28 In our issues paper, we asked if there was a need for a focus on governance and shared outcomes to improve relationships within the system,<sup>16</sup> including the criminal justice system. We heard widespread support for this.
- 4.29 Sexual Assault Services Victoria told us there was an 'urgent need' for a governance framework that:
- builds and regulates partnerships between agencies such as Victoria Police, VIFM [the Victorian Institute of Forensic Medicine], Child Protection and [Sexual Assault Services Victoria], to work together on behalf of victim survivors. Under such a framework, any service delivery changes proposed by any partner in the sexual assault service system would need to be negotiated and endorsed prior to implementation. Collaborative arrangements and partnership agreements need to be systematised, and not personality, relationship or geography dependent.<sup>17</sup>
- 4.30 Victoria Police supported 'continual assessment of governance and achievement of shared outcomes'. It noted that 'any updates or changes to these arrangements should include the development of primary prevention objectives, and continued commitment to shared victim-centric principles', including 'what such principles may look like for the various stages of the justice process and their own service delivery'.<sup>18</sup>
- 4.31 The Victorian Institute of Forensic Medicine told us that collaboration 'means understanding where that service fits within the system and how it operates with the other services within the system', and that it was 'very interested' in collaborating to 'improve higher level governance'.<sup>19</sup>

<sup>16</sup> Victorian Law Reform Commission, *Working Together to Respond to Sexual Offences: Systems* (Issues Paper A, October 2020) Question 6.

<sup>17</sup> Submission 17 (Sexual Assault Services Victoria).

<sup>18</sup> Submission 68 (Victoria Police).

<sup>19</sup> Submission 61 (Victorian Institute of Forensic Medicine).

## A revised governance framework is a priority

- 4.32 We recommend that the Victorian Government should revise the governance framework for the system for responding to sexual violence as a priority, so that everyone in the system can work together most effectively.
- 4.33 The most appropriate place to design a governance framework is within the Sexual Assault Strategy. This strategy will span primary prevention and secondary prevention, as well as the responses to sexual violence. The development of the strategy will include consultation processes to design the most effective system. The Sexual Assault Strategy is led by Family Safety Victoria, which is already involved with the overlapping governance structures, such as family violence, that we describe below.
- 4.34 However, as we have had the benefit of hearing from many people, we have included in our recommendation some aims and principles of a governance structure. We discuss key elements and some relevant models. We have also recorded what we heard from stakeholders.

## What should be the aims of a revised governance structure?

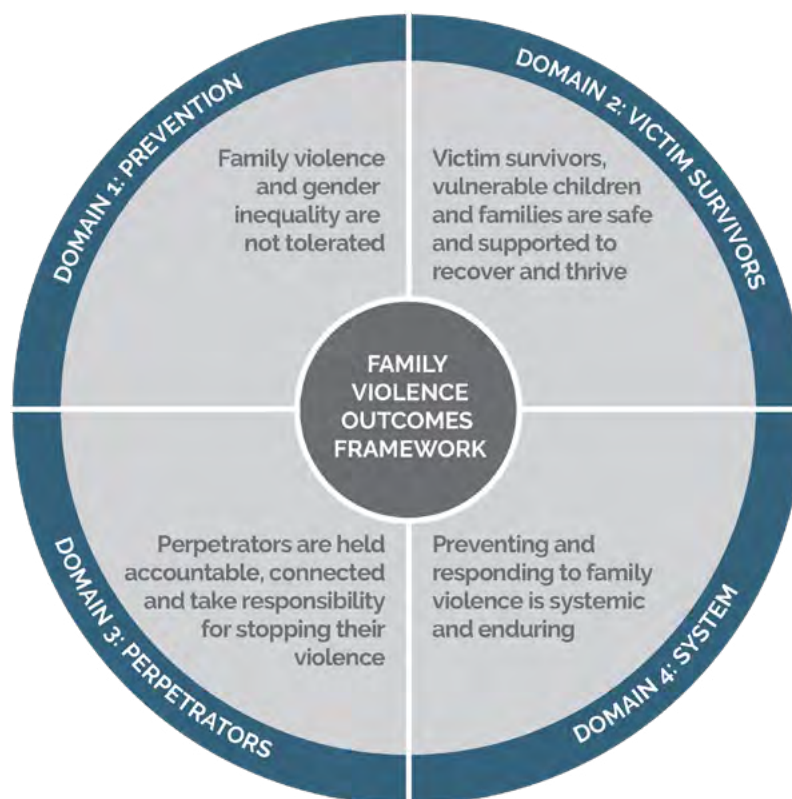
### Shared vision should be an aim

- 4.35 We need a shared vision so that everyone understands the broader purpose of what they are trying to achieve, beyond the aims of their own organisation or part of the system. For example, Queensland's sexual assault prevention framework states that its vision is that 'everyone in Queensland lives free of the fear, threat or experience of sexual violence'.<sup>20</sup>
- 4.36 Victoria's future Sexual Assault Strategy (see Chapter 1) offers an ideal opportunity to set out this vision and a shared understanding of sexual violence. We expect that, as with the family violence strategy, this will include shared principles, aims and outcomes (see Figure 5). For example, Queensland's sexual assault strategy includes as an aim that the 'justice system is responsive to the needs of victims and survivors, and perpetrators are held to account for their actions'. This is reflected in the shared outcomes.<sup>21</sup>

<sup>20</sup> Queensland Government, *Prevent. Support. Believe. Queensland's Framework to Address Sexual Violence* (Policy, 15 October 2018) 14–15 <<https://www.csyw.qld.gov.au/violence-prevention/sexual-violence-prevention/sexual-violence-prevention-framework>>.

<sup>21</sup> Ibid 15.

**Figure 5: Victoria's Family Violence Outcomes Framework**



- 4.37 Shared outcomes help us identify what we want to achieve and measure our success. For example, they could include 'specific areas of accountability for service delivery' to key groups, such as children and young people, including those who are Aboriginal, have disabilities, are culturally and linguistically diverse, and/or LGBTIQ+.<sup>22</sup>
- 4.38 In Chapter 6, we discuss the need for measures and indicators of progress against these shared outcomes. There should be public reporting so that 'system leaders and the community ... know if the reform is bringing about the benefits' intended.<sup>23</sup>
- 4.39 A shared vision with shared outcomes should also help frame cross-agency training (see Chapter 18). Different sectors have different perspectives on sexual violence. Understanding and bringing together these different perspectives is crucial.<sup>24</sup>

### Identifying and addressing systemic issues should be an aim

- 4.40 A key aim of a revised governance structure would be to enable organisations to identify and address emerging and systemic issues (see box). We have identified several issues throughout this report, including the need to:
- improve the consistency of data collection (see Chapter 6)
  - understand and address the causes of delays and attrition<sup>25</sup> (see Chapter 6 and 19)
  - improve communication with those experiencing sexual violence through the criminal justice process (see Chapters 12 and 17).

<sup>22</sup> Submission 57 (Commission for Children and Young People (Vic)).

<sup>23</sup> Family Violence Reform Implementation Monitor, *Report of the Family Violence Reform Implementation Monitor* (Report, 1 November 2020) 149 <<http://www.fvrim.vic.gov.au/fourth-report-parliament-1-november-2020-tabled-may-2021>>.

<sup>24</sup> Submission 10 (Carolyn Worth AM and Mary Lancaster).

<sup>25</sup> For example, the previous Statewide Steering Committee to Reduce Sexual Assault commissioned research on attrition: see Statewide Steering Committee to Reduce Sexual Assault, *Study of Reported Rapes in Victoria 2000–2003* (Summary Research Report, July 2006) <<https://apo.org.au/node/8211>>.

### **An emerging issue of technology-facilitated sexual assault**

Sexual assault practitioners at forensic services (see Chapter 16) have anecdotally observed a trend of people being sexually assaulted on the first face-to-face meeting after online communication through dating apps. This is being researched by practitioners, with improvements being made to data collection to better identify the characteristics of this technology-facilitated sexual assault. They observed an 'alarming' trend in technology-facilitated assault of children.

The practitioners made 12 recommendations that span education, awareness raising among health and legal professionals, data collection, legislative reform, regulation of technology companies and research. They included establishing a core interest group to foster formal collaboration and facilitate a coordinated response.<sup>26</sup>

This is an example of an emerging issue that a high-level governance mechanism or a working group could consider within the revised governance structure.

- 4.41 The coronavirus (COVID-19) pandemic, which caused rapid changes to service delivery, highlighted the need for a more formalised structure.<sup>27</sup> There was no structure in place to deal with these changes in the system for responding to sexual violence. In contrast, in the family violence system, an operations group monitored the effects of the pandemic-related service responses and ensured strong information sharing and coordination.<sup>28</sup>

### **Fostering collaboration should be an aim**

- 4.42 A revised governance structure should provide a way for people to share information and identify opportunities for working together and for improving practice, including promoting good practice. There are examples of good practice that have not yet translated into common practice (see Chapter 5). These practices can be embedded through the multi-agency protocol we discuss later in this chapter.
- 4.43 We see opportunities, for example, for:
- developing and promoting shared information and resources (see Chapter 7)
  - translating good practice adopted in multi-disciplinary centres (MDCs) into other collaborative arrangements (see Chapter 5)
  - fostering relationships across agencies and organisations outside MDCs and across service systems (see Chapters 5 and 8).
- 4.44 A revised structure could make it easier to put together joint funding proposals. For example, such a structure would make it easier to identify the needs and resources for MDCs and other initiatives that depend upon collaboration across the system. A coordinated approach within and outside government will also help identify priorities for funding. We were told that a whole-of-government effort in responding to family violence, facilitated by a clear governance structure, was fundamental in securing successive budget bids.<sup>29</sup>
- 4.45 This could, for example, make it easier for Child Protection and Victoria Police to work together to deal with online activity, or joint projects such as the Enhanced Response Model for Child Sexual Exploitation (see Chapter 5).<sup>30</sup>

<sup>26</sup> Submission 71 (Victorian Institute of Forensic Medicine and Victorian Forensic Paediatric Medical Service).

<sup>27</sup> For example, forensic medical services were restricted: see Submissions 11 (Associate Professor John AM Gall), 61 (Victorian Institute of Forensic Medicine). This is discussed in Ch 16.

<sup>28</sup> Family Violence Reform Implementation Monitor, *Report of the Family Violence Reform Implementation Monitor* (Report, 1 November 2020) 114 <<http://www.fvrim.vic.gov.au/fourth-report-parliament-1-november-2020-tabled-may-2021>>.

<sup>29</sup> Consultation 88 (Victims of Crime Commissioner).

<sup>30</sup> Consultation 57 (Department of Health and Human Services).

## Ensuring accountability should be an aim

- 4.46 The work of the partners in the system for responding to sexual violence is closely connected. What happens in one place affects the work of the others and the experiences of victim survivors (see box).

### **Example: The impact of COVID-19 on forensic medical examinations**

In April 2020, VIFM made the decision to limit FMEs [forensic medical examinations] to three metro locations. This has created additional barriers and unwarranted stress for VS [victim survivors] in relation to deciding whether or not to report and follow through with criminal charges. ...

VIFM currently operates autonomously and continues to initiate changes to their processes (locations, recruitment), in isolation from other partners responding to sexual violence. The relationship between all partners needs to be more collaborative and systematised to avoid an 'us and them' dynamic.<sup>31</sup> — Sexual Assault Services Victoria

- 4.47 A broad governance framework will ensure partners are accountable to each other and to the community. For example, family violence governance frameworks include a broad range of accountability mechanisms, including political accountability. Under the *Family Violence Protection Act 2008* (Vic), the Minister for the Prevention of Family Violence must publish an annual report on implementing the MARAM framework (see Chapter 1).<sup>32</sup>
- 4.48 We focus later in this chapter on accountability across the criminal justice system. We consider in Chapter 22 the need for accountability across all reforms related to sexual violence.

## There are models for a revised governance structure

### Previous governance arrangements were a good model

- 4.49 Some previous governance arrangements have worked well.<sup>33</sup> A Statewide Steering Committee to Reduce Sexual Assault was established in 2003. It was jointly convened by Victoria Police and the Office of Women's Policy and included high-level representatives from government, the criminal justice system, service providers and civil society (see Table 4).

<sup>31</sup> Submission 17 (Sexual Assault Services Victoria).

<sup>32</sup> *Family Violence Protection Act 2008* (Vic) s 193.

<sup>33</sup> See, eg, Submissions 10 (Carolyn Worth AM and Mary Lancaster), 61 (Victorian Institute of Forensic Medicine); Consultation 89 (Sexual Assault Services Victoria (No 2)).

**Table 4: Membership of Statewide Steering Committee to Reduce Sexual Assault<sup>34</sup>**

Government	Criminal justice	Service providers	Civil society
Child Protection, Department of Human Services	Corrections Victoria	Aboriginal Family Violence and Prevention Legal Service	Australian Centre for the Study of Sexual Assault
Department of Education and Training	Magistrates' Court of Victoria	Barwon Centre Against Sexual Assault	Ethnic Communities Council of Victoria
Department of Justice	Office of Public Prosecutions	CASA Forum	Male Adolescent Program for Positive Sexuality
Office for Children, Department of Human Services	Victoria Police	Federation of Community Legal Centres	Victorian Community Council Against Violence
Office of Women's Policy	Victorian Forensic Science Centre	Gatehouse Centre	Women with Disabilities Network
Victim Support Agency	Victorian Institute of Forensic Medicine	Northern Area Mental Health Service	Youth Affairs Council of Victoria
Victorian Law Reform Commission		South Eastern Centre Against Sexual Assault	

4.50 The Committee's terms of reference were to improve the safety of Victorian women and children by advising on:

- prevention, education and early intervention
- best practice within and between organisations, coordination between agencies, monitoring and evaluation
- responses of police, service providers, courts, media and the community
- the diverse needs and experiences of Victorian women and children.<sup>35</sup>

4.51 Carolyn Worth (a former member of the Statewide Steering Committee to Reduce Sexual Assault) and Mary Lancaster submitted a detailed proposal for a committee like the Statewide Steering Committee. They proposed including those working in primary prevention and restorative justice. Their submission also proposed a Commission to sit alongside this committee (see Chapter 22).<sup>36</sup>

<sup>34</sup> For the full membership, see Statewide Steering Committee to Reduce Sexual Assault, *Study of Reported Rapes in Victoria 2000–2003* (Summary Research Report, July 2006) Appendix 2 <<https://apo.org.au/node/8211>>.

<sup>35</sup> For the full terms of reference: see *ibid* Appendix 1.

<sup>36</sup> Submission 10 (Carolyn Worth AM and Mary Lancaster).



## Should the governance of sexual assault services align with family violence?

- 4.52 Another approach would be to build the governance of sexual assault strategies onto the existing governance structures for family violence. This is how it is done, for example, in Queensland.<sup>37</sup>
- 4.53 Victoria has established a strong governance structure for family violence following the Royal Commission.<sup>38</sup> Its elements include:
- ministerial responsibility, through the Minister for the Prevention of Family Violence and a Cabinet subcommittee
  - a parliamentary committee (the Legal and Social Issues Standing Committee)
  - whole-of-government coordination (including a Family Violence Reform Interdepartmental Committee that meets monthly)<sup>39</sup>
  - an advisory body to steer the development of reforms
  - a coordination agency to deliver on reform (Family Safety Victoria)
  - a primary prevention agency (Respect Victoria)
  - representation of victim survivors (the Victim Survivors Advisory Council, discussed above)
  - regional integration committees (discussed below)
  - an independent implementation monitor (the Family Violence Implementation Monitor, discussed below).
- 4.54 The governance structure for family violence has been recently streamlined. Responsibilities for family violence now all sit within the new Department of Families, Fairness and Housing.<sup>40</sup>
- 4.55 A separate governance structure for family violence exists under the Dhelk Dja partnership agreement with Aboriginal communities.<sup>41</sup> There are overlapping governance frameworks for related reforms, such as national child sexual abuse reforms.
- 4.56 Building on the family governance model would involve both benefits and risks. Many of the same organisations are involved in both sectors. There would be advantages in ensuring that sexual assault reforms leverage, and align with, family violence reforms.
- 4.57 But there are risks in conflating family violence and sexual violence. We heard of the risks of making sexual violence the 'poor cousin' of family violence.<sup>42</sup> We need to recognise what is different about it. Some patterns of violence are distinctive, such as child sexual exploitation. Some groups affected by sexual violence may feel left out of a framework that extends family violence frameworks. These concerns need to be addressed through careful design and consultation.
- 4.58 Whatever the governance structure, the Victorian Government needs to consider how it overlaps with family violence governance. It also needs to consider the overlaps with national governance frameworks such as the Child Sexual Abuse Strategy and sexual harassment reforms.

37 Queensland Government, *Prevent. Support. Believe. Queensland's Framework to Address Sexual Violence* (Policy, 15 October 2018) 4 <<https://www.csyw.qld.gov.au/violence-prevention/sexual-violence-prevention/sexual-violence-prevention-framework>>.

38 Email from Family Safety Victoria to Victorian Law Reform Commission, 30 April 2021; Victorian Government, 'Establish a Governance Structure for Implementing the Commission's Recommendations', *VIC.GOV.AU* (Web Page, 18 May 2020) <<http://www.vic.gov.au/family-violence-recommendations/establish-governance-structure-implementing-commissions>>. There is also an Industry Taskforce that advises on family violence workforce issues.

39 Family Violence Reform Implementation Monitor, *Report of the Family Violence Reform Implementation Monitor* (Report, 1 November 2020) 114 <<http://www.fvrim.vic.gov.au/fourth-report-parliament-1-november-2020-tabled-may-2021>>.

40 Ibid 37.

41 Victorian Government, *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>>.

42 Submission 20 (Anonymous member of the Aboriginal community).

## What are the key elements of a revised structure?

- 4.59 Although the design of the model is beyond the scope of this inquiry, we recommend including some key elements, which we discuss next. These are not comprehensive, but reflect what people told us, and lessons learnt from the family violence governance models.

### Ministerial leadership is a key element

- 4.60 The Royal Commission on Family Violence identified a need for ministerial leadership, including to coordinate a whole-of-government approach. Having a Minister for the Prevention of Family Violence and a Cabinet subcommittee provides this.
- 4.61 In New South Wales, the Attorney-General is also the Minister for Domestic and Sexual Violence.<sup>43</sup> In Queensland, the Attorney-General is also the Minister for the Prevention of Domestic and Family Violence.<sup>44</sup>
- 4.62 We were told that what made the previous Family Violence Statewide Steering Committee effective, in part, was that ministers backed a whole-of-government approach.<sup>45</sup>

### A high-level statewide mechanism is a key element

- 4.63 The most obvious gap in current governance arrangements is the lack of a body that is collectively responsible for overseeing the system for responding to sexual violence. Currently, the main governance forum is a Sexual Offences Reference Group (SORG), which has been divided into two. Victoria Police chairs one of these, which includes service sector representatives.<sup>46</sup> The other is a policy group that does not include sexual assault services.
- 4.64 The Gatehouse Centre, a specialist child sexual abuse service, told us that the SORG group that they are involved with has no government representatives senior enough to address systemic issues.<sup>47</sup> In contrast, the previous Statewide Steering Committee's membership was inclusive and comprised high-level representatives.
- 4.65 The recent refresh of the family violence governance structures replaced four steering committees working on specific projects with a Reform Board, internal to government, and a Reform Advisory Group with external representatives and the Dhelk Dja Partnership Forum and Victim Survivors' Advisory Council.<sup>48</sup> The lessons from these changes should be considered in the revision of the governance structure.
- 4.66 In Chapter 22, we also discuss the need for a body that can strengthen the state-wide mechanism by coordinating feedback between partners across the system, such as acting as a secretariat for the statewide governance structure.

### Regional governance is a key element

- 4.67 Local and regional links between those involved in responding to sexual assault need to be strengthened.<sup>49</sup> Stronger links will provide more consistent and continuous support for people experiencing sexual violence, helping them to stay engaged with the system. Stronger relationships will also help improve the response of the justice system, by enabling partners to share information and identify and fix emerging and systemic issues, such as changes in services or trends in sexual violence.

43 'Attorney General, and Minister for the Prevention of Domestic and Sexual Violence', *NSW Government* (Web Page, 2021) <<https://www.nsw.gov.au/nsw-government/contact-a-minister/attorney-general-and-minister-for-prevention-of-domestic-and-sexual-violence>>.

44 Queensland Government, 'Our Minister', *Department of Justice and Attorney-General* (Web Page, 16 November 2020) <<https://www.justice.qld.gov.au/about-us/minister>>.

45 Consultation 88 (Victims of Crime Commissioner).

46 Submission 14 (Gatehouse Centre, Royal Children's Hospital).

47 Ibid.

48 Family Violence Reform Implementation Monitor, *Report of the Family Violence Reform Implementation Monitor* (Report, 1 November 2020) 148–9 <<http://www.fvrim.vic.gov.au/fourth-report-parliament-1-november-2020-tabled-may-2021>>.

49 See Submission 10 (Carolyn Worth AM and Mary Lancaster).

- 4.68 In some places, there is already a strong collaborative response, forged through individual effort rather than structures. For example, members of the Aboriginal community in Loddon Mallee reported that relationships there were already strong, because of the deep commitment of key people who had been around a long time.<sup>50</sup>
- 4.69 While some regional areas have a local network, the strength of them varies.<sup>51</sup> Further, it was not clear how local areas could elevate issues so they could be addressed across Victoria.
- 4.70 An obvious model is the Family Violence Regional Integration Committees. They bring together local representatives across the family violence system, including in prevention, early intervention and response. The Royal Commission recognised these committees as a key part of the governance structure.<sup>52</sup>
- 4.71 These committees are convened by a principal strategic advisor funded by the Victorian Government.<sup>53</sup> Advisors drive reforms, build partnerships and collaborate across sectors. They support the development of the workforce and provide insight into the issues and opportunities in their region.<sup>54</sup>
- 4.72 The Royal Commission into Victoria's Mental Health System has similarly recommended establishing Regional Mental Health and Wellbeing Boards to plan mental health services in their area and lead engagement with communities.<sup>55</sup>
- 4.73 SAS Victoria noted that there were no parallel regional governance arrangements for sexual violence, other than in regions with a MDC (discussed in Chapter 5). It supported exploring these to 'ensure regular multi-agency governance mechanisms to encourage collaboration ... and a consistent systems response'.<sup>56</sup>
- 4.74 In designing a regional governance model, similar structures to those in family violence or those representing culturally and linguistically diverse communities should be considered.<sup>57</sup>

### Putting lived experience at the heart is a key element

- 4.75 The voices and experiences of those who have experienced sexual violence must be at the heart of the new governance structure.<sup>58</sup> This has been a key theme in related reforms.<sup>59</sup>

My purpose in participating [in this inquiry] is to be the voice for those that are still victims, those that cannot find their voice as a result of fear and shame and for those that are no longer here.

My hope is for the victim to be the focus and most important during the whole process once they report, ultimately in the court process. To encourage, educate and protect.—Cecilia<sup>60</sup>

50 Consultation 67 (Loddon Mallee Regional Aboriginal Justice Advisory Committee).  
51 See Submission 10 (Carolyn Worth AM and Mary Lancaster) (for child protection).  
52 *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016) Recommendation 193 <<http://rcfv.archive.royalcommission.vic.gov.au/Report-Recommendations.html>>.  
53 These are also sometimes referred to as Regional Integration Coordinators. They are administered by Family Safety Victoria: see Family Violence Reform Implementation Monitor, *Report of the Family Violence Reform Implementation Monitor* (Report, 1 November 2020) 37 <<http://www.fvrim.vic.gov.au/fourth-report-parliament-1-november-2020-tabled-may-2021>>.  
54 The Lookout, *Family Violence Regional Integration: Driving Greater Integration of Regional Family Violence Responses* (Factsheet, December 2017) <<https://www.thelookout.org.au/family-violence-workers/regional-integration>>.  
55 *Royal Commission into Victoria's Mental Health System* (Final Report, 3 February 2021) Recommendation 4 <<https://finalreport.rcvmhs.vic.gov.au/>>.  
56 Submission 17 (Sexual Assault Services Victoria).  
57 See, eg, Submission 54 (Victorian Multicultural Commission).  
58 See Submission 56 (Domestic Violence Victoria).  
59 See, eg, *Royal Commission into Aged Care Quality and Safety* (Final Report, 1 March 2021) Recommendation 94 <<https://agedcare.royalcommission.gov.au/publications/final-report>>; *Royal Commission into Victoria's Mental Health System* (Final Report, 3 February 2021) Recommendation 28. See also Recommendation 29 <<https://finalreport.rcvmhs.vic.gov.au/>>.  
60 Consultation 56 (Cecilia, a victim survivor of sexual assault).

- 4.76 These voices should shape legislation, policy and practice—not only when there is an inquiry, but continuously. To know how well the criminal justice system is performing, the people who have experienced it need to be asked about it, and to improve the system, their feedback should be listened to.
- 4.77 The Victim Survivors' Advisory Council, a family violence body, provides a model for putting lived experiences at the heart of governance. The Minister for Prevention of Family Violence appoints its members. The Council advises government departments and inquiries. It has a secretariat that supports its participation.<sup>61</sup>

### **Reflecting the diversity of experiences and contexts is a key element**

- 4.78 The governance framework needs to reflect the diversity of experiences and contexts of sexual violence, and it needs to include community-based systems that respond to sexual violence (see Chapter 8).
- 4.79 The Victorian Aboriginal Child Care Agency told us that Aboriginal community-controlled organisations (ACCOS) must be involved in governance. It observed that standards could play an important role, such as the addendum it had developed to existing Human Services Standards.<sup>62</sup>
- 4.80 The Victorian Multicultural Commission identified a need to incorporate multicultural and multi-faith groups as part of the 'mainstream'. There is also scope to improve the use of multicultural legal advisory bodies at local and state government levels.<sup>63</sup>
- 4.81 We recognise that there are challenges in designing structures that reflect this diversity. Many people who experience sexual violence are often not in a position to take part in governance because of unequal patterns of power (see Chapter 2). Representing your community takes resources that many, such as newly arrived refugees, women in prison or children and young people, will not have. In designing any high-level mechanism, we need to correct for those power imbalances. This may include reaching out beyond organisations, and funding participation in policy making by those who would not otherwise have a seat at the table.

### **Regulation and reporting across other sectors are key elements**

- 4.82 Sexual violence often happens in places that are regulated in other ways. There are regulatory bodies responsible for sexual violence within specific contexts that include:
- mental health
  - the sex industry
  - aged care
  - disability services
  - out-of-home care for children
  - organisations that come into contact with children (see box).

61 The model of this Council will be refreshed under Victoria's most recent rolling action plan on family violence reform: Victorian Government, *Family Violence Reform Rolling Action Plan 2020–2023: Activities Index* (Combined Activity Summary) 14 <<https://www.vic.gov.au/family-violence-reform-rolling-action-plan-2020-2023>>.

62 Submission 21 (Victorian Aboriginal Child Care Agency).

63 Submission 54 (Victorian Multicultural Commission).

### Reportable conduct scheme

Child sexual abuse in organisations must be reported under Victoria's reportable conduct scheme.<sup>64</sup> This scheme requires institutions to report five categories of conduct involving a child, including sexual offending and sexual misconduct.<sup>65</sup> Around 7–8 per cent of allegations so far relate to sexual offences, with 18 per cent relating to sexual misconduct.<sup>66</sup>

Reports are made to the independent Commission for Children and Young People (CCYP), which can monitor the organisation's investigation or conduct its own investigation into an allegation under the scheme, with broad information-gathering powers.<sup>67</sup>

Reports made under this scheme are shared with police where there is a potentially criminal allegation. In 2019–20, 56 per cent of the reports under the scheme were shared with police by either the organisation required to report the conduct, or by the CCYP.<sup>68</sup> Under the scheme, police investigations take priority over investigations under the scheme, so parallel investigations are not conducted.<sup>69</sup> Where a person is found to have engaged in reportable conduct, they are referred to the Department of Justice and Community Services so that their suitability to hold a Working with Children Check can be reassessed.

- 4.83 The Victorian Government is establishing a new regulator for those providing social services, including sexual assault, family violence, and homelessness services. This regulatory scheme, expected to start in 2023, will monitor these publicly funded services against proposed standards.<sup>70</sup>
- 4.84 While these regulatory responses are beyond the scope of this inquiry, they could prevent and reduce the risk of sexual violence and may meet at least some justice needs outside a criminal context. For example, one person told us that the main reason they reported the incident to police was to prevent their rapist from becoming a teacher, even though they were reluctant to go through the criminal justice process.<sup>71</sup>
- 4.85 Regulatory responses also provide more systemic ways for diverse experiences of sexual violence to be reported. This could help address low reporting rates in some communities, by shifting the focus away from individual reporting.
- 4.86 We heard of many opportunities to improve sexual safety by preventing or reducing the risk of sexual violence and by improving responses to sexual violence in particular contexts. We discuss some examples of what we heard next.

64 *Child Wellbeing and Safety Act 2005* (Vic) pt 5A. This followed the recommendation of the 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, November 2013) <<https://www.parliament.vic.gov.au/58th-parliament/fcdc/inquiries/article/1788>>.

65 *Child Wellbeing and Safety Act 2005* (Vic) s 3 definition of 'reportable conduct'. While specified organisations must report, anyone can report their concerns: ss 16L, 16M.

66 Commission for Children and Young People (Vic), *Annual Report 2019–20* (Report, 10 December 2020) 83 <<https://ccyp.vic.gov.au/about-the-commission/annual-reports/>>. Of the allegations of sexual offences, 19% were substantiated: ibid 93.

67 *Child Wellbeing and Safety Act 2005* (Vic) ss 16O–16W.

68 Commission for Children and Young People (Vic), *Annual Report 2019–20* (Report, 10 December 2020) 96 <<https://ccyp.vic.gov.au/about-the-commission/annual-reports/>>. Police investigated 58% of all cases notified to them, and in 46% of all cases notified to police the investigation was completed with no further police action, and in 7% of cases criminal charges were laid or pending, with a further 8% under investigation or awaiting an update: ibid.

69 *Child Wellbeing and Safety Act 2005* (Vic) s 16U.

70 Victorian Government, *Sector Update on Social Services Regulation Reform* (Report, June 2021) <<https://fac.dhhs.vic.gov.au/news/regulation-reform-updates>>; Victorian Government, 'Introducing Social Services Regulation Reform', *Funded Agency Channel* (Web Page, 9 March 2021) <<https://fac.dhhs.vic.gov.au/news/introducing-social-services-regulation-reform>>. Consultation 63 (A victim survivor of sexual assault, name withheld).

## The sex industry

- 4.87 Women working in the sex industry told us that there were many measures that could prevent sexual violence or respond more effectively to it within the sex industry (see also Chapter 8). These included training management, security and staff; adopting an internal complaints process; consistent and universal policies across the sex industry; and a monitoring body that could report if venues were not complying with these policies. They told us that, while Consumer Affairs Victoria was meant to be monitoring, this was 'done inconsistently or handed to another body to do'.<sup>72</sup>
- 4.88 Project Respect told us that there needed to be measures and processes under licensing requirements and occupational health and safety standards for the sex industry, so that business owners were aware of their obligations to report suspected sexual offences.<sup>73</sup>
- 4.89 Sex Work Law Reform told us that WorkSafe officers could refer suspected offences to police, but did not receive any training, and that its officers have been known to think the work was 'titillating' or not serious.<sup>74</sup>

## Mental health services in inpatient units

- 4.90 Many people do not feel or are not sexually safe when accessing acute mental health inpatient treatment.<sup>75</sup> There is work underway to address this, including guidelines to promote sexual safety,<sup>76</sup> training for mental health services and funded improvements to the safety of inpatient units (see Chapter 7).<sup>77</sup>
- 4.91 Following a report on sexual safety by the Mental Health Complaints Commissioner (MHCC) in 2018,<sup>78</sup> work has begun on a sexual safety strategy.<sup>79</sup> The sexual safety guidelines are also being revised.<sup>80</sup> The Commissioner has also sought responses from services on their compliance with recommendations.<sup>81</sup>
- 4.92 The MHCC continues to call for more transparent reporting and accountability by, for example, reporting on sexual safety breach indicators in statewide reports, and including sexual safety breaches in the Statement of Priorities for services.<sup>82</sup> We also heard that a code of conduct could be developed to address non-compliance with standards of reporting at mental health services through regular meetings.<sup>83</sup>

<sup>72</sup> Consultation 34 (Project Respect Women's Advisory Group).

<sup>73</sup> Submission 50 (Project Respect).

<sup>74</sup> Consultation 45 (Sex Work Law Reform Victoria).

<sup>75</sup> Toni Ashmore, Jo Spangaro and Lorna McNamara, "I Was Raped by Santa Claus": Responding to Disclosures of Sexual Assault in Mental Health Inpatient Facilities' (2015) 24(2) *International Journal of Mental Health Nursing* 139, 139.

<sup>76</sup> Department of Health (Vic), *Promoting Sexual Safety, Responding to Sexual Activity, and Managing Allegations of Sexual Assault in Adult Acute Inpatient Units* (Chief Psychiatrist's Guideline, June 2012) <<https://www2.health.vic.gov.au/443/about/key-staff/chief-psychiatrist/chief-psychiatrist-guidelines/promoting-sexual-safety>>.

<sup>77</sup> Mental Health Complaints Commissioner (Vic), *The Right to Be Safe: Ensuring Sexual Safety in Acute Mental Health Inpatient Units: Responses from Services to Project Recommendations* (Report, May 2020) 1–2 <<https://www.mhcc.vic.gov.au/mental-health-service-responses-our-sexual-safety-report>>.

<sup>78</sup> Mental Health Complaints Commissioner (Vic), *The Right to Be Safe: Ensuring Sexual Safety in Acute Mental Health Inpatient Units* (Sexual Safety Project Report, March 2018) <<https://www.mhcc.vic.gov.au/sites/default/files/2021-01/The-right-to-be-safe-sexual-safety-project-report.pdf>>.

<sup>79</sup> Mental Health Complaints Commissioner (Vic), *The Right to Be Safe: Ensuring Sexual Safety in Acute Mental Health Inpatient Units: Responses from Services to Project Recommendations* (Report, May 2020) 3 <<https://www.mhcc.vic.gov.au/mental-health-service-responses-our-sexual-safety-report>>.

<sup>80</sup> Office of the Chief Psychiatrist, *Annual Report 2019–20* (Report, October 2020) 24–5 <<https://www2.health.vic.gov.au/about/key-staff/chief-psychiatrist/annual-reports>>.

<sup>81</sup> Mental Health Complaints Commissioner (Vic), *The Right to Be Safe: Ensuring Sexual Safety in Acute Mental Health Inpatient Units: Responses from Services to Project Recommendations* (Report, May 2020) 5–16 <<https://www.mhcc.vic.gov.au/mental-health-service-responses-our-sexual-safety-report>>.

<sup>82</sup> Ibid 4.

<sup>83</sup> Consultation 66 (Consultation focused on people who have a lived experience of states of mental and emotional distress commonly labelled as 'mental health challenges').



- 4.93 The Royal Commission into Victoria's Mental Health System has made more recent recommendations, including to address gender-based violence in mental health facilities. It also recommended establishing a Mental Health and Wellbeing Commission that will have complaints and oversight functions. One of its priorities will be to monitor the incidence of gender-based violence in mental health facilities. It also recommended a Mental Health Improvement Unit to lead quality and safety improvements in mental health and wellbeing services.<sup>84</sup>

### Aged care

- 4.94 We heard similar concerns about the risks of sexual violence in aged care (see Chapter 6). Aged care is regulated at a federal level.<sup>85</sup> This may contribute to the lack of visibility of sexual assault in aged care.<sup>86</sup>
- 4.95 Sexual abuse was previously reported under the reportable assaults scheme to the Aged Care Quality and Safety Commission (ACQSC). However, following the Australian Law Reform Commission's (ALRC) report into elder abuse, this has been replaced by a Serious Incident Response Scheme (SIRS). The SIRS scheme began on 1 April 2021.<sup>87</sup>
- 4.96 The key changes are:
- The scheme requires reports of serious incidents committed by another resident, including those with a cognitive impairment, as well as by a staff member.<sup>88</sup>
  - The emphasis has changed from reporting to requiring an investigation and response.
  - The investigation and response is monitored by an independent oversight body.<sup>89</sup>
- 4.97 The ALRC also recommended strengthening screening requirements for employees, including a national employment process and a requirement for unregistered workers to abide by the National Code of Conduct for Health Care Workers.<sup>90</sup>
- 4.98 One of the types of incident that must be reported to the regulator is unlawful sexual contact or inappropriate sexual conduct. This includes suspected or alleged incidents. However, the Health Law and Ageing Research Unit expressed concern that the new scheme left it to aged-care staff to interpret the seriousness of the incident, and that the aged-care regulator was not an appropriate body either to interpret the seriousness of the incident or to analyse the data.<sup>91</sup>
- 4.99 As with mental health, aged care is undergoing significant reform. The Royal Commission into Aged Care Quality and Safety reported in March 2021 and recommended an overhaul of the regulation of aged care.<sup>92</sup> However, despite submissions about sexual violence, it did not make any recommendations specific to sexual violence.<sup>93</sup>

84 *Royal Commission into Victoria's Mental Health System* (Final Report, 3 February 2021) Recommendations 13, 52. See also Recommendation 44 <<https://finalreport.rcvmhs.vic.gov.au/>>.

85 For a general discussion of aged care, see Rebecca Storen, *Aged Care: A Quick Guide* (Report, Parliamentary Library, 30 April 2021) <<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%2Fprspub%2F7933570%22>>.

86 See Submission 1 (Dr Catherine Barrett).

87 Australian Law Reform Commission, *Elder Abuse—A National Legal Response* (Report No 131, 2017) Recommendation 4–1 <<https://www.alrc.gov.au/publication/elder-abuse-a-national-legal-response-alrc-report-131/>>; 'Serious Incident Response Scheme', *Aged Care Quality and Safety Commission* (Web Page, 23 July 2021) <<https://www.agedcarequality.gov.au/sirs>>. See also *Royal Commission into Aged Care Quality and Safety* (Final Report, 1 March 2021) Recommendation 100 <<https://agedcare.royalcommission.gov.au/publications/final-report>>; Kate Carnell and Ron Paterson, *Review of National Aged Care Quality Regulatory Processes* (Report, October 2017) Recommendation 6 <<https://www.health.gov.au/resources/publications/review-of-national-aged-care-quality-regulatory-processes-report>>.

88 Previously, there was a discretion not to report where the alleged assault was committed by a resident with an assessed cognitive or mental impairment: see Rosemary Mann et al, *Norma's Project—A Research Study into the Sexual Assault of Older Women in Australia* (Report, Australian Research Centre in Sex, Health and Society, La Trobe University, 30 June 2014) 48 <<https://apo.org.au/node/40334>>.

89 Australian Association of Gerontology Workshop and Policy Recommendations, *A Fair Future for Older Women Who Experience Sexual Abuse: What Needs to Be Done* (Report, 2019) 16 <<https://www.aag.asn.au/news-publications/policy-papers/a-fair-future-for-older-women-who-experience-sexual-abuse>>. See also Aged Care Quality and Safety Commission, *Serious Incident Response Scheme – Guidelines for Residential Aged Care Providers* (Guidelines, 17 June 2021) <<https://www.agedcarequality.gov.au/resources/serious-incident-response-scheme-guidelines-residential-aged-care-providers>>.

90 Ibid.

91 Submission 3 (Health Law and Ageing Research Unit, Monash University).

92 *Royal Commission into Aged Care Quality and Safety* (Final Report, 1 March 2021) <<https://agedcare.royalcommission.gov.au/publications/final-report>>.

93 See Submission 1 (Dr Catherine Barrett); Alison Branley and Loretta Lohberger, 'Aged Care Royal Commission Hears There Are around 50 Sexual Assaults a Week of Residents Nationally', *ABC News* (online, 22 October 2020) <<https://www.abc.net.au/news/2020-10-22/aged-care-royal-comm-told-of-50-sex-assaults-a-week/12801806>>.



## Connecting regulatory responses

- 4.100 These different regulatory contexts are unique, but there are common themes. For example, in Chapter 7, we note recommendations from recent inquiries that aim to make it easier for people to report sexual violence within institutions. As we also discuss in that chapter, we heard concerns that Victoria Police may not always investigate complaints of sexual violence reported by regulatory or other bodies (see Chapter 7). We also heard concerns that data about sexual violence is not collected or used in these contexts (see Chapter 6).
- 4.101 In many of these contexts, the real opportunity to prevent and respond to sexual violence will be regulatory, rather than through the criminal justice system. We heard many practical suggestions for improving sexual safety in these contexts that could make a real difference. Inquiries, including royal commissions, have also made recommendations that may be useful in other regulatory contexts.<sup>94</sup>
- 4.102 However, too often good practice and lessons learnt are not being shared across regulatory contexts. Regulatory responses are not aligned to an overarching strategy or connected to the system for responding to sexual violence.
- 4.103 We therefore recommend that a working group should be formed of regulators under the auspices of a revised governance structure, as part of the Sexual Assault Strategy. This would have the aim of sharing information and best practice and aligning and coordinating this work, including with key partners in the system for responding to sexual violence.
- 4.104 The working group should:
- map existing plans, protocols and initiatives to improve sexual safety
  - share good practices and resources
  - work with people who have lived experience and with specialists in responding to sexual violence through the revised governance structure
  - identify ways to improve sexual safety in their contexts as part of an overarching Sexual Assault Strategy, including by working together to implement recommendations from inquiries on improving pathways to reporting
  - identify a consistent way of collecting data about the investigation of reports made under regulatory schemes to police, and of working with Victoria Police to improve their responses
  - review or develop protocols, guidance and training that improve responses to disclosures of sexual violence and clarify regulatory reporting requirements (see Chapter 7)
  - be guided by the revised statewide governance mechanism and keep it informed of the working group's work and relevant reforms.

94

See, eg, the Child Safe Standards, reporting within institutions, and diverse contexts (eg, out-of-home care): *Royal Commission into Institutional Responses to Child Sexual Abuse: Final Report* (Report, December 2017) chs 6, 7, 12–16 <<https://www.childabuseroyalcommission.gov.au/final-report>>.

## Recommendation

- 6 The Victorian Government should, as part of the Sexual Assault Strategy, consult on and develop a clear governance structure for coordinating responses to sexual violence to:
  - a. ensure a shared vision of responding as a system to sexual violence
  - b. identify and respond to systemic issues and opportunities for improvement
  - c. foster collaboration between stakeholders, including by resolving differences
  - d. ensure transparency and accountability for a system-wide response to sexual violence, including through the proposed strengthening of the role of the Victims of Crime Commissioner.
- 7 The governance structure for coordinating responses to sexual violence should include:
  - a. ministerial responsibility for sexual violence
  - b. a high-level statewide body representing government departments and key stakeholders
  - c. regional governance arrangements linked to the high-level structure
  - d. genuine and ongoing representation of views from victim survivors and diverse communities
  - e. a working group of regulators with responsibility for addressing sexual violence that will work together on ways to improve sexual safety in their areas.

## A multi-agency protocol should translate law and policy into practice

### Protocols set out how to work together

The 'biggest problem is who is responsible for each part of the case and making sure that everything is covered off and the responsible party is held accountable to support the person from start to finish.'—Anonymous member of the Aboriginal community<sup>95</sup>

- 4.105 During this inquiry, we heard about gaps between policy and practice, and the variability of practice across the state. For example, we heard concerns about:
- inconsistent referrals to and between specialist and community-based services (see Chapters 5 and 8)
  - the experience of reporting to police (see Chapter 17)
  - communication about the progress of the case (see Chapter 17)
  - delay (see Chapter 19).
- 4.106 As those chapters discuss, these gaps and inconsistencies can have profound effects on how people experience the criminal justice system, and their willingness to continue engaging with it.
- 4.107 SAS Victoria identified the need to translate law and policy into consistent practice. For this, protocols are needed.<sup>96</sup>
- 4.108 Protocols set out how people should work together. They set out how each partner sees each other, who is responsible for what, and state clearly their commitment to work together to improve the response to sexual violence. Protocols make it clear:
- who does what
  - who informs and communicates with victim survivors, and how
  - when other people should be involved
  - how to provide feedback and identify areas to improve.
- 4.109 A protocol would identify key interactions between partners, and common issues in those interactions (see box).<sup>97</sup> It would set out transparently what should be done and when, to ensure consistency across Victoria.

#### Examples of key interactions

'The police told me the decision not to seize my dress [take my dress] was the forensic medical examiner's. The medical examiner took my underwear but not my dress. This is an example of how disjointed things are and indicates that this part of the process needs to be more transparent and clearer. The decision not to seize [take] my dress had a major impact on my case.'<sup>98</sup>

SAS Victoria expressed concern that police practice had changed in the last few years. Previously, SOCITs appeared much more inclined to routinely interview persons named as perpetrators, which at least made victim survivors feel their report had been taken seriously even if charges were not laid.<sup>99</sup>

SAS Victoria also identified a need for police to work with counsellor advocates before giving an options talk, to ensure the way they deliver information is trauma-informed (we discuss 'options talks' in Chapter 17).<sup>100</sup>

<sup>96</sup> Submission 17 (Sexual Assault Services Victoria).

<sup>97</sup> For a model, see National SART Guidelines Development Group (Ireland), *National Guidelines on Referral and Forensic Clinical Examination Following Rape and Sexual Assault (Ireland)* (Guidelines, 4th ed, Sexual Assault Response Team, 2018) <<https://www.hse.ie/eng/services/publications/healthprotection/sexual-assault-response-team-national-guidelines.pdf>>.

<sup>98</sup> Consultation 63 (A victim survivor of sexual assault, name withheld).

<sup>99</sup> Submission 17 (Sexual Assault Services Victoria).

<sup>100</sup> Ibid.

- 4.110 A protocol could help improve feedback processes. Feedback should be heard and acted upon, and key partners should learn lessons from each other's experiences.
- 4.111 For example, there is a lack of communication between forensic examiners, police and lawyers in sexual offence cases.<sup>101</sup> Associate Professor Gall told us that forensic medical officers get very little information before giving evidence, and they receive no feedback about the value of the specimens they collected.<sup>102</sup>
- 4.112 A protocol could clarify how people who have experienced sexual violence can give feedback about the response of services. Some work on victim survivor feedback has already been done by Victoria Police and the Office of Public Prosecutions.<sup>103</sup>
- 4.113 A protocol would include opportunities for feedback by victim advocates (see Chapter 12) and by other services. For example, we heard that Rainbow Door, which connects LGBTIQ+ people to mainstream services, provides feedback to those services about how its clients are treated.<sup>104</sup>

### Victoria Police Code of Practice sets out some processes

- 4.114 Victoria Police has a Code of Practice that sets out processes for police in some detail.<sup>105</sup> However, the Code focuses on the obligations of police, centres against sexual assault and forensic services are not partners to, and do not have obligations under, the Code. Importantly, there are no mechanisms under the Code to hold the police to account if they do not meet those obligations.
- 4.115 Victoria Police has a protocol with Child Protection on child sexual abuse, with an addendum that addresses child sexual exploitation. We make recommendations in Chapter 5 to strengthen protocols involving child sexual abuse.
- 4.116 We recommend building on these codes and protocols by:
- strengthening the detail of the protocols
  - making sure they include all key agencies, including non-government agencies, as partners.

<sup>101</sup> Sally F Kelty et al, 'Dismantling the Justice Silos: Flowcharting the Role and Expertise of Forensic Science, Forensic Medicine and Allied Health in Adult Sexual Assault Investigations' (2018) 285 *Forensic Science International* 21, 21–2; Sally F Kelty, Roberta Julian and Alastair Ross, 'Dismantling the Justice Silos: Avoiding the Pitfalls and Reaping the Benefits of Information-Sharing between Forensic Science, Medicine and Law' (2013) 230(1–3) *Forensic Science International* 8.

<sup>102</sup> Submission 11 (Associate Professor John AM Gall).

<sup>103</sup> Submission 68 (Victoria Police). See also Centre for Innovative Justice (RMIT), *Communicating with Victims about Resolution Decisions: A Study of Victims' Experiences and Communication Needs* (Report to the Office of Public Prosecutions (Vic), April 2019) <<https://cij.org.au/cms/wp-content/uploads/2018/08/communicating-with-victims-about-resolution-decisions--a-study-of-victims-experiences-and-communication-needs-1.pdf>>. For related reforms, see, eg, Victorian Government, 'Client Partnership Strategy for The Orange Door', *VIC.GOV.AU* (Web Page, 27 November 2019) <<https://www.vic.gov.au/client-partnership-strategy-orange-door>>; Department of Health and Human Services (Vic), 'Client Voice Framework for Community Services', *DHHS.vic* (Web Page, 14 November 2019) <<https://www.dhhs.vic.gov.au/publications/client-voice-framework-community-services>>.

<sup>104</sup> Consultation 22 (First roundtable on the experience of LGBTIQ+ people).

<sup>105</sup> 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>>.

## There are models of multi-agency protocols

### The Sexual Assault Response Team (SART) is a good model

- 4.117 A model for a more thorough approach is the Sexual Assault Response Team (SART) in the United States.
- 4.118 The SART approach uses a team to provide an immediate response, usually combining law enforcement, medical and legal responses, and community-based advocacy. It may be paired with a broader coordinated community response, which brings together more people in the community to prevent and reduce sexual assault. For example, this broader response may include schools, faith groups and other social services coming together to plan activities to raise community awareness or identify gaps in services.<sup>106</sup>
- 4.119 While SARTs are common in the United States, the way they work varies widely. They commonly include police, rape crisis centres, prosecutors and forensic nurses, but they can involve a wider range of organisations. An empirical review found that most SARTs had a high degree of structure and cross-system coordination.<sup>107</sup>
- 4.120 SART models often use cross-agency training and collaborative meetings to discuss local responses. This may include reviews of individual cases. They may engage in quality assurance or formal evaluation. However, SART models are also often driven by communities without their own funding, which can pose challenges.<sup>108</sup>
- 4.121 As with other multi-agency models (see Chapter 5), research indicates SARTs improve the effectiveness of responses to sexual violence. More research is needed to identify which elements or models work best,<sup>109</sup> although research suggests there may be benefits to more formal structures, especially those that include evaluation and more broadly based memberships.<sup>110</sup>
- 4.122 A key part of the SART model is to develop a local protocol between its members, based on existing services, community needs and the feedback of people who have experienced sexual violence.<sup>111</sup> Some states provide a model protocol which defines the relationship between partners and specifies the roles of partners (see, for an example, Figure 6).<sup>112</sup> Some model protocols identify key considerations in developing a local protocol, while others provide a template that can be customised for local needs.<sup>113</sup>

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106 Virginia Department of Criminal Justice Services, *Sexual Assault Response Teams (SART): A Model Protocol for Virginia* (Report, May 2011) 6–7 <<https://www.communitysolutionsva.org//index.php/resources/item/sexual-assault-response-teams-sart-a-model-protocol-for-virginia>>.

107 Megan R Greeson and Rebecca Campbell, 'Coordinated Community Efforts to Respond to Sexual Assault: A National Study of Sexual Assault Response Team Implementation' (2015) 30(14) *Journal of Interpersonal Violence* 2470, 2471–2, 2482–3.

108 Megan R Greeson and Rebecca Campbell, 'Sexual Assault Response Teams (SARTs): An Empirical Review of Their Effectiveness and Challenges to Successful Implementation' (2013) 14(2) *Trauma, Violence, & Abuse* 83, 92. The response of the legal, medical, and mental health/advocacy systems to sexual assault has been inadequate and uncoordinated. To address this problem, communities have developed coordinated sexual assault response teams (SARTs).

109 Ibid 93.

110 Megan R Greeson et al, 'Improving the Community Response to Sexual Assault: An Empirical Examination of the Effectiveness of Sexual Assault Response Teams (SARTs)' (2016) 6(2) *Psychology of Violence* 280, 288–90.

111 National Sexual Violence Resource Center, 'Section 3.1 Build Your SART', *Sexual Assault Response Team Toolkit* (Online Manual) <<https://www.nsvrc.org/sarts/toolkit/3-1>>.

112 'Protocols and Guidelines for Sexual Assault Response Teams', *NSVRC National Sexual Violence Resource Center* (Web Page) <<https://www.nsvrc.org/sarts/protocols-and-guidelines>>.

113 For a protocol that provides key considerations: see Virginia Department of Criminal Justice Services, *Sexual Assault Response Teams (SART): A Model Protocol for Virginia* (Report, May 2011) <<https://www.communitysolutionsva.org//index.php/resources/item/sexual-assault-response-teams-sart-a-model-protocol-for-virginia>>. For a protocol that sets out a model template: see Office of the Child Advocate for the Protection of Children, State of Georgia, 2017 *Statewide Model Protocol: Multidisciplinary Investigation & Prosecution of Child Abuse, Sexual Abuse & Sexual Exploitation* (Protocol, 7 November 2017) <[https://oca.georgia.gov/sites/oca.georgia.gov/files/related\\_files/document/2017-18%20Statewide%20Model%20Protocol%20FINAL.pdf](https://oca.georgia.gov/sites/oca.georgia.gov/files/related_files/document/2017-18%20Statewide%20Model%20Protocol%20FINAL.pdf)>.

**Figure 6: Roles and responsibilities of victim advocates checklist, from Georgia SART guide<sup>114</sup>**

**Roles And Responsibilities Checklists**

**Advocate Roles And Responsibilities Checklist**

- ☐ Determine whether the victim is safe (both physically and emotionally) and provide safety planning if needed
- ☐ Determine the immediate medical care needs of the victim and whether the victim wants to go to the hospital or another medical provider for STI/pregnancy care
- ☐ Assess and accommodate the special needs of the victim, including but not limited to language or cultural barriers, physical, mental, age, gender, rural, etc.
- ☐ Provide crisis intervention, support, information and referrals to the victim and family/friends
- ☐ Provide non-judgmental information about options
- ☐ Determine whether the victim wants to report the assault
- ☐ If not reporting, provide information on the evidence collection timeline and how it affects the victim's future options
- ☐ If reporting, contact law enforcement or follow SART protocol
- ☐ Provide transportation to medical facility for medical evaluation if necessary
- ☐ Inform victim of preserving options through evidence collection and evaluation
- ☐ Assess whether victim has need of clothing/food/shelter/transportation
- ☐ Access services and resources for victim or assist them in accessing services and resources as needed
- ☐ Accompany, support, and provide information throughout all aspects of the process
- ☐ Provide continuing follow-up care after the initial response by regularly checking-in with victim on their needs, concerns, comfort, and questions
- ☐ Ensure the victim understands the systems in which they find themselves, including the roles and objectives of each agency and individual involved in the response
- ☐ Serve as a liaison between the victim and professional agencies
- ☐ Advocate on behalf of the victim's self-defined needs, decisions, wishes, questions/concerns
- ☐ Provide support, information, and referrals to family/friends of the victim
- ☐ Provide accompaniment when requested (FME, courtroom, etc.)

- 4.123 Some protocols include clear accountability mechanisms. The model protocol in Georgia, for example, establishes a child abuse protocol committee headed by a judge which must meet twice annually. The committee must prepare an annual report on compliance and measures to improve it, as well as reporting on which measures have been successful in preventing child abuse.<sup>115</sup>

### There are other models of protocols

- 4.124 Other models can provide some guidance. For example, Orange Doors are developing 'interface' arrangements with other key stakeholders.
- 4.125 Guidelines establishing minimum statewide requirements will define how Orange Doors work with other organisations, including courts and community-based services.<sup>116</sup> Each local area will then use these as a basis for developing their own procedures.
- 4.126 The guidelines for Orange Doors for working with Victoria Police set out referral pathways, including the timeframes for responding and referrals for children and young people and Aboriginal people. It sets out when an Orange Door and Victoria Police can work together to manage risks for victims of family violence, and how to resolve disputes.<sup>117</sup>
- 4.127 Another model is the interagency guidelines developed by the Queensland Government for responding to sexual assault. These outline the responsibilities of police, Queensland Health, the justice department and the department that funds sexual support services. The guidelines set out general processes and key considerations in responding to sexual assault. These include responsibilities for each partner in relation to referrals and feedback. The guidelines are reviewed every two years.<sup>118</sup>

### Police and prosecution protocol in England and Wales

In England and Wales, a joint protocol between the police and the Crown Prosecution Service provides a useful model for the legal process.<sup>119</sup> This framework was first introduced in 2008, with local protocols adopted, and updated in 2015. A joint inspection in 2012 found universal adoption of the protocol, with all prosecutors aware of the protocol and what was expected of them.<sup>120</sup>

The protocol comprehensively addresses the prosecution of rape from the time it is first reported to police. The relationship between the police and prosecution is not the same in England and Wales as in Victoria, and includes the use of early investigative advice and charging (see Chapter 17).<sup>121</sup>

115 Office of the Child Advocate for the Protection of Children, State of Georgia, *2017 Statewide Model Protocol: Multidisciplinary Investigation & Prosecution of Child Abuse, Sexual Abuse & Sexual Exploitation* (Protocol, 7 November 2017) 6 <[https://oca.georgia.gov/sites/oca.georgia.gov/files/related\\_files/document/2017-18%20Statewide%20Model%20Protocol%20FINAL.pdf](https://oca.georgia.gov/sites/oca.georgia.gov/files/related_files/document/2017-18%20Statewide%20Model%20Protocol%20FINAL.pdf)>.

116 See the interim service interfaces in Victorian Government, 'Practitioner Resources for The Orange Door', VIC.GOV.AU (Web Page, 30 April 2021) <<http://www.vic.gov.au/orange-door-practitioner-resources>>.

117 Victorian Government, *Interim Operational Guidance between The Orange Door and Victoria Police* (Report, October 2018) 10–11, 16–17 <<https://www.vic.gov.au/sites/default/files/2019-05/Interface-between-The-Orange-Door-and-Victoria-Police.pdf>>.

118 Queensland Government, *Response to Sexual Assault: Queensland Government Interagency Guidelines for Responding to People Who Have Experienced Sexual Assault* (Report, June 2014) <<https://www.publications.qld.gov.au/dataset/1f7ea4ec-bec8-4428-ab60-0a6c119ac70d/resource/3b3958c9-504f-4698-a64d-e56ca7e5248e/download/qld-govt-guidelines-for-responding-to-sexual-assault.pdf>>.

119 Association of Chief Police Officers (UK) and Crown Prosecution Service (UK), *Protocol between the Police Service and Crown Prosecution Service in the Investigation and Prosecution of Rape* (Protocol, 2015) <<https://www.cps.gov.uk/publication/acpo-cps-protocol-investigation-and-prosecution-allegations-rape-january-2015>>.

120 Her Majesty's Inspectorate of Constabulary (UK) and Her Majesty's Inspectorate of the Crown Prosecution Service (UK), *Forging the Links: Rape Investigation and Prosecution* (Report, February 2012) [4.2]–[4.6] <<https://www.justiceinspectorates.gov.uk/hmicfrs/media/forging-the-links-rape-investigation-and-prosecution-20120228.pdf>>.

121 This will be updated as a result of a recently announced Joint National Action Plan: Crown Prosecution Service (UK), 'Police-CPS Joint National RASSO (Rape and Serious Sexual Offences) Action Plan 2021', CPS (Web Page, 22 January 2021) <<https://www.cps.gov.uk/publication/police-cps-joint-national-rasso-rape-and-serious-sexual-offences-action-plan-2021>>.



While there are differences, much can still be learnt from this protocol. For example, one section sets out an obligation on the police to identify a 'single point of contact' and a person's preferred means of contact, and for this to be shared with the Crown Prosecution Unit and its witness support program. It also addresses:

- contact with Independent Sexual Violence Advisors (see Chapter 12)
- meetings to discuss special measures
- arranging a visit to a court to familiarise the victim
- the responsibility for informing people about victim impact statements and supporting the victim to make one
- the responsibility for informing people when charges are dropped and their rights to review.<sup>122</sup>

This joint protocol sets out obligations to share the lessons learned. For example, prosecutors provide a written report on acquittals in cases copied to the police. Designated officers are required to meet regularly to provide feedback on matters including the quality of files, the timeliness and effectiveness of decision making and outcomes; and they regularly review the protocol itself. These meetings can include the forensic service provider and Independent Sexual Violence Advisor (see Chapter 12).<sup>123</sup>

## We recommend a multi-agency protocol

- 4.128 One of the key tasks of the high-level statewide governance mechanism should be to develop a model multi-agency protocol. While we do not specify here the precise content of this protocol, it should include these key elements:
- a statement of the role and responsibilities of each partner
  - a commitment to working collaboratively according to overarching principles
  - processes that specify who is responsible at key points and how people should interact with each other
  - timeframes for interactions
  - processes that clarify who is responsible for communicating with the person who has experienced sexual violence (see Chapter 17)
  - guidance on flexible arrangements for reporting and taking statements (see Chapter 17)
  - processes that clarify when, how and to whom referrals are to be made, including to the after-hours Sexual Assault Crisis Line (see Chapter 5)
  - addressing the use of intervention orders (see Chapter 17)
  - processes for ensuring feedback to each other and for continual improvement, including the need to identify and address causes of delay (see Chapter 19)
  - processes for resolving disputes and ensuring regular review of the protocol and compliance with the protocol.

122 Association of Chief Police Officers (UK) and Crown Prosecution Service (UK), *Protocol between the Police Service and Crown Prosecution Service in the Investigation and Prosecution of Rape* (Protocol, 2015) Section 15 <<https://www.cps.gov.uk/publication/acpo-cps-protocol-investigation-and-prosecution-allegations-rape-january-2015>>.

123 Ibid Section 17.

- 4.129 This model protocol should then be used as a guide or template and adapted at a local level.
- 4.130 To ensure that the protocol translates into practice, there should be accountability measures to track and address compliance with the protocol.<sup>124</sup> We address this next.

## Recommendation

- 8 The recommended high-level statewide body should develop a statewide multi-agency protocol for responding to sexual violence. This should include:
- a statement of the role and responsibilities of each partner
  - a commitment to working collaboratively based on overarching principles
  - processes that identify responsibilities during key interactions and how people should interact with each other
  - timeframes for key interactions
  - processes that clarify who is responsible for communicating with the person who has experienced sexual violence
  - guidance on flexible arrangements for reporting sexual violence and taking statements
  - processes that clarify when, how and to whom referrals are to be made
  - how and when people should be supported to apply for intervention orders
  - processes for ensuring feedback between partners and for continual improvement, including the need to identify and address causes of delay
  - processes for resolving disputes between partners and ensuring regular review of the protocol and compliance with the protocol.

## We need accountability for the experiences of victims of crime

### The Victims' Charter Act and Commissioner's role should be strengthened

- 4.131 A key concern for this inquiry is ensuring accountability within the criminal justice system for the experiences of victim survivors. Improving those experiences is key to reducing their trauma, improving their engagement with the criminal justice system, and reducing barriers to reporting. There is already an established framework of accountability in this area.
- 4.132 The Victims' Charter Act sets out principles that govern the response by criminal justice and government agencies to victims of crime (see Table 5). It also establishes requirements for the monitoring and review of those principles.<sup>125</sup> The Charter's principles apply to organisations in the criminal justice system and victims' services agencies.<sup>126</sup>

<sup>124</sup> See, eg, New South Wales Ombudsman, *The JIRT Partnership—20 Years On* (Report, 5 October 2018) ch 25 <<https://www.ombo.nsw.gov.au/news-and-publications/publications/reports/child-protection/the-jirt-partnership-20-years-on>>.

<sup>125</sup> *Victims' Charter Act 2006* (Vic) s 1.

<sup>126</sup> These include those who provide services to victims of crime either under law or through public funding, and public officials responsible for providing such services: *ibid* s 3.

**Table 5: Principles of the Victims Charter Act<sup>127</sup>**

Topic	Principle
Treatment	All people affected by crime are to be treated with courtesy, respect and dignity and are to have their particular needs or differences taken into account.
Information and referrals	Agencies are to provide clear, timely and consistent information about relevant support services, possible entitlements and legal assistance available to victims of crime.
Role of victim of crime	Agencies are to respect the rights and entitlements of victims as participants in proceedings for criminal offences and consider the needs of those living in rural and regional areas.
Communication and information	<p>Agencies are to be responsive to how victims prefer to be communicated with.</p> <p>Investigatory agencies are to inform victims about the progress of an investigation into a criminal offence unless this may jeopardise the investigation.</p> <p>Prosecuting agencies are to provide information to victims about the offences charged against the accused person, including any decision to substantially modify the offences charged against the accused person, discontinue the charges or accept a plea of guilty to a lesser charge.</p> <p>The Office of Public Prosecutions is to provide details to victims about specific court hearings and the progress of prosecutions, and to consult with victims on certain decisions relating to the prosecution.</p> <p>Victims can request prosecuting agencies inform them of the outcomes of bail applications and any bail conditions intended to protect them.</p> <p>Prosecuting agencies are to provide information to victims about the court process, being a witness, the availability of any special protections or alternative arrangements for giving evidence, and the right to attend court proceedings, unless the court orders otherwise.</p>
Protection	Prosecuting agencies and the courts should minimise contact between a victim and the person accused of the crime.
Referral	When a victim chooses to make a victim impact statement, the prosecuting agency should refer the victim to a victims' services agency for support.
Privacy and respect	<p>The personal information of victims should not be disclosed.</p> <p>Investigating and prosecuting agencies that have a victim's property in their possession should handle and store the property respectfully, lawfully and securely.</p>
Compensation	A victim may seek compensation or financial assistance on application.
Information	A victim of crime may apply to be included on the Victims' Register.

- 4.133 The Victims of Crime Commissioner is responsible for oversight and monitoring of the Act.<sup>128</sup> The Commissioner is an independent statutory officer whose role is to:
- advocate for the recognition, inclusion, participation and respect of victims of crime by government, the police and the prosecution
  - inquire and report to ministers into issues affecting groups of, or many, victims of crime in Victoria
  - advise ministers, government and organisations on how to improve the justice system to better meet the needs of victims of crime
  - consider complaints from victims about organisations that investigate, prosecute or provide services to victims of crime under the Victims' Charter Act.<sup>129</sup>
- 4.134 In this inquiry, we heard many concerns directly related to the Charter, or that reflect specific applications of its principles. These include:
- the need for more consistent referrals from police to counsellor advocates to ensure people receive support (see Chapter 5)
  - the obligations of police and prosecution to consult victims of crime before ending cases (see Chapter 17)
  - obligations to communicate with the person experiencing sexual violence throughout the criminal justice process (see Chapter 17).
- 4.135 Similar codes or charters for victims of crime in the United Kingdom confer further rights in relation to sexual and some other types of offences. In Scotland, this includes the right to specify the gender of the police interviewer and the forensic medical examiner (see Chapters 16 and 17).<sup>130</sup>
- 4.136 In England and Wales, the Victims' Code includes provision for 'enhanced rights' for some types of victim, including those who have been a victim of sexual offences. For example, those with 'enhanced rights' have the right to be referred to specialist supports and informed more quickly about the investigation and prosecution.<sup>131</sup>
- 4.137 In this report, we recommend extending the rights in the Victims' Charter Act. We explain in the chapters listed why the following rights should be included:
- strengthening the existing right to be referred to support in cases of sexual offences to require an agency to refer a person to support services within a timeframe set out in the local protocol (see Chapter 5)
  - a new right to specify the gender of the police interviewer and the forensic medical examiner, where it is reasonably practical to comply (see Chapter 17)
  - a new right to flexible arrangements for interviewing, where it is reasonably practical to comply (see Chapter 17)
  - a new right to request an independent review of a decision by police or prosecution to discontinue or not file charges or indictments after an internal review (see Chapter 17)

128 See, eg, *Victims of Crime Commissioner Act 2015* (Vic) div 3A. This role has recently been strengthened following recommendations in our 2016 inquiry into the role of victims of crime at trial: *Victims and Other Legislation Amendment Act 2018* (Vic); Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016).

129 Department of Justice and Community Safety (Vic), 'What We Do', *Victims of Crime Commissioner* (Web Page, 22 July 2021) <<https://www.victimsofcrimecommissioner.vic.gov.au/about/what-we-do>>; *Victims of Crime Commissioner Act 2015* (Vic) s 13.

130 *Victims and Witnesses (Scotland) Act 2014* (Scotland) ss 8, 9, although s 9 has not yet come into force.

131 Ministry of Justice (UK), *Code of Practice for Victims of Crime in England and Wales* (Code of Practice, November 2020) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/974376/victims-code-2020.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/974376/victims-code-2020.pdf)>.

- a new right to interpretation and translation (see Chapter 15)
- a right to special protections including, if implemented, the right to pre-recorded evidence (see Chapter 21)<sup>132</sup>
- a right to be notified of applications to introduce confidential communications or evidence of sexual history and to be heard on those applications (see Chapter 21)<sup>133</sup>
- if implemented, a right to funded legal representation for applications to introduce confidential communications or evidence of sexual history (see Chapter 21)
- if implemented, a new right to be referred to restorative justice (see Chapter 9).

- 4.138 There are some clear advantages of extending or detailing the rights in the Victims' Charter Act to enhance rights for victim survivors of sexual offences. First, it would enshrine in the law our expectations of how they should be treated. This would send a powerful signal to the public and to the agencies required to comply with the Charter.
- 4.139 Secondly, it could drive change within agencies to meet those requirements, while giving them the flexibility to determine how to meet them in a practical sense.
- 4.140 Thirdly, the Charter includes an accountability mechanism through the Victims of Crime Commissioner, who has powers to require information from agencies and review complaints from victim survivors. This is an independent accountability mechanism with a mandate to focus on the experiences of victim survivors.
- 4.141 The Victims of Crime Commissioner has powers to produce systemic reports on victims of crime.<sup>134</sup> The Commissioner recently announced her first systemic inquiry, on the participation of victims in the justice system.<sup>135</sup>
- 4.142 We consider that the Victims of Crime Commissioner is ideally placed to ensure accountability within the criminal justice system to victim survivors. This could also ensure the flow of feedback from victim survivors into the criminal justice system.
- 4.143 We recognise that the office of the Victims of Crime Commissioner has not yet fulfilled its potential, partly because of a lack of awareness of its existence and role, and a lack of resourcing.<sup>136</sup> This role is, however, being strengthened through increased powers, some increased resourcing, and the appointment in mid-2019 of a Commissioner with longstanding expertise in domestic violence.<sup>137</sup>
- 4.144 While the Victims of Crime Commissioner's existing mandate and powers provide an excellent foundation for that office to play a role in ensuring accountability, we see two ways to strengthen this role further.
- 4.145 First, the Commissioner could play an ongoing role in monitoring compliance. For example, the family violence reform implementation monitor reviews and monitors the progress of an agency against the Implementation Plan that is published by the responsible minister, and publishes reports that are tabled in parliament.<sup>138</sup>
- 4.146 We heard from the monitor that a valuable aspect of its work was sharing its findings with agencies to improve their practice.<sup>139</sup> We see potential for a similar model with the Victims of Crime Commissioner, with the multi-agency protocol proposed in this chapter to be published under the the Victims' Charter Act and monitored by the Victims of Crime Commissioner.

132 This reflects existing provisions set out in the *Criminal Procedure Act 2009* (Vic) pt 8.2 divs 4–6, as well as the new right recommended in that chapter.

133 This reflects existing provisions in the *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 32D and the *Criminal Procedure Act 2009* (Vic) s 344, as well as changes to those provisions referred to in Chapter 21.

134 *Victims of Crime Commissioner Act 2015* (Vic) s 25.

135 Department of Justice and Community Safety (Vic), 'Victim Participation in the Justice System', *Victims of Crime Commissioner* (Web Page, 23 June 2021) <<https://www.victimsofcrimecommissioner.vic.gov.au/about/media/victim-participation-in-the-justice-system>>.

136 See also Tyrone Kirchengast, Mary Iliadis and Michael O'Connell, 'Development of the Office of Commissioner of Victims' Rights as an Appropriate Response to Improving the Experiences of Victims in the Criminal Justice System: Integrity, Access and Justice for Victims of Crime' (2019) 45(1) *Monash University Law Review* 1.

137 Daniel Andrews (Premier of Victoria), 'Top Advocate Appointed As Victims Of Crime Commissioner' (Media Release, 13 June 2019) <<http://www.premier.vic.gov.au/top-advocate-appointed-victims-crime-commissioner>>.

138 *Family Violence Reform Implementation Monitor Act 2016* (Vic) ss 5, 14, 23, 24.

139 Consultation 8 (Family Violence Reform Implementation Monitor).

- 4.147 Secondly, the Commissioner already publishes annual reports and can conduct systemic inquiries. An annual report on compliance with the protocol would increase transparency and accountability. Reports could be like the implementation reports published by the monitor, which are tabled in parliament. They could include key data and commentary about the criminal justice system.
- 4.148 This strengthened role should be enshrined in the legislation establishing the Victims of Crime Commissioner. Such a reform would go a long way to ensuring accountability under the revised governance framework. To fulfil this role effectively, the office of the Commissioner will need to be resourced properly.
- 4.149 In Chapter 22, we recommend establishing an independent body, such a Commission for Sexual Safety, with a broader scope than the role we propose here for the Victims of Crime Commissioner. We discuss there how the strengthened role of the Victims of Crime Commissioner should feed into and complement that work in that chapter.

## Recommendations

- 9 The *Victims' Charter Act 2006* (Vic) should be amended to provide that victims of sexual offences have:
  - a. the right to be referred to specialist support services within a set timeframe
  - b. the right to specify the gender of the person interviewing them
  - c. the right to specify the gender of a forensic medical examiner
  - d. the right to request flexible arrangements for police interviews
  - e. the right to request an independent review of decisions by police or the prosecution to discontinue or not file charges or indictments after an internal review
  - f. the right to interpretation and translation
  - g. the right to special protections, including the recommended right to pre-recorded evidence
  - h. the right to be notified of applications to introduce confidential communications or evidence of sexual history and, as recommended, the right to be heard on those applications and to funded legal advice and representation for those applications
  - i. the right to be informed about the recommended restorative justice scheme for sexual offences and, if they choose to and it appears appropriate, to be referred to this scheme.
- 10 The *Victims of Crime Commissioner Act 2015* (Vic) should be amended to:
  - a. confer on the Victims of Crime Commissioner powers to monitor progress under, and compliance with, the statewide multi-agency protocol
  - b. require annual public reports on progress under, and compliance with, the statewide multi-agency protocol, to parliament.





# CHAPTER 05

## Working together to respond to sexual violence

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## 5. Working together to respond to sexual violence

### Overview

- To be most effective and efficient, everyone needs to work together to respond to sexual violence.
- We should start by making sure that people experiencing sexual violence are connected with, or referred to, support services. While they have a right to be referred under the law, this right needs to be spelt out in a way that makes sure it happens in practice.
- While there are good examples of working together, such as multi-disciplinary centres, there needs to be good planning so that working together becomes common practice.
- An independent review should inform this planning by identifying the needs and opportunities for working better together. The review should include and go beyond expanding multi-disciplinary centres and other multi-agency models.
- This should build upon the work already being done to strengthen the relationship between the family violence and sexual assault services.
- We need to refresh and strengthen processes to improve joint responses to child sexual abuse.

### Working together should be common practice

- 5.1 Everyone involved in responding to sexual violence agrees that they need to work together to be most effective and efficient. For people who experience sexual violence, this will make services more timely, accessible and less traumatising than they are now. For organisations, it will improve relationships, will make it easy for them to understand each other's work and learn from each other, and will ensure regular feedback between partners.
- 5.2 This is especially important, as any poor experience can discourage someone who has experienced sexual violence from continuing to seek justice, and can undermine their healing and recovery.<sup>1</sup> These poor experiences can also discourage others from seeking support or justice.

One person detailed her traumatic experience talking to the police as a child more than 20 years ago, after calling the emergency line. She detailed the abuse to the operator, who failed to tell her she wasn't the police. She was then forced to repeat her story to the 'condescending' police officer. The emergency operator did not pass on what she had been told, including that she had told her parents. The police officer told her to call back after she had told her parents, if the parents hadn't done anything, but the officer didn't take down her details or offer to follow up. She said: 'I was sobbing throughout the call. I guess he thought it wasn't very serious.'<sup>2</sup>

- 5.3 This chapter continues the discussion about how to rebuild the system begun in Chapter 4. While that chapter recommended rebuilding the architecture of the system for responding to sexual violence, this chapter focuses on strengthening relationships on the ground, and between the system for responding to sexual violence and other systems, such as child protection.
- 5.4 This chapter explores key opportunities for improving how services work together. Models for working together may be best thought of as lying on a spectrum of 'integration' (see Figure 7).<sup>3</sup>

**Figure 7: Diagram of continuum model.<sup>4</sup>**



<sup>2</sup> Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021).

<sup>3</sup> See generally Australian Law Reform Commission, *Family Violence—A National Legal Response* (Report No 114, October 2010) ch 29 <<https://www.alrc.gov.au/publication/family-violence-a-national-legal-response-alrc-report-114/>>; Jan Breckenridge et al, *Meta-Evaluation of Existing Interagency Partnerships, Collaboration, Coordination and/or Integrated Interventions and Service Responses to Violence against Women* (State of Knowledge Paper No 11/2015, ANROWS Australia's National Research Organisation for Women's Safety, September 2015) 11–12 <<https://www.anrows.org.au/publication/meta-evaluation-of-existing-interagency-partnerships-collaboration-coordination-and-or-integrated-interventions-and-service-responses-to-violence-against-women-key-findings-and-future-directions/>>. See also James L Herbert and Leah Bromfield, *National Comparison of Cross-Agency Practice in Investigating and Responding to Severe Child Abuse* (CFCA Paper No 47, Australian Institute of Family Studies (Cth), February 2018) <<https://aifs.gov.au/cfca/publications/national-comparison-cross-agency-practice-investigating-and-responding>>.

<sup>4</sup> Jan Breckenridge et al, *Meta-Evaluation of Existing Interagency Partnerships, Collaboration, Coordination and/or Integrated Interventions and Service Responses to Violence against Women* (State of Knowledge Paper No 11/2015, ANROWS Australia's National Research Organisation for Women's Safety, September 2015) 10 <<https://www.anrows.org.au/publication/meta-evaluation-of-existing-interagency-partnerships-collaboration-coordination-and-or-integrated-interventions-and-service-responses-to-violence-against-women-key-findings-and-future-directions/>>. See also Karen Wilcox, 'Connecting Systems, Protecting Victims: Towards Vertical Coordination of Australia's Response to Domestic and Family Violence' (2010) 33(3) *UNSW Law Journal* 1013, 1020.

- 5.5 In the past two decades there has been a strong push across the world towards models close to the end of the spectrum involving multiple agencies ('multi-agency models', also known as 'integrated', 'multi-sectoral' or 'multi-disciplinary' models).<sup>5</sup> There is reasonable evidence that these models can improve outcomes for clients compared to standard models, although we still need robust research to identify which models work best, and why.<sup>6</sup>
- 5.6 Victoria uses multi-agency models for sexual violence in the form of multi-disciplinary centres (MDCs). Multi-agency models are also a common feature of many recent reforms, including family violence, child sexual abuse, mental health and elder abuse.
- 5.7 Our inquiry found that while there had been significant improvements to the way organisations worked together, much more can and should be done.

Coordination and collaboration between the various service types that comprise the sexual assault system remain fraught and inconsistent. This lack of service integration is expressed in numerous ways across the system and stems from multiple causes.—Gatehouse Centre, Royal Children's Hospital.<sup>7</sup>

- 5.8 We should move towards making working together common practice. In doing so, we can build on many related reforms. For example, the Multi-Agency Risk Assessment and Management Framework (MARAM), discussed in Chapter 1, makes working together a core responsibility for organisations involved in responding to family violence, including sexual assault services and organisations within the criminal justice system.<sup>8</sup> We can also learn from the many models in related reforms, such as Orange Doors and health–justice partnerships.
- 5.9 We can start by making sure that people are connected to the services they need. We should then move to charting a path for working together into the future, including by expanding strong models such as multi-disciplinary centres. The work already being done to improve working together with family violence services should inform this path. Finally, we can build upon these lessons to move towards a stronger joint response to child sexual abuse.

## Making the connection: people should always be offered support

- 5.10 As we discuss in Chapter 12, many people need support to get justice. This support reduces the trauma they experience in engaging with the criminal justice system, and supports are key to helping them stay engaged with it. Yet, too often, they are not being connected (referred to) the services that exist to support them.
- 5.11 The *Victims' Charter Act 2006* (Vic) provides that people affected by crime have the right to be given 'clear, timely and consistent information about relevant support services'. They have the right, if appropriate, to be referred to relevant support services and legal

5 Jan Breckenridge et al, *Meta-Evaluation of Existing Interagency Partnerships, Collaboration, Coordination and/or Integrated Interventions and Service Responses to Violence against Women* (State of Knowledge Paper No 11/2015, ANROWS Australia's National Research Organisation for Women's Safety, September 2015) 9, 28–9 <<https://www.anrows.org.au/publication/meta-evaluation-of-existing-interagency-partnerships-collaboration-coordination-and-or-integrated-interventions-and-service-responses-to-violence-against-women-key-findings-and-future-directions/>>.

6 See, eg, *ibid*; James Herbert and Leah Bromfield, *Components of Effective Cross-Agency Responses to Abuse—A Report for the NSW Ombudsman's Office* (No 2, Australian Centre for Child Protection, University of South Australia, August 2017) <<https://www.unisa.edu.au/siteassets/episerver-6-files/global/eass/research/accp/components-of-effective-cross-agency-responses-to-abuse.pdf>>; James L Herbert and Leah Bromfield, *National Comparison of Cross-Agency Practice in Investigating and Responding to Severe Child Abuse* (CFCA Paper No 47, Australian Institute of Family Studies (Cth), February 2018) <<https://aifs.gov.au/cfca/publications/national-comparison-cross-agency-practice-investigating-and-responding>>; James Leslie Herbert and Leah Bromfield, 'Better Together? A Review of Evidence for Multi-Disciplinary Teams Responding to Physical and Sexual Child Abuse' (2019) 20(2) *Trauma, Violence, & Abuse* 214.

7 Submission 14 (Gatehouse Centre, Royal Children's Hospital).

8 For a full list of organisations: see *Family Violence Protection (Information Sharing and Risk Management) Regulations 2018* (Vic) s 17, Sch 3. A practice guide explains what is expected of organisations in fulfilling their responsibilities to collaborate under MARAM: Victorian Government, *Responsibility 10: Family Violence: Collaborate for Ongoing Risk Assessment and Risk Management* (Practice Guide, 2020) <<https://www.vic.gov.au/maram-victim-survivor-practice-guides>>.

assistance.<sup>9</sup> In its Code of Practice, Victoria Police also sets out the obligations of police to refer people to centres against sexual assault.<sup>10</sup>

They did not ask if I was safe, if I required assistance to exit the relationship, or offer any referrals to support services. ... If they had ... it could have been very different ...—Geraldine<sup>11</sup>

- 5.12 Despite this, all too often people are still not getting connected to the support they need because of inconsistent practices. We heard that:
- Police were failing to refer people consistently to other services, especially centres against sexual assault (CASAs).<sup>12</sup>
  - Referrals do not always end up with someone being connected to a service, because of limits to the referral system used and because of competing pressures on police.<sup>13</sup>
  - Especially in regional areas, police sometimes failed to refer people to the Child Witness Service.<sup>14</sup>
- 5.13 We also heard of many opportunities to improve referrals or pathways, including:
- between CASAs and the general victim services provided by the Department of Justice's Victim Support Agency (discussed in Chapter 12)
  - by giving independent third persons, who support people with cognitive disabilities in police interviews, a role in referring people (see Chapter 15)<sup>15</sup>
  - by supporting community legal centres to offer another referral pathway to the justice system and support services<sup>16</sup>
  - by in-patient mental health units to CASAs (see Chapter 7)<sup>17</sup>
  - by workers under the National Disability Insurance Scheme (NDIS)<sup>18</sup>
  - from sexual assault services to child protection, through an online form<sup>19</sup>
  - from child protection to community and sexual assault support services.<sup>20</sup>
- 5.14 These are not problems of law or policy, but of practice. It is about making sure that everyone knows when they should refer someone, how to refer someone, and who to refer them to.
- 5.15 For this reason, we have recommended that the multi-agency protocol in Chapter 4 should address referrals. While the protocol could include a requirement like that in the existing Code of Practice, it should also include clear referral pathways to and from other organisations, such as between victim support programs, from community legal centres or through community organisations.<sup>21</sup> This protocol can be adapted for the different services in each area.

9 *Victims' Charter Act 2006* (Vic) s 7. These obligations apply to investigatory agencies, prosecuting agencies and victims' services agencies (defined as agencies publicly funded or established by law to provide services to persons adversely affected by crime, or a public official responsible for providing such services): s 3.

10 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>>.

11 Consultation 31 (Geraldine, Deputy Chairperson of the Victim Survivors' Advisory Council).

12 Submissions 17 (Sexual Assault Services Victoria), 27 (Victoria Legal Aid).

13 Submission 41 (Office of the Public Advocate).

14 Consultation 15 (Child Witness Service).

15 Submission 41 (Office of the Public Advocate).

16 Submissions 12 (Women's Legal Service Victoria), 55 (Springvale Monash Legal Service).

17 Consultation 66 (Consultation focused on people who have a lived experience of states of mental and emotional distress commonly labelled as 'mental health challenges').

18 Consultation 11 (Family violence and sexual assault practitioners focusing on disability inclusion).

19 Submission 17 (Sexual Assault Services Victoria).

20 Consultation 53 (Elizabeth Morgan House and a victim survivor of sexual assault).

21 Similarly, the *Crimes Act 1958* (Vic) requires Victoria Police to notify the Victorian Aboriginal Legal Service within an hour when an Aboriginal person is taken into custody: s 464FA. The role of victim support programs is discussed in ch 12, and the role of community organisations in ch 8.

- 5.16 Organisations will have to develop codes of practice to ensure referrals are made consistently. These will depend on each organisation's preferences and systems, and so we have not recommended a particular form of referral.
- 5.17 We also recommend in Chapter 4 changing the Victims' Charter Act, so that the Victims of Crime Commissioner can use their powers to monitor compliance with the rights on referrals more effectively. While the Act already requires a general right of referral 'if appropriate' to relevant support services and to others that may provide access to entitlements and legal assistance, we recommend strengthening this reference.
- 5.18 Instead of a general right of referral 'where appropriate', we recommend that, for victim survivors of sexual offences, the right to be referred should require an agency to refer a person to the support services identified in the local protocol within the timeframe set out in the protocol. This will help keep people accountable.
- 5.19 We also recommend in Chapter 12 moving towards a model of victim advocates. This model would include a function of helping people to navigate services, including ensuring that people are referred to services.

## Organisations can improve the way they work together

### Multi-disciplinary centres are one way of working together

- 5.20 The most 'integrated' models for sexual violence in Victoria are multi-disciplinary centres (MDCs), which were established after our previous inquiry into sexual offences. There are seven centres in Victoria, with an eighth planned for Shepparton.<sup>22</sup>
- 5.21 The aim of MDCs is to provide 'a collaborative, wrap-around service that is trauma-informed and best practice, that offers an efficient and effective pathway' for people experiencing sexual violence to access counselling, support and justice.<sup>23</sup>
- 5.22 The centres are discreet and private. They are located away from police stations, and police officers in MDCs do not wear uniforms. The buildings have discreet signs. The centres have counselling and clinic rooms, evidence recording facilities and, in some cases, forensic medical suites.<sup>24</sup>
- 5.23 All MDCs include:
- specialist police officers (the Sexual Offences and Child Abuse Investigation Teams, or SOCITs)
  - counsellor advocates from CASAs
  - child protection officers
  - community health nurses.<sup>25</sup>
- 5.24 Some MDCs include other partners, such as workers from the Victims Assistance Program (discussed in Chapter 12).<sup>26</sup> The centre in Dandenong also includes family violence teams from Victoria Police.<sup>27</sup> The Victorian Government is currently working to develop a 'core' MDC model, as part of its work to clarify the relationships between MDCs and Orange Doors.<sup>28</sup>

22 Submissions 17 (Sexual Assault Services Victoria), 68 (Victoria Police); Victoria Police, *Multidisciplinary Centres (MDCs)* (Information Sheet, 16 October 2017) <[https://msau-mdvs.org.au/wp-content/uploads/2019/04/MDC\\_Information\\_Sheet.pdf](https://msau-mdvs.org.au/wp-content/uploads/2019/04/MDC_Information_Sheet.pdf)>. Existing MDCs are in Mildura and Seaford (opened 2007), Geelong (opened 2012), Dandenong (opened 2014), Morwell and Bendigo (opened 2015), Wyndham (opened 2018).

23 Submission 17 (Sexual Assault Services Victoria).

24 'Sexual Offences and Child Abuse Investigation Teams', *Victoria Police* (Web Page, 5 July 2021) <<https://www.police.vic.gov.au/sexual-offences-and-child-abuse-investigation-teams>>.

25 Submission 17 (Sexual Assault Services Victoria).

26 Ibid.

27 Premier of Victoria, 'Family Violence Support under One Roof' (Media Release, 21 April 2017) <<http://www.premier.vic.gov.au/family-violence-support-under-one-roof/>>. This MDC has also been evaluated, but this evaluation was not published and was not provided to the Victorian Law Reform Commission.

28 Agreement about the 'core services' is recommended in Submission 10 (Carolyn Worth AM and Mary Lancaster).



- 5.25 Orange Doors (also known as support and safety hubs) are new and they work differently to MDCs. Orange Doors are the flagship reform of the Royal Commission on Family Violence, and have been built on the model of MDCs. These are still being established, with most of the 17 sites due to open by the end of 2022.<sup>29</sup>
- 5.26 In Orange Doors, several organisations, including family violence services, child protection and Aboriginal services, work together to respond to the needs of victim survivors, perpetrators and families.<sup>30</sup>
- 5.27 The Orange Door is a 'front door' into services. Partner agencies work together in multi-disciplinary teams to assess and prioritise the needs and goals of clients. People can receive crisis support from the Orange Door and be referred to other services.<sup>31</sup>
- 5.28 The Orange Door model does not include police. In contrast, in MDCs Victoria Police are core partners and in most cases the lead agency. MDCs are also funded by the Department of Justice and Community Safety.
- 5.29 The MDC model aims to improve practice by locating agencies in the same place, rather than working together in teams.<sup>32</sup> Services within MDCs work under their own protocols, funding arrangements and legislation, with processes for working together set out in a memorandum of understanding and local area agreements.<sup>33</sup> Members of MDCs also have regular opportunities for shared training and learning.<sup>34</sup>
- 5.30 The two models therefore differ in their approaches, with Orange Doors adopting a more multi-disciplinary and joint response to clients. In contrast, MDCs mainly focus on improving relationships through co-location, with more informal collaboration.
- 5.31 Sexual Assault Services Victoria (SAS Victoria) told us that there was 'work to be done to reconcile the two different multi-agency models'.<sup>35</sup> This was also reflected in a report on improving collaboration between family violence and sexual assault services, discussed below.

### Multi-disciplinary centres are achieving their aims

- 5.32 Multi-agency models aim to reduce the need for people to re-tell their stories and navigate complex systems. They also aim to improve how people who respond to violence share information, skills and relationships.<sup>36</sup>
- 5.33 Evaluations indicate MDCs are achieving these aims.<sup>37</sup> People who had attended a centre were positive about their experience. MDCs were seen to offer more privacy and easy access to a range of services.<sup>38</sup>

29 Victorian Government, 'The Orange Door: Delivering a Statewide Network of Specialist Hubs for Family Violence Support and Services', *Engage Victoria* (Web Page) <<https://engage.vic.gov.au/family-violence-rolling-action-plan-2020-2023/the-orange-door>>.

30 Victorian Government, *The Orange Door Service Model* (Guide, December 2019) <<http://www.vic.gov.au/orange-door-service-model>>.

31 Ibid.

32 Victoria Police, *Multidisciplinary Centres (MDCs)* (Information Sheet, 16 October 2017) <[https://msau-mdvs.org.au/wp-content/uploads/2019/04/MDC\\_Information\\_Sheet.pdf](https://msau-mdvs.org.au/wp-content/uploads/2019/04/MDC_Information_Sheet.pdf)>. Tidmarsh and Hamilton observe that MDCs still need to move 'from co-location to effective co-working': Submission 44 (Dr Patrick Tidmarsh and Dr Gemma Hamilton).

33 Victoria Police, *Multidisciplinary Centres (MDCs)* (Information Sheet, 16 October 2017) <[https://msau-mdvs.org.au/wp-content/uploads/2019/04/MDC\\_Information\\_Sheet.pdf](https://msau-mdvs.org.au/wp-content/uploads/2019/04/MDC_Information_Sheet.pdf)>.

34 Submission 68 (Victoria Police).

35 Submission 17 (Sexual Assault Services Victoria).

36 See Jan Breckenridge et al, *Meta-Evaluation of Existing Interagency Partnerships, Collaboration, Coordination and/or Integrated Interventions and Service Responses to Violence against Women* (State of Knowledge Paper No 11/2015, ANROWS Australia's National Research Organisation for Women's Safety, September 2015) 9, Table 1 (adapted from Fine, Pancharatnam and Thomson (2000)) <<https://www.anrows.org.au/publication/meta-evaluation-of-existing-interagency-partnerships-collaboration-coordination-and-or-integrated-interventions-and-service-responses-to-violence-against-women-key-findings-and-future-directions/>>.

37 See Martine B Powell and Rita Cauchi, 'Victims' Perceptions of a New Model of Sexual Assault Investigation Adopted by Victoria Police' (2013) 14(3) *Police Practice and Research* 228, 239–40; 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, 338–43; Success Works and Department of Justice (Vic), *Sexual Assault Reform Strategy* (Final Evaluation Report, Department of Justice (Vic), January 2011) ii, 24–5 <<https://trove.nla.gov.au/version/169811763>>. We are aware of a second, unpublished, evaluation in 2015.

38 Martine B Powell and Rita Cauchi, 'Victims' Perceptions of a New Model of Sexual Assault Investigation Adopted by Victoria Police' (2013) 14(3) *Police Practice and Research* 228, 234–6, 238; note, however, that this evaluation also included the benefits of SOCITs. See also Monash Health and South Eastern CASA (Centre Against Sexual Assault & Family Violence), *Keep Following the Yellow Brick Road. The Trials, Tribulations and Triumphs of Colocated Police, Child Protection and Sexual Assault Workers* (Report, 21 February 2016) <<https://www.casa.org.au/assets/Documents/keep-following-the-yellow-brick-road.pdf>>. The second evaluation, in 2015, did not interview people who had experienced sexual violence.



- 5.34 An early evaluation also found that these reforms could 'significantly contribute to a cultural shift' in attitudes of police involved in the pilot.<sup>39</sup> It found that the MDCs had improved cooperation and changed practice. A second evaluation found much closer cooperation for joint investigations into child sexual abuse.<sup>40</sup>
- 5.35 During this inquiry, we heard widespread support for multi-disciplinary centres.<sup>41</sup> For people experiencing sexual violence, the centres improved availability, communication and continuity between services,<sup>42</sup> and contributed to increased reporting and reduced the number of withdrawn reports.<sup>43</sup>

One woman spoke of the value of reporting to a SOCIT [at an MDC], saying she 'felt very safe and supported' because the building was not connected to the police station, which was especially important in a small regional town.<sup>44</sup>

- 5.36 Other benefits included:
- more opportunities for partners to come together early and regularly to discuss cases
  - clear roles in relation to family violence police investigators and SOCITs
  - clear protocols and processes for planning
  - partners learning from and adopting each other's knowledge and approaches.<sup>45</sup>

## There are opportunities to improve multi-disciplinary centres

The multi-disciplinary centre model should be expanded

- 5.37 Several people, including the Victims of Crime Commissioner, supported expanding MDCs across Victoria.<sup>46</sup> Victoria Police and SAS Victoria both expressed powerful support for the model.<sup>47</sup>
- 5.38 They also identified a need to extend services within MDCs. SAS Victoria suggested including mental health and drug and alcohol services, as well as the Office of Public Prosecutions.<sup>48</sup> Victoria Police identified opportunities to extend MDCs and improve the diversity of services beyond its primary focus on women and children.<sup>49</sup> The Gatehouse Centre also suggested that forensic paediatricians should be part of MDCs.<sup>50</sup>

The Multi-Disciplinary Centre model could be strengthened

- 5.39 Integrated models face some common challenges. These include:
- power imbalances between agencies
  - tensions in their purposes and goals, perspectives and disciplines
  - information-sharing and privacy concerns

39 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, 350.

40 This second evaluation has not been published. This summary is from Monash Health and South Eastern CASA (Centre Against Sexual Assault & Family Violence), *Keep Following the Yellow Brick Road. The Trials, Tribulations and Triumphs of Colocated Police, Child Protection and Sexual Assault Workers* (Report, 21 February 2016) <<https://www.casa.org.au/assets/Documents/keep-following-the-yellow-brick-road.pdf>>.

41 Submissions 44 (Dr Patrick Tidmarsh and Dr Gemma Hamilton), 45 (Victims of Crime Commissioner), 55 (Springvale Monash Legal Service), 68 (Victoria Police); Consultation 25 (CASA senior counsellor/advocates). See also Consultation 8 (Family Violence Reform Implementation Monitor).

42 Submissions 17 (Sexual Assault Services Victoria), 45 (Victims of Crime Commissioner), 55 (Springvale Monash Legal Service).

43 Victoria Police, *Policing Harm, Upholding the Right: Victoria Police Strategy for Family Violence, Sexual Offences and Child Abuse 2018-2023* (Policy, 2017) 15 <<https://www.police.vic.gov.au/sites/default/files/2019-03/Policing-Harm-Upholding-The-Right.pdf>>.

44 Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021).

45 Submission 17 (Sexual Assault Services Victoria).

46 Submissions 10 (Carolyn Worth AM and Mary Lancaster), 22 (knowmore legal service), 45 (Victims of Crime Commissioner).

47 Submissions 17 (Sexual Assault Services Victoria), 68 (Victoria Police).

48 Submission 17 (Sexual Assault Services Victoria).

49 Submission 68 (Victoria Police).

50 Submission 14 (Gatehouse Centre, Royal Children's Hospital).

- being responsive and accessible to diverse and complex needs<sup>51</sup>
  - not enough resources.<sup>52</sup>
- 5.40 These challenges were reflected in our inquiry. SAS Victoria told us that:
- In some centres approaches were still too 'siloed', with inadequate understanding of each other's work and perspectives.
  - There was not enough communication, possibly because of a lack of resources.
  - There was a need to improve induction processes for new members.<sup>53</sup>
- 5.41 The Gatehouse Centre supported reviewing the structure of the MDC model and the role of Victoria Police as the lead agency at most MDCs.<sup>54</sup> It told us that:
- Lead agencies ... are the principal conduit for both funding and Victorian Government contract communication. This structurally advantageous position often causes lead agencies to exert an oversized influence over the management of the relevant project. This inequitable dynamic sits uncomfortably with a project designed to create and maintain cross-agency coordination and collaboration. For MDCs, this problem is exacerbated by the fact that Victoria Police is a workforce in constant churn. This churn results in frequent changes to SOCIT membership, which is disruptive to MDC leadership and the goal of creating a permanent culture of integration.<sup>55</sup>
- 5.42 Associate Professor Gall recommended a review of the governance structure of MDCs, with transfer of management and funding to the then Department of Health and Human Services.<sup>56</sup> As discussed in Chapter 16, he and the Victorian Institute of Forensic Medicine each said that forensic medical examinations should be conducted at hospitals, rather than MDCs.<sup>57</sup>
- 5.43 There is also an opportunity to increase the level of collaboration within the MDCs and more broadly. Victoria Police, for example, said that, anecdotally, police and staff in MDCs and other support services saw 'significant advantages to cross-agency, or multi-agency reflective practices'.<sup>58</sup> This kind of practice can include regular sessions to reflect as a group, for example, on the ways they work together and how to improve their processes.

51 Jan Breckenridge et al, *Meta-Evaluation of Existing Interagency Partnerships, Collaboration, Coordination and/or Integrated Interventions and Service Responses to Violence against Women* (State of Knowledge Paper No 11/2015, ANROWS Australia's National Research Organisation for Women's Safety, September 2015) 21–6 <<https://www.anrows.org.au/publication/meta-evaluation-of-existing-interagency-partnerships-collaboration-coordination-and-or-integrated-interventions-and-service-responses-to-violence-against-women-key-findings-and-future-directions/>>; James Leslie Herbert and Leah Bromfield, 'Better Together? A Review of Evidence for Multi-Disciplinary Teams Responding to Physical and Sexual Child Abuse' (2019) 20(2) *Trauma, Violence, & Abuse* 214, 215, citing NSW Ombudsman, 2012. In a recent national study, the authors were unable to find any integrated responses targeting women with disability: Jan Breckenridge et al, *Meta-Evaluation of Existing Interagency Partnerships, Collaboration, Coordination and/or Integrated Interventions and Service Responses to Violence against Women* (State of Knowledge Paper No 11/2015, ANROWS Australia's National Research Organisation for Women's Safety, September 2015) 25 <<https://www.anrows.org.au/publication/meta-evaluation-of-existing-interagency-partnerships-collaboration-coordination-and-or-integrated-interventions-and-service-responses-to-violence-against-women-key-findings-and-future-directions/>>.

52 Jan Breckenridge et al, *Meta-Evaluation of Existing Interagency Partnerships, Collaboration, Coordination and/or Integrated Interventions and Service Responses to Violence against Women* (Research Report, ANROWS Australia's National Research Organisation for Women's Safety, July 2016) 21 <[https://d2rn9gno7zhxqg.cloudfront.net/wp-content/uploads/2019/02/19025016/H4\\_3.2\\_IRME\\_WEB-270616.pdf](https://d2rn9gno7zhxqg.cloudfront.net/wp-content/uploads/2019/02/19025016/H4_3.2_IRME_WEB-270616.pdf)>.

53 Submission 17 (Sexual Assault Services Victoria). See also Monash Health and South Eastern CASA (Centre Against Sexual Assault & Family Violence), *Keep Following the Yellow Brick Road. The Trials, Tribulations and Triumphs of Colocated Police, Child Protection and Sexual Assault Workers* (Report, 21 February 2016) <<https://www.casa.org.au/assets/Documents/keep-following-the-yellow-brick-road.pdf>>; 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, 350.

54 Submission 14 (Gatehouse Centre, Royal Children's Hospital). It gave as an example the Mallee MDC, where Mallee Sexual Assault Unit is the lead agency.

55 Ibid.

56 Submission 11 (Associate Professor John AM Gall).

57 Ibid; Submission 61 (Victorian Institute of Forensic Medicine).

58 Submission 68 (Victoria Police).

## Multi-disciplinary centres should not be the only model used

- 5.44 Although MDCs are valuable, they should not be 'seen as the solution to too many issues'.<sup>59</sup> Research in the United Kingdom, which uses a similar model, suggests that there is a role for MDC-type models and for independent voluntary organisations.<sup>60</sup>
- 5.45 One reason for this is that many people may not feel comfortable going to an MDC, because of the presence of police and child protection. For example, the fear of children being removed is strong in Aboriginal communities, given both past and present practices of removal.<sup>61</sup> Djirra told us that this was 'unfortunate, but the trust has gone in that regard'.<sup>62</sup>
- 5.46 Springvale Monash Legal Service told us that some young people may not feel confident to come if police are involved, and encouraged us to explore integrated models in other settings.<sup>63</sup> It gave as an example a partnership it has with schools in south-east Melbourne, with an onsite lawyer located close to wellbeing staff, as another way for people to disclose sexual violence and seek support.<sup>64</sup>
- 5.47 A growing integrated response to family violence is the use of health justice services. These offer legal services (typically by community legal centres or legal aid commissions) within health services. This can take different forms, including:
- health justice partnerships, where legal help is embedded into a health care setting
  - lawyers employed by health services
  - outreach legal clinics
  - legal and health care as part of a broader hub of services.<sup>65</sup>
- 5.48 Women's Legal Service Victoria, for example, has a health justice partnership with Monash Health for women who attend antenatal appointments.<sup>66</sup> It is common in Aboriginal health or community support settings.<sup>67</sup>
- 5.49 Another model is being established under elder abuse reforms. The Australian Government has funded trials since 2018–19 for elder abuse services, comprising lawyers, social workers, and specialist and support staff who develop a case plan to respond to the individual's needs.<sup>68</sup>
- 5.50 In Chapter 8, we recommend strengthening the role community organisations play in providing people with support and access to the justice system.

## We recommend charting a path towards improving collaboration

- 5.51 We are at a point in the road where progress is stalling on improving the ways organisations work together. While there have been improvements to MDCs and protocols, we are still some way off realising the full benefits of working together.

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59 Submission 44 (Dr Patrick Tidmarsh and Dr Gemma Hamilton).

60 Amanda Robinson and Kirsty Hudson, 'Different yet Complementary: Two Approaches to Supporting Victims of Sexual Violence in the UK' (2011) 11(5) *Criminology & Criminal Justice* 515.

61 Consultation 53 (Elizabeth Morgan House and a victim survivor of sexual assault). See also Marcia Langton et al, *Improving Family Violence Legal and Support Services for Aboriginal and Torres Strait Islander Women* (Research Report No 25, ANROWS Australia's National Research Organisation for Women's Safety, December 2020) 64–6 <<https://www.anrows.org.au/publication/improving-family-violence-legal-and-support-services-for-aboriginal-and-torres-strait-islander-peoples-key-findings-and-future-directions/>>.

62 Consultations 20 (Members of Barwon South West RAJAC and Barwon South West Dhelk Dja Action Group), 30 (Djirra).

63 Submission 55 (Springvale Monash Legal Service).

64 Ibid.

65 Health Justice Australia, *Joining the Dots: 2018 Census of the Australian Health Justice Landscape* (Report, 2018) 2–3 <<https://www.healthjustice.org.au/joining-the-dots/>>.

66 Submission 12 (Women's Legal Service Victoria).

67 Twenty per cent of services target domestic violence, and 17 of the 38 health justice services were located in Aboriginal health or community support settings, 15 of them with Aboriginal Community Controlled Health Organisations: Health Justice Australia, *Joining the Dots: 2018 Census of the Australian Health Justice Landscape* (Report, 2018) 2–3 <<https://www.healthjustice.org.au/joining-the-dots/>>.

68 'Protecting the Rights of Older Australians', *Attorney-General's Department (Cth)* (Web Page) <<https://www.ag.gov.au/rights-and-protections/protecting-rights-older-australians>>.

- 5.52 The MDC model, while successful, has not fully resolved some tensions that are common to such models. There are lessons to be learnt from other integrated models that have not yet found their way into the MDC model. There are also new integrated models such as Orange Doors to consider.<sup>69</sup>
- 5.53 We support expanding MDCs, but we also need to move beyond them. MDCs are just one part of the larger picture.
- 5.54 As we discuss below, a review has been recently completed identifying ways to strengthen collaboration between family violence and sexual assault services. This will form the foundation of a path towards improving collaboration.
- 5.55 We recommend a similar review across the system for responding to sexual violence, leading to a practical plan that will identify priorities for strengthening collaboration. An independent reviewer should conduct this so that everyone involved can speak freely. However, the report should be prepared with the input of those on the high-level statewide body, as with the review conducted for the family violence and sexual assault peak bodies.
- 5.56 We recommend a review as a first step, but it should not be the last step. Our recommendation is that this review informs a further investment in collaboration. It is not a substitute for that investment.
- 5.57 Reflecting what we heard in this inquiry, the review should consider:
- the key purposes and outcomes for MDCs
  - the governance and funding structure of MDCs
  - which partners should be located within MDCs, including the role of forensic services and (as discussed later) collaboration with other police units such as Family Violence Investigation Units
  - the scope of other services within MDCs
  - ways to strengthen collaborative practice within MDCs, such as cross-agency reflective practice
  - the potential of other integrated models, such as health justice partnerships
  - the relationship between MDCs and other integrated models
  - the planning and sequencing of any expansion of MDCs, based on need and in close consultation with local communities and the relevant regional governance mechanisms.
- 5.58 The review of the purposes and outcomes of MDCs should be informed by the principles of reform we outline in Chapter 1, and by the Sexual Assault Strategy (see Chapter 1). For example, the aims of MDCs should be to support the choices of people experiencing sexual violence.
- 5.59 The review should consider what we can learn from other integrated models. For example, Orange Doors have:
- a manager within each site funded by Family Safety Victoria, and who is independent of the other partner agencies<sup>70</sup>
  - a lead position that focuses on developing collaborative practices
  - 'service system navigators' who identify ways to connect to the broader community and create partnerships.

69 The proposed new mental health system would also be an integrated service system: *Royal Commission into Victoria's Mental Health System* (Final Report, 3 February 2021) 20–2, Recommendation 6 <<https://finalreport.rcvmhs.vic.gov.au/>>.

70 A coordinator role was a recommendation of the second evaluation of MDCs: Monash Health and South Eastern CASA (Centre Against Sexual Assault & Family Violence), *Keep Following the Yellow Brick Road. The Trials, Tribulations and Triumphs of Colocated Police, Child Protection and Sexual Assault Workers* (Report, 21 February 2016) 3 <<https://www.casa.org.au/assets/Documents/keep-following-the-yellow-brick-road.pdf>>.

- 5.60 We note that a project plan is being developed to determine how MDCs interact with the Orange Door. This will help develop a consistent arrangement between sexual assault services and the Orange Door.<sup>71</sup> The review should build upon this work.
- 5.61 There may also be ways to take advantage of the broader range of services in Orange Doors and the new local mental health and wellbeing centres. In Chapter 21, we also note that some Orange Doors will have remote witness facilities and these could be shared with those who experience sexual violence outside a family violence context.
- 5.62 There may also be opportunities flowing from what was learned during the coronavirus (COVID-19) pandemic to improve ways of working together through videoconferencing and virtual teams.<sup>72</sup>
- 5.63 While the involvement of police means that the model of working together in Orange Doors will not be appropriate, the review should also consider the value of joint meetings focused on the needs of clients. This model is used in the child and family advocacy centres in Western Australia (discussed later in this chapter), in risk assessment and management panels as part of the family violence reforms, and under the Enhanced Response Model (discussed below).
- 5.64 In planning the expansion of MDCs, care should also be taken to identify elements of best practice, such as locating MDCs near hospitals to increase access to forensic medical examinations.

## Recommendations

- 11 The Victorian Government should commit to and fund the expansion of Multi-Disciplinary Centres.
- 12 The Victorian Government should set up an independent review of collaboration between those working to respond to sexual violence. The review should:
- identify what could be done to improve collaboration
  - inform an implementation plan that improves collaboration, including how to implement Recommendation 11 and to identify other promising models of collaborative practice that should be implemented.

## Responses to sexual violence within family violence can be improved

- 5.65 There is widespread agreement that we need to improve responses to sexual violence within a family violence context. This is a theme throughout this report.
- 5.66 The Sexual Assault Strategy, which we discuss in Chapter 1, provides an excellent opportunity for Family Safety Victoria to review the family violence reforms to ensure that sexual violence within a family violence context is appropriately recognised. Throughout this report, we have also identified ways to embed sexual violence reforms within family violence reforms (see Chapters 5 and 18).

<sup>71</sup> Email from Family Safety Victoria to Victorian Law Reform Commission, 30 April 2021.

<sup>72</sup> Family Violence Reform Implementation Monitor, *Report of the Family Violence Reform Implementation Monitor* (Report, 1 November 2020) 128 <<http://www.fvrim.vic.gov.au/fourth-report-parliament-1-november-2020-tabled-may-2021>>.

- 5.67 This chapter focuses on the significant overlap between the clients of family violence and sexual assault services.<sup>73</sup>
- 5.68 Most CASAs have a relationship with local family violence services, such as being co-located with family violence services or having regular visiting arrangements.<sup>74</sup>
- 5.69 Some regional CASAs operate as combined family violence and sexual assault services.<sup>75</sup> However, these are mostly services that bring together staff members who work in either family violence or sexual violence. Few staff provide both services.<sup>76</sup>
- 5.70 These services share similar principles in the way they work and in their understanding of their clients. However, there are key differences.
- 5.71 Family violence services are more focused on risk and on case management, while sexual assault services focus on counselling.<sup>77</sup> Sexual assault services provide longer-term interventions while family violence services are more often responding to crisis. Family violence services also typically have a wider range of functions (including, for example, case management), and are part of a much larger sector. Their funding models also differ.<sup>78</sup>

### Family and sexual violence services can improve the way they work together

- 5.72 There is some data on how often sexual violence occurs within family violence. The Personal Safety Survey in 2016 reported that intimate partners were responsible for 46 per cent of the experiences of sexual violence among adult females, and family members were responsible for another 7 per cent.<sup>79</sup> Domestic violence and sexual assault service providers estimate upwards of 70 per cent of their adult female clients experience sexual violence within a family violence context. These experiences are not, however, reported to police at the same rate. As Victoria Police have identified, over a third of sexual offences reported to police involve intimate partner sexual violence, child sexual abuse or other family violence.<sup>80</sup>
- 5.73 The challenge is to make sure that family violence and sexual assault services work together to support people who experience sexual violence within family violence. While there has been much effort and progress in doing this (see box), we heard that there is still some way to go.

73 Domestic Violence Victoria and CASA Forum, *Progressing Recommendation 31—Final Report* (Report, September 2020) 20 <<http://dvvic.org.au/publications/progressing-recommendation-31-final-report/>>.

74 Ibid 23.

75 Mallee Sexual Assault Unit and Mallee Domestic Violence Services, 'Home', *MDSAU MDVS* (Web Page) <<https://msau-mdvs.org.au/>>; *The Sexual Assault and Family Violence Centre* (Web Page, 2021) <<https://www.safvcentre.org.au/>>.

76 Domestic Violence Victoria and CASA Forum, *Progressing Recommendation 31—Final Report* (Report, September 2020) 22 <<http://dvvic.org.au/publications/progressing-recommendation-31-final-report/>>.

77 Ibid 17–18.

78 Ibid 19.

79 This is calculated from Australian Bureau of Statistics, *Personal Safety, Australia, 2016* (Catalogue No 4906.0, 8 November 2017) Table 3.1. The experiences of adult females are for the most recent incident of violence experienced in the past 10 years. The sample of sexual violence experienced by men is not statistically reliable enough for general use.

80 Victoria Police, *Policing Harm, Upholding the Right: Victoria Police Strategy for Family Violence, Sexual Offences and Child Abuse 2018–2023* (Policy, 2017) 7, 10 <<https://www.police.vic.gov.au/sites/default/files/2019-03/Policing-Harm-Upholding-The-Right.pdf>>.



### Family violence reforms and sexual assault services

Following the Royal Commission into Family Violence's recommendations,<sup>81</sup> sexual assault services:

- must align their policies, procedures, practice guidance and tools to the Family Violence Multi-Agency Risk Assessment and Management Framework<sup>82</sup>
- can share information under the Family Violence Information Sharing Scheme and Child Information Sharing Scheme<sup>83</sup>
- are funded alongside family violence services.<sup>84</sup>

As discussed below, a project has recently been completed to identify ways to improve collaboration between the two sectors.

- 5.74 The Australian Association of Social Workers said that, while it commended the family violence reforms, its members continued to see 'limited improvement in response to sexual offences within intimate partner relationships'. They continued to see 'gaps in the system', especially for women who faced greater barriers to support and justice, such as women on partner visas. It was 'still difficult to get action taken by police and the courts' on sexual offending within intimate partner relationships, even when these were reported.<sup>85</sup>
- 5.75 Dr Patrick Tidmarsh and Dr Gemma Hamilton, who are researching the connection between family and sexual violence, saw the fields as 'currently quite separate'. A lack of policy work on the similarities and differences has led to 'much confusion in the sector and a lack of connection in service delivery'. They pointed out that child sexual abuse was 'missing' in many discussions of family violence. They saw a need for more 'cross-pollination' of family violence and sexual assault services, including more training and development and potentially co-location.<sup>86</sup>

[T]here's a big gap between common practice and best practice. There's a real area of need in relation to [sexual violence] in [family violence] situations: a need to build on best practice. Common practice generally falls short because it's such a pressured environment.—Rodney Vlasis<sup>87</sup>

- 5.76 Project Respect identified a need to improve awareness and understanding within family violence services of the intersections in the sex industry between family violence, trafficking and sexual assault.<sup>88</sup>
- 5.77 The Victorian Aboriginal Child Care Agency supported the need for further integration including joint training and a more collaborative practice between sexual assault and family violence services and Aboriginal community-controlled organisations. It told us that there was a need for sexual violence committed in and outside family violence contexts to be 'afforded the same gravitas' as other kinds of violence.<sup>89</sup>

81 *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016) Recommendations 31–2. See also vol 2, 236–7 <<http://rcfv.archive.royalcommission.vic.gov.au/Report-Recommendations.html>>.

82 The Common Risk Assessment Framework (CRAF), established in 2007, was examined by the Royal Commission into Family Violence, which made key recommendations for improvement. The framework has been renamed the Multi-Agency Risk Assessment and Management Framework (MARAM): 'Family Violence Multi-Agency Risk Assessment and Management Framework', *VIC.GOV.AU* (Web Page, 29 June 2021) <<https://www.vic.gov.au/family-violence-multi-agency-risk-assessment-and-management>>.

83 Victorian Government, 'About the Information Sharing and MARAM Reforms', *VIC.GOV.AU* (Web Page, 3 June 2021) <<http://www.vic.gov.au/about-information-sharing-schemes-and-risk-management-framework>>.

84 Victorian Government, *Creating Jobs, Caring for Victorians* (Budget Paper No 3, May 2021) 51.

85 Submission 13 (Australian Association of Social Workers).

86 Submission 44 (Dr Patrick Tidmarsh and Dr Gemma Hamilton).

87 Consultation 18 (Rodney Vlasis).

88 Submission 50 (Project Respect).

89 Submission 21 (Victorian Aboriginal Child Care Agency).



## We commend the work on family violence and sexual assault service collaboration

- 5.78 Concerns about the need to connect responses between family violence and sexual assault services were reflected in a recent report reviewing the collaboration between family violence and sexual assault services. It found 'significant variation' in the ways the two sectors worked together, including referrals and working with joint clients.<sup>90</sup>
- 5.79 This report was commissioned as part of implementing family violence reforms and was prepared by a consulting firm for the peak bodies of both sectors. Family Safety Victoria is working with these peak bodies to review and prioritise the 20 recommendations made by the report. This will be a key input into the Sexual Assault Strategy.<sup>91</sup>
- 5.80 The report's first recommendation was for Family Safety Victoria to 'recognise and support each specialist sector in its own right, and support greater collaboration'. It found that the essentials for working together existed and that there was a willingness to work together more and improve the way they approached sexual violence within the family violence context.<sup>92</sup>
- 5.81 The report's main recommendations address:
- improving collaborative practice through improving referral pathways, co-located approaches, and developing a framework to guide and support joint client work
  - flexible funding frameworks to better support integrated service delivery
  - improving information between the two sectors about their services and how to access them
  - case management within specialist sexual assault services (see Chapter 12)
  - designing service models that clearly address sexual violence within a family violence context
  - professional development opportunities
  - research on effective service responses to sexual violence within the family violence context.<sup>93</sup>
- 5.82 The report also recommended the need for further examination of the relationship between the two after-hours crisis services, the MDC and Orange Door models (discussed above), and family violence therapeutic counselling services.<sup>94</sup> In this inquiry, both sexual assault and family violence peak bodies supported the recommendations in that report.<sup>95</sup>
- 5.83 This joint report between the two sectors provides an excellent roadmap to address most of the concerns raised with us. It provides practical steps to make sure family violence services can better identify sexual violence and create better pathways to support for sexual violence. We commend the work that is being done to progress this and look forward to seeing this work reflected within the Sexual Assault Strategy.
- 5.84 In Chapter 7, we recommend significant investment to establish a new central website where people can access information and connect with support services. We recommend that this should build on existing services (such as the Sexual Assault Crisis Line) and be embedded in the service system structure. This can include a relationship with family violence services such as Safe Steps.

90 Domestic Violence Victoria and CASA Forum, *Progressing Recommendation 31—Final Report* (Report, September 2020) 35 <<http://dvvic.org.au/publications/progressing-recommendation-31-final-report/>>.

91 Email from Family Safety Victoria to Victorian Law Reform Commission, 30 April 2021.

92 Domestic Violence Victoria and CASA Forum, *Progressing Recommendation 31—Final Report* (Report, September 2020) 1–33 <<http://dvvic.org.au/publications/progressing-recommendation-31-final-report/>>.

93 Ibid Recommendations 1–17.

94 Ibid 37–8.

95 Submissions 17 (Sexual Assault Services Victoria), 56 (Domestic Violence Victoria). Two areas raised by Sexual Assault Services Victoria's submission which were also addressed by the report were: the need to improve training on identifying sexual assault within family violence services; and better coordination between the two sectors when working with shared clients.

- 5.85 We also note that the lack of a referral protocol between Victoria Police and the after-hours Sexual Assault Crisis Line resulted in referrals being sent through to the Safe Steps line instead.<sup>96</sup> This is identified as an issue to be addressed in the multi-agency protocol recommended in Chapter 4.

### Police should build on their integration of family violence and sexual violence

- 5.86 Victoria Police has specialised police officers dealing with sexual violence (SOCITS) as well as family violence investigation units. While both sit under the family violence command within Victoria Police, we heard that more could be done to integrate this work.
- 5.87 Sexual Assault Services Victoria told us that Victoria Police could improve the way its family violence and sexual assault units worked together, including by clarifying the responsibilities of each unit.<sup>97</sup> Dr Patrick Tidmarsh and Dr Gemma Hamilton supported more 'cross-pollination' between practitioners and regular collaboration between them.<sup>98</sup> Associate Professor John Gall supported integrating the units.<sup>99</sup>
- 5.88 Victoria Police has already begun work to integrate the work of family violence investigation units alongside SOCITs in three MDCs. It told us there were also plans to co-locate the units in Shepparton.<sup>100</sup>
- 5.89 The lessons from these co-locations within MDCs should inform the broader review we recommend above. The review should identify the partners which should be within MDCs, including which police units should be present. It should also consider other ways to improve collaboration between police officers who work with sexual violence in a family violence context, such as joint training and case planning.

## Child Protection and criminal justice processes could strengthen the way they work together

### Joint Child Protection and criminal investigations can be at odds

In one case, we had a family where the child disclosed the abuse, the dad was subsequently removed from home, and the SOCIT team commenced an investigation which has gone on for 18 months. Child Protection is stuck, as the dad is denying the allegations against him. As a result, any recovery of the family is stalled and dependent on [the] justice system moving forward, and the pressure returns to the mum, who [is a] single parent in the home.<sup>101</sup> —Sexual Assault Services Victoria Specialist Children's Services

- 5.90 Child Protection and the police may be involved in investigating cases of child sexual abuse. However, the purposes, evidence required, timeframes and outcomes of each investigation are different (see Table 6). The purpose of a Child Protection investigation is to establish if the child is in need of protection, and the child's parents have not protected or are unlikely to protect them from harm, so Child Protection investigations can end earlier than a criminal investigation if Child Protection is satisfied that there are parents who are likely to protect the child.

<sup>96</sup> Submission 56 (Domestic Violence Victoria).

<sup>97</sup> Submission 17 (Sexual Assault Services Victoria).

<sup>98</sup> Submission 44 (Dr Patrick Tidmarsh and Dr Gemma Hamilton).

<sup>99</sup> Submission 11 (Associate Professor John AM Gall). Tidmarsh and Hamilton proposed a new relationship-based crime command, with co-location and 'seamless training' for family violence and sexual offences investigators: Submission 44 (Dr Patrick Tidmarsh and Dr Gemma Hamilton).

<sup>100</sup> The three MDCs were Geelong, Wyndham and Dandenong: Submission 68 (Victoria Police).

<sup>101</sup> Consultation 23 (Sexual Assault Services Victoria Specialist Children's Services).

- 5.91 This chapter deals with how to improve the interaction between Child Protection and criminal justice processes. We discuss barriers to reporting in Chapter 2, and ways to support children and young people in Chapter 12.

**Table 6: Comparison of Child Protection and criminal investigations**

Feature	Child Protection investigation	Criminal investigation
Purpose	To establish if the child is in need of protection, including if the child has suffered, or is likely to suffer, significant harm as a result of sexual abuse and the child's parents have not protected or are unlikely to protect them from that harm <sup>102</sup>	To establish if sexual offence committed
Evidence	Satisfied on reasonable grounds that the child is in need of protection	Reasonable prospect of conviction (which is then based on a 'beyond reasonable doubt' standard)
Timeframes	Child Protection to determine outcome within 28 days of report	No specific timeframe, but data suggests that police lay around two-thirds of charges within three months or less <sup>103</sup>
Outcomes	Protection order made in the Children's Court or case closed	Charge laid or charge not laid

- 5.92 This can cause tensions, as a paediatric forensic examiner observed:

Victims of family violence/sexual assault/abuse risk either being over investigated or under investigated. For example, a victim may be subjected to multiple interviews by different agencies regarding the same event. This may lead to differing accounts which may be detrimental to any case later heard in court. Repeated interviews by different agencies may also dissuade the victim from proceeding with their complaint due to perceived harassment. At the other end of the spectrum, the differing agencies may believe that the other agency has undertaken the investigation where in fact it hasn't leading to the case being under investigated and no prosecution or intervention proceeding.<sup>104</sup>

- 5.93 Delays in investigations can also lead to children being stuck in unsafe situations or dropping out of justice processes. We also heard that criminal proceedings may discourage an accused from being involved in Child Protection risk assessments, or may mean that they cannot fully take part in a contested Child Protection case.<sup>105</sup>
- 5.94 A formal protocol governs the relationship between Child Protection and police (see box). Another protocol sets out referral pathways in family violence incidents between Child Protection, Victoria Police and Family Safety Victoria.<sup>106</sup>

<sup>102</sup> *Children, Youth and Families Act 2005* (Vic) s 162.

<sup>103</sup> S Bright et al, *Attrition of Sexual Offence Incidents through the Victorian Criminal Justice System: 2021 Update* (Report, Crime Statistics Agency, 2021). This study focuses on child and adult sexual offences.

<sup>104</sup> Submission 11 (Associate Professor John AM Gall).

<sup>105</sup> Consultation 61 (Children's Court of Victoria).

<sup>106</sup> Families, Fairness and Housing (Vic), *Family Violence Referral Protocol between DHHS, Family Safety Victoria and Department of Justice and Regulation and Victoria Police* (Report, 2018) <<https://providers.dhhs.vic.gov.au/family-violence-referral-protocol-between-dhhs-family-safety-victoria-and-department-justice-and>>.

### Protecting Children Protocol

The Protocol requires the police and Child Protection to:

- inform each other of all allegations of child sexual abuse and other interactions involving both Child Protection and police
- work together to coordinate, plan and share information about joint investigations, according to agreed principles
- organise a quality care screening meeting to address out-of-home care concerns
- resolve disputes through a process of escalation.<sup>107</sup>

The protocol identifies matters that should be considered in planning for joint investigations, such as interviews, medical examinations, gathering further evidence, how to deal with the accused, and the taking of a statement of complaint.<sup>108</sup>

An addendum to the Protocol sets out further requirements to prevent sexual exploitation in out-of-home care. This requires the parties to:

- strengthen local governance arrangements
- promote practice and professional development
- share information and data.

It also requires police to be represented on multi-disciplinary high-risk youth panels. The addendum also establishes a sub-committee that is responsible for developing a statewide strategy, analysing data and monitoring compliance.<sup>109</sup>

## Multi-agency approaches to child sexual abuse are becoming common

- 5.95 The move towards multi-agency models of responding to violence, discussed above, has also been a key theme of reforms in responding to child sexual abuse.<sup>110</sup>
- 5.96 In Victoria, MDCs reflect this trend, with Child Protection and police co-located together with CASA counsellors. However, as discussed earlier, this is a co-located model rather than a more formal joint response by Child Protection and police.<sup>111</sup>
- 5.97 A multi-agency approach is taken also to dealing with children using harmful sexual behaviour (discussed in Chapter 8). Police and Child Protection have also recently piloted a multi-agency model for reducing child sexual exploitation (see box).

107 Department of Human Services (Vic), Victoria Police and Child Protection (Vic), *Protecting Children* (Protocol, June 2012) <<https://www.cpmanual.vic.gov.au/sites/default/files/Protecting-Children-CP-and-VicPol-protocol-2012-2825.pdf>>. Under the Protocol, the police are required to notify Child Protection of all allegations of physical abuse, sexual abuse and child neglect, and if a child is harmed or at risk of harm. The police are also required to notify Child Protection if they are interviewing a child victim or witness involved with Child Protection, or if there is an alleged offender who is a Child Protection client. The Protocol requires Child Protection to notify the police if a child is in need of protection due to sexual abuse, physical abuse or serious neglect.

108 Ibid ch 14.

109 Department of Human Services (Vic) and Victoria Police, *Addendum—Preventing Sexual Exploitation of Children and Young People in Out-of-Home Care* (Addendum, 2014) <[https://www.cpmanual.vic.gov.au/sites/default/files/addendum%20to%20police%20protocol%20re%20SE\\_09.04.14.pdf](https://www.cpmanual.vic.gov.au/sites/default/files/addendum%20to%20police%20protocol%20re%20SE_09.04.14.pdf)>.

110 See James L Herbert and Leah Bromfield, *National Comparison of Cross-Agency Practice in Investigating and Responding to Severe Child Abuse* (CFCA Paper No 47, Australian Institute of Family Studies (Cth), February 2018) <<https://aifs.gov.au/cfca/publications/national-comparison-cross-agency-practice-investigating-and-responding>>.

111 *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report* (Executive Summary and Parts I-II, 2017) 371.

### The Enhanced Response Model for Sexual Exploitation

This model was piloted in July 2016 by Victoria Police and Child Protection for 12 months in five locations.<sup>112</sup> Its chief aim was to stop the sexual exploitation of children known to Child Protection, reduce the risk of this happening, and to hold offenders to account.

The model 'piloted interventions and processes that focused on the areas of governance, intelligence, investigation and disruption of offenders'. It also improved relationships with young people and information-sharing practices between Victoria Police, Child Protection, and community service organisations, including those who provide residential care.<sup>113</sup>

The pilot was not rolled out because of constraints in resourcing, although Victoria Police told us that the lessons have been 'integrated into business-as-usual practices'.<sup>114</sup>

The Commission for Children and Young People reported, however, that while some elements of the pilot continue in local areas, 'other areas reported poor levels of cooperation'. It also found that other measures, including centralised, cross-agency reporting and an interdepartmental committee, 'were also allowed to stop'.<sup>115</sup> It recommended that the Victorian Government commit to and maintain a joint, targeted, statewide response to child criminal exploitation, like the Enhanced Response Model.

- 5.98 As with other multi-agency models, there is a need for more research on their effectiveness for responding to child sexual abuse. A recent review of multi-agency models for child sexual abuse found:
- evidence that they increased the mental health and medical services clients received
  - some evidence that Child Protection responses increased
  - mixed evidence of higher satisfaction with these responses
  - mixed evidence that these increased arrests or prosecutions.<sup>116</sup>
- 5.99 As noted earlier, evaluations of MDCs have found that these have increased cooperation in Child Protection and criminal investigations.<sup>117</sup> As we discuss next, there are ways to further strengthen these joint investigative responses.

112 See Premier of Victoria, *Protecting Children From Sexual Exploitation* (Media Release, 1 July 2016) <<http://www.premier.vic.gov.au/protecting-children-from-sexual-exploitation-0>>.

113 Submission 68 (Victoria Police).

114 Ibid. All of the original sites continue to use this approach, and another 10–12 SOCIT sites use these practices or are considering them: Consultation 57 (Department of Health and Human Services).

115 Commission for Children and Young People (Vic), *Out of Sight: Systemic Inquiry into Children and Young People Who Are Absent or Missing from Residential Care* (Report, 2021) 22 <<https://ccyp.vic.gov.au/assets/Publications-inquiries/Out-of-sight-inquiry-report-Web.pdf>>.

116 James Herbert and Leah Bromfield, *Components of Effective Cross-Agency Responses to Abuse—A Report for the NSW Ombudsman's Office* (No 2, Australian Centre for Child Protection, University of South Australia, August 2017) 6–7, 109–10 <<https://www.unisa.edu.au/siteassets/episerver-6-files/global/eass/research/accp/components-of-effective-cross-agency-responses-to-abuse.pdf>>. See also Nina Westera, Elli Darwinckel and Martine Powell, *A Systematic Review of the Efficacy of Specialist Police Investigative Units in Responding to Child Sexual Abuse* (Report, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016) <<http://www.childabuseroyalcommission.gov.au/getattachment/9f511ab0-c107-42b9-814c-b5e502b5fa4b/The-response-of-specialist-police-investigative-un>>.

117 Monash Health and South Eastern CASA (Centre Against Sexual Assault & Family Violence), *Keep Following the Yellow Brick Road. The Trials, Tribulations and Triumphs of Colocated Police, Child Protection and Sexual Assault Workers* (Report, 21 February 2016) <<https://www.casa.org.au/assets/Documents/keep-following-the-yellow-brick-road.pdf>>.

## We can learn from other multi-agency models in Australia

- 5.100 While most other Australian states and territories use a multi-agency model to respond to child sexual abuse, the most comprehensive models are used in New South Wales and Western Australia.<sup>118</sup>
- 5.101 In New South Wales, the model (formerly known as the Joint Investigation and Response Team, JIRT)<sup>119</sup> involves a longstanding partnership between the police, the Department of Family and Communities and NSW Health.
- 5.102 In contrast to the MDC model, the New South Wales model is statewide, with police and child protection co-located in about half the sites. Key features of this model include:
- a cross-agency intake process through a Child Protection Helpline, which screens cases for referrals
  - the involvement of NSW Health as a full partner
  - comprehensive protocols in Australia for joint investigations, joint decision making, including at the local level
  - comprehensive training and professional development for cross-agency work.<sup>120</sup>
- 5.103 The New South Wales Ombudsman recently reviewed the program, and recommended:
- strengthening the advocacy component of its response
  - strengthening joint planning processes and compliance with these
  - improving data collection and performance monitoring
  - strengthening governance, including clearer processes for escalating disputes, more cohesive leadership, and reinstating a mechanism for executive leadership.<sup>121</sup>
- 5.104 The Multiagency Investigation and Support Team (MIST) pilot in Western Australia co-locates police, specialist child interviewers within child protection and a child protection worker, a child and family advocate (see Chapter 12), and therapeutic support services. The model includes strategy meetings between police and child protection with information passed to the child advocate.<sup>122</sup>
- 5.105 The MIST model is closer to the model of child advocacy centres used in the United States, although each centre is different and their services vary.<sup>123</sup> The United States model typically uses independent interviewers, and a distinctive feature of the Western Australian model is the use of a joint team of police and child protection interviewers.<sup>124</sup>
- 5.106 An evaluation of the MIST pilot found that there was no significant difference between the model and usual practice in terms of whether and how far cases progressed through the justice system.<sup>125</sup>

118 James Herbert and Leah Bromfield, *Components of Effective Cross-Agency Responses to Abuse—A Report for the NSW Ombudsman's Office* (No 2, Australian Centre for Child Protection, University of South Australia, August 2017) 67 <<https://www.unisa.edu.au/siteassets/episerver-6-files/global/eass/research/accp/components-of-effective-cross-agency-responses-to-abuse.pdf>>. See, eg, James Herbert, Leah Bromfield, and Australian Centre for Child Protection, *Multiagency Investigation & Support Team (MIST) Pilot: Evaluation Report* (Report, Australian Centre for Child Protection, July 2017); James L Herbert and Leah Bromfield, *National Comparison of Cross-Agency Practice in Investigating and Responding to Severe Child Abuse* (CFCA Paper No 47, Australian Institute of Family Studies (Cth), February 2018) <<https://aifs.gov.au/cfca/publications/national-comparison-cross-agency-practice-investigating-and-responding>>.

119 Following the Ombudsman's review, this has been renamed the Joint Child Protection Response Program: 'The Joint Child Protection Response Program (JCPRP)', *Communities and Justice (NSW)* (Web Page, 24 December 2020) <<https://www.facs.nsw.gov.au/providers/children-families/child-protection-services/joint-child-protection-response>>.

120 New South Wales Ombudsman, *The JIRT Partnership—20 Years On* (Report, August 2017) 21–2, 25–6, 37–8 <<https://www.ombo.nsw.gov.au/news-and-publications/publications/reports/child-protection/the-jirt-partnership-20-years-on>>.

121 Ibid ix–x, xvi, xxi–xiii.

122 James Herbert, Leah Bromfield and Australian Centre for Child Protection, *Multiagency Investigation & Support Team (MIST) Pilot: Evaluation Report* (Report, Australian Centre for Child Protection, July 2017) 8, 19–20. Strategy meetings are also held normally as part of the 'practice as usual' process: 19.

123 See, eg, James Leslie Herbert and Leah Bromfield, 'Evidence for the Efficacy of the Child Advocacy Center Model: A Systematic Review' (2016) 17(3) *Trauma, Violence & Abuse* 341, 342, 352.

124 See James Herbert, Leah Bromfield and Australian Centre for Child Protection, *Multiagency Investigation & Support Team (MIST) Pilot: Evaluation Report* (Report, Australian Centre for Child Protection, July 2017) 30.

125 Ibid 110, 114.



- 5.107 However, it found that the model 'was much quicker from the point of report to each of the key points of the policing response'. There was also high use of support services, although this data could not be compared to the standard process. The evaluation was also positive about its success in improving collaboration among professionals, including interviewers.<sup>126</sup>

### People told us there was a need to strengthen collaboration

- 5.108 The Children's Court of Victoria reported that the protocol between police and Child Protection had improved the way they worked together.<sup>127</sup> However, we heard that there was a need to strengthen collaboration to improve the response of the justice system and outcomes for children and young people.
- 5.109 The Commission for Children and Young People considered there needed to be more structure, formality and transparency, similarly to the New South Wales model.<sup>128</sup>
- 5.110 Family violence practitioners within Victoria Police also considered there was benefit to looking at joint response models such as the Joint Child Protection Response Program. It said the benefit of the model:
- is that each agency has a clear role, within its area of expertise, and the child or young person and their family receive support throughout the process, including immediate access to crisis counselling. Increased collaboration and information sharing also provides the opportunity to improve justice system responses, allowing for increased numbers of offenders to be identified and charged, enhanced standards of briefs of evidence, and more prosecutions.<sup>129</sup>
- 5.111 Sexual Assault Services Victoria (SAS Victoria) and its specialist children's services similarly identified a need for more planning and processes.<sup>130</sup> They supported approaches such as extending co-location, implementing structures that were not dependent on people, and setting out protocols and standards of practice. They thought that current protocols and arrangements are not 'interlocking or interconnected', so there was no way to hold the system to account.<sup>131</sup> The Gatehouse Centre also saw a need for better coordination of investigations.<sup>132</sup>
- 5.112 SAS Victoria also pointed to a need for their workers 'to contribute more fully to influence and ensure a child's safety'. In its view, there was also a need to shift the focus away from children being forced to manage their own safety, and away from placing high levels of responsibility on the parent who was not offending.<sup>133</sup>
- 5.113 SAS Victoria also supported regular meetings to discuss complex cases between Child Protection and sexual assault services, and more collaborative case planning to sustain children's safety after a case was closed.<sup>134</sup>
- 5.114 Dr Patrick Tidmarsh and Dr Gemma Hamilton noted joint investigations between Child Protection and police were not standardised, and depend on ad hoc relationships in certain areas, and that better connections were also needed with family violence investigators.<sup>135</sup>
- 5.115 The Victorian Aboriginal Child Care Agency noted that while initial joint work between itself and SOCITs worked well, responsibilities to follow up with the child and family were not upheld as the case progressed through the system.<sup>136</sup>

126 Ibid 114.

127 Consultation 61 (Children's Court of Victoria).

128 This discussion related to the involvement of Child Protection, Victoria Police and relevant community organisations in responding to a child's report of sexual offences: Consultation 65 (Commissioner for Children and Young People).

129 Submission 68 (Victoria Police).

130 Submission 17 (Sexual Assault Services Victoria); Consultation 23 (Sexual Assault Services Victoria Specialist Children's Services).

131 Consultation 23 (Sexual Assault Services Victoria Specialist Children's Services).

132 Submission 14 (Gatehouse Centre, Royal Children's Hospital).

133 Submission 17 (Sexual Assault Services Victoria).

134 Ibid.

135 Submission 44 (Dr Patrick Tidmarsh and Dr Gemma Hamilton).

136 Submission 21 (Victorian Aboriginal Child Care Agency).



- 5.116 We also heard that there should be better pathways to support through other organisations. Elizabeth Morgan House, a peak Aboriginal women's organisation, had many clients with children under Child Protection, but they had not been referred to Elizabeth Morgan House by Child Protection and Elizabeth Morgan House was not being used as a service to support mothers.<sup>137</sup>

### **We recommend moving towards a partnership model**

- 5.117 While the MDC model has clearly improved joint responses, there are opportunities to strengthen the model, including by learning from the lessons from the Enhanced Response Model and models in other states. These opportunities include:
- extending the benefits of the more integrated approaches used in MDCs across Victoria
  - moving towards a partnership model that includes as key partners the Department of Families, Fairness and Housing and centres against sexual assault
  - formalising processes and protocols to embed collaboration, including through regular joint case meetings
  - improving governance and including stronger accountability mechanisms, learning from the New South Wales model
  - increasing collaborative practice and joint training
  - strengthening the role of child advocacy, learning from the Western Australian model (see Chapter 12)
  - including data analysis, evaluation and review as core parts of the protocol.
- 5.118 In Chapter 4, we recommend developing a multi-agency protocol to clarify roles and set out clearly procedures and mechanisms of accountability between those responding to sexual violence.
- 5.119 We make a similar recommendation here. A separate protocol is needed because of the distinctive role of Child Protection and other legal obligations and relevant agencies.
- 5.120 This protocol should build upon the existing protocol between Victoria Police and Child Protection. The aim would be to build on the benefits of the MDC model and bring these into a broader partnership model. It should address the opportunities identified above.
- 5.121 As we discuss above, this shift does not need to rely on co-location as the key driver of reform. Elements such as joint case meetings and planning, child advocates, joint training, and relationship building across agencies can be achieved in other ways.
- 5.122 This work overlaps with both the work of developing the broader multi-agency protocol and the recommendation in this chapter for a broader plan to strengthen collaboration. Ideally, these recommendations would be developed in parallel, to ensure they 'interlock and interconnect'.
- 5.123 It would also be valuable to consider how the Commission for Children and Young People could play a role in the protocol similar to the role we recommend for the Victims of Crime Commissioner in Chapter 4.

## Recommendation

- 13 The Victorian Government should, building on the Protocol between Child Protection and Victoria Police, develop a revised protocol for child sexual abuse to improve the interactions between the justice system and the child protection system. The revised protocol should move towards:
- a. a partnership model across the state that includes as key partners those responsible for providing therapeutic services for children
  - b. clear and strong processes for joint case planning, joint training and collaborative practice
  - c. a strong component of advocacy for children
  - d. improved governance and accountability
  - e. an approach informed by evidence, including regular data analysis, evaluation and review.



# CHAPTER 06

## Adding to the evidence base about sexual violence

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## 6. Adding to the evidence base about sexual violence

### Overview

- We need to know more about sexual violence and what works in responding to it.
- Gaining this knowledge should be a key goal of the Sexual Assault Strategy.
- We need to know more about the contexts and patterns of sexual violence, why people commit sexual violence, and how to change their behaviour.
- The Sexual Assault Strategy should commit to evaluating what works.
- We need to improve the way we collect, use and publish data on the criminal justice system. This should be the job of a working group.
- This working group should develop an annual report on key data. It should record and address the reasons for delays and measure the impact of reforms.
- The Crime Statistics Agency should also publish regular studies on why cases do not progress through the criminal justice system.

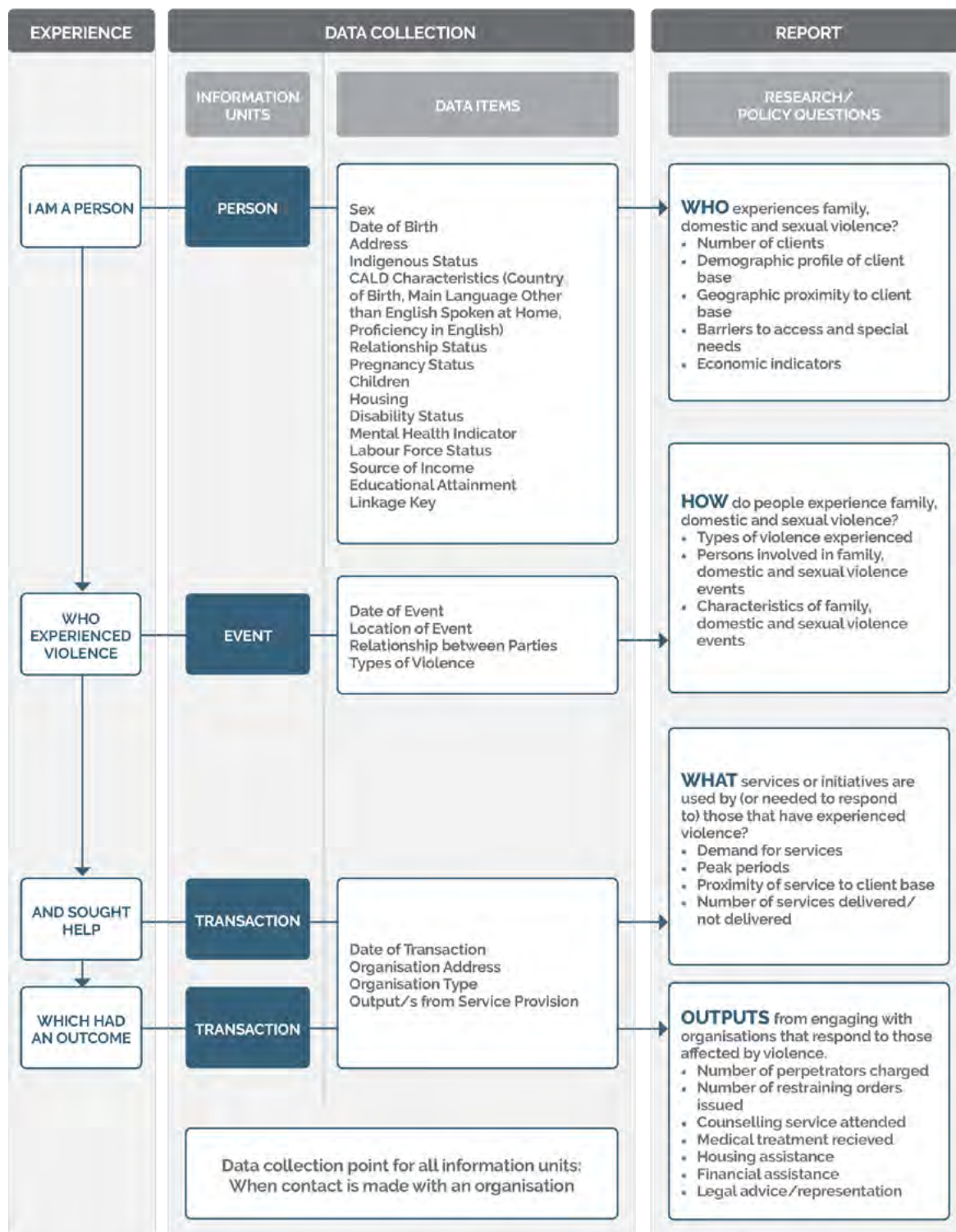
### We need further research about sexual violence and our responses to it

We don't know what we don't know, although we do know that we don't know enough around data reporting.<sup>1</sup>—First roundtable on the experience of LGBTIQ+ people

- 6.1 We need to understand sexual violence before we can decide the best ways to respond to it.
- 6.2 We need to know who experiences sexual violence, and who commits it. We need to know why, how and when it happens, and how it affects people. We need to know what people who experience sexual violence want and need in response (see Figure 8).<sup>2</sup>

<sup>1</sup> Consultation 22 (First roundtable on the experience of LGBTIQ+ people).

<sup>2</sup> For discussion of what data is required and what it should capture, including the context, risks, characteristics and impacts of sexual violence, formal and informal responses to it, and evaluations of successful responses: see generally Australian Bureau of Statistics, *Defining the Data Challenge for Family, Domestic and Sexual Violence* (Catalogue No 4529.0, 7 February 2013) <<https://www.abs.gov.au/statistics/people/crime-and-justice/defining-data-challenge-family-domestic-and-sexual-violence/latest-release>>.

Figure 8: Foundation for a data collection and reporting framework<sup>3</sup>

- 6.3 Knowing this will make our responses to sexual violence appropriate and effective. It will help us design safer environments to prevent sexual violence and more accessible and effective services.
- 6.4 To end sexual violence, we need to know why people commit it and how to change their behaviour. To improve the justice system's response, we need to know what we're doing right and what needs fixing.
- 6.5 We are still a long way from knowing all of this. It can be hard to understand sexual violence or how well we are responding to it because:
- It is often hidden, so we only know a small part of what is going on.
  - The patterns of power that structure sexual violence make it harder for us to understand some types of violence.
  - Different organisations and systems respond to sexual violence, so the data we have about responses are fragmented and inconsistent.<sup>4</sup>

## We can improve what we know by building on reforms

- 6.6 These problems are not new, and they are not unique to sexual violence. The many reform processes tackling different forms of violence (see Chapter 1) all address the need to improve our knowledge.
- 6.7 The key themes across these reform processes (see Figure 9) include:
- improving the consistency of data collection and reporting (for example, by adopting data frameworks and dictionaries)
  - investing in data collection (for example, through national surveys)
  - identifying priorities for research through research agendas and investing in research
  - establishing centres to conduct research that translates into practice
  - sharing data collected by organisations in delivering their services and publishing data and research (for example, through data portals and data linkage projects)
  - funding and building capacity to conduct more regular evaluations.

4

See, eg, *ibid*; Denise Lievore, *Non-Reporting and Hidden Recording of Sexual Assault: An International Literature Review* (Report, Australian Institute of Criminology (Cth), 15 June 2003) <<https://aic.gov.au/publications/archive/non-reporting-and-hidden-recording-of-sexual-assault>>.



Figure 9: Key data, research and evaluation reforms

	DATA	RESEARCH		EVALUATION
NATIONAL PLAN TO REDUCE VIOLENCE AGAINST WOMEN AND THEIR CHILDREN	Foundation for National framework for data collection and reporting (1)	National Research Agenda (2)	ANROWS (2)	
VICTORIA'S FAMILY VIOLENCE REFORMS	Family Violence Data Collection Framework (1)	Family Violence Data Portal (2)	Whole-of-government research agenda (3)	Regular evaluations and evaluation capacity-building (3)
	Family Violence and Sexual Assault Data Dictionary (4)	Aboriginal Data Needs Project (3)	Respect Victoria (2)	
CHILD SEXUAL ABUSE REFORMS NATIONAL CHILD SEXUAL ABUSE STRATEGY MEASURES	Australian Child Maltreatment Study National minimum child protection data set (3)	National Centre for the Prevention of Child Sexual Abuse (3)		
OTHER KEY REFORMS	National elder abuse study (3)	Elder abuse research priorities (2)	Aboriginal Social and Emotional Wellbeing Centre (3)	
	Sexual harassment survey and data set (4)	Elder Abuse Knowledge Hub (3)	Statewide Trauma Service (4)	

**LEGEND**

1. Completed
2. Established and ongoing
3. In progress
4. Committed

- 6.8 As discussed in Chapter 1, the Victorian Government is developing a Sexual Assault Strategy. A key part of this strategy should be to improve our understanding of sexual violence and our responses to it. In this chapter, we identify key priorities.
- 6.9 Some of these gaps in our knowledge may also be addressed through activities in related areas. The most recent action plan on family violence reform includes relevant actions on data.<sup>5</sup> A National Child Sexual Abuse Strategy is also due to be released in September 2021.<sup>6</sup> Reforms concerning sexual harassment and elder abuse, and the next National Plan to Reduce Violence against Women and Children are also in progress.<sup>7</sup>

## Understanding sexual violence—what are the priorities?

- 6.10 There are three key priorities for improving our understanding of sexual violence. These should be a focus of the Sexual Assault Strategy:
- understanding the hidden contexts of violence
  - understanding why people commit sexual violence, and what changes their behaviour
  - understanding what works in responding to sexual violence—including our criminal justice response.
- 6.11 The third priority is the thing we understand least: after a discussion of the first two priorities, this chapter therefore focuses on understanding what works in responding to sexual violence.

## We need to understand the hidden contexts and patterns of sexual violence

- 6.12 A National Research Agenda has identified the main gaps in the research on violence against women. One of these gaps is the experiences of those who face discrimination, especially how different forms of discrimination intersect (for example, the experience of being a migrant and a sex worker).<sup>8</sup>
- 6.13 People who face discrimination are more likely than others to be under-represented in surveys, in data collected by mainstream services, and in research.<sup>9</sup> They may not be visible in 'one-size-fits-all' methods of data collection, such as national surveys that do not account for people who do not identify as male or female.<sup>10</sup>
- 6.14 Their experiences of discrimination often mean they are less likely than others to disclose sexual violence and are harder to find and engage in research. Their experiences of sexual violence therefore remain hidden. For example, Project Respect told us that some women they had assisted in the sex industry 'stated that there was no point recognising their experience as sexual violence given [they] did not believe they could escape the violence'.<sup>11</sup>
- 6.15 We need to know more about certain patterns of sexual violence. These include sexual violence within intimate partner violence,<sup>12</sup> and technology-facilitated sexual violence (see Chapter 14).<sup>13</sup>

5 Victorian Government, *Family Violence Reform Rolling Action Plan 2020–2023* (Report, December 2020) <<http://www.vic.gov.au/family-violence-reform-rolling-action-plan-2020-2023>>.

6 Prime Minister of Australia, *A New National Strategy to Prevent Child Sexual Abuse* (Report, 11 May 2021) <<https://www2.pm.gov.au/media/new-national-strategy-prevent-child-sexual-abuse>>.

7 Attorney-General's Department (Cth), *National Plan to Respond to the Abuse of Older Australians (Elder Abuse) 2019–2023* (Report, Council of Attorneys-General, 19 March 2019) <<https://www.ag.gov.au/rights-and-protections/publications/national-plan-respond-abuse-older-australians-elder-abuse-2019-2023>>; Australian Government, *A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces* (Report, 8 April 2021) <<https://www.ag.gov.au/rights-and-protections/publications/publications/roadmap-for-respect>>; 'National Plan to Reduce Violence against Women and Their Children', *Australian Government* (Web Page, 2021) <<https://plan4womenssafety.dss.gov.au/>>.

8 Australia's National Research Organisation for Women's Safety (ANROWS), *National Research Agenda to Reduce Violence against Women and Their Children: (ANRA) 2020–2022* (Report, 20 October 2020) 9–11 <<https://www.anrows.org.au/about/national-research-agenda-to-reduce-violence-against-women-and-their-children/>>. See also Submission 50 (Project Respect).

9 Australian Institute of Health and Welfare (Cth), *Family, Domestic and Sexual Violence in Australia: Continuing the National Story 2019* (Report, 5 June 2019) 119–22 <<https://www.aihw.gov.au/reports/domestic-violence/family-domestic-sexual-violence-australia-2019>>.

10 Consultation 22 (First roundtable on the experience of LGBTIQ+ people).

11 Submission 50 (Project Respect).

12 'Beyond Silence', a project that focuses on intimate partner sexual violence, should be published this year: Consultation 46 (Safer Families Research Centre & Monash Social Inclusion Centre).

13 Submission 71 (Victorian Institute of Forensic Medicine and Victorian Forensic Paediatric Medical Service); Consultation 7 (Associate Professor Nicola Henry). We note that there is a research project underway on technology-facilitated harm: Australia's National Research Organisation for Women's Safety (ANROWS), 'New Research to Investigate the Growing Problem of Technology-Facilitated Abuse' (Media Release, 4 June 2020) <<https://www.anrows.org.au/media-releases/the-growing-problem-of-technology-facilitated-abuse/>>.

- 6.16 There has been progress in improving our understanding of the diverse contexts of sexual violence (see Table 7). We briefly discuss some gaps that we heard about in this inquiry, although this only reflects what people told us, and is not a comprehensive account of the gaps. We also recognise that what people told us is affected by the same factors that mean some people are under-represented in research.

**Table 7: Key initiatives to improve our understanding of key contexts**

Focus	Initiative	Source	Status
Older people, including people from culturally and linguistically diverse (CALD) backgrounds	National Elder Abuse Prevalence Study <sup>14</sup>	National Plan to Reduce Elder Abuse	Funded between 2019–2021
Children and young people	Australian Child Maltreatment Study, a national survey of all forms of child maltreatment including child sexual abuse <sup>15</sup>	Response to Royal Commission into Institutional Responses to Child Sexual Abuse	First results expected July 2023
Sexual harassment	National survey on sexual harassment <sup>16</sup>	Response to Australian Human Rights Commission's Respect@Work inquiry	Announced in 2021, to be conducted in 2022
Aboriginal and Torres Strait Islander people	Aboriginal Data Mapping and Data Needs project	Rolling Action Plan under Victoria's family violence reforms <sup>17</sup>	Scheduled to complete in 2021
LGBTIQA+ people	Private Lives surveys <sup>18</sup>	Private Lives funded by the Victorian Government	Third Private Lives report published in 2020
	Trans and Gender Diverse Sexual Health Survey <sup>19</sup>	Community-led collaboration	Inaugural report published in 2018

14 'National Elder Abuse Prevalence Study', *Australian Institute of Family Studies (Cth)* (Web Page, 2021) <<https://aifs.gov.au/projects/national-elder-abuse-prevalence-study>>.

15 The Australian Child Maltreatment Study will be the first national study of all forms of child maltreatment (including sexual abuse), and first results are expected from July 2023; Australian Government, *Annual Progress Report 2020* (Implementation of recommendations from the Final Report of the Royal Commission into Institutional Responses to Child Sexual Abuse, Report, 2020) 9 <<https://www.childabuseroyalcommissionresponse.gov.au/annual-progress-reporting>>.

16 The Commission recommended the government fund a national survey every four years: Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020) Recommendation 2 <<https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>>. The government has provided funding for the next survey in 2022: Australian Government, *A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces* (Report, 8 April 2021) 6–7 <<https://www.ag.gov.au/rights-and-protections/publications/roadmap-for-respect>>.

17 Victorian Government, *Family Violence Reform Rolling Action Plan 2020–2023: Activities Index* (Combined Activity Summary) 5 <<https://www.vic.gov.au/family-violence-reform-rolling-action-plan-2020-2023>>.

18 Adam O Hill et al, *Private Lives 3: The Health and Wellbeing of LGBTIQ People in Australia* (Monograph Series No 122 ARCSHS, Australian Research Centre in Sex, Health and Society (LaTrobe), 27 October 2020) <<https://www.latrobe.edu.au/arcs/hs/publications/private-lives/private-lives-3>>.

19 Denton Callander et al, *The 2018 Australian Trans and Gender Diverse Sexual Health Survey: Report of Findings* (Report, The Kirby Institute, University of New South Wales, 2019) <<https://kirby.unsw.edu.au/report/2018-australian-trans-and-gender-diverse-sexual-health-survey-report-findings>>.

## Understanding sexual violence and the sex industry

- 6.17 Project Respect told us that there should be more research to understand sexual violence within the sex industry. It suggested that:
- The national research body on violence against women and their children, ANROWS, should research relevant measures, data and statistics.
  - The Australian Human Rights Commission should collect data on sexual harassment and assault within the sex industry.<sup>20</sup>
- 6.18 Sex Work Law Reform Victoria told us that data published by the Crime Statistics Agency does not include the occupation of victim survivors so it is difficult to know—beyond anecdotal information—how frequently sexual assault is occurring in the sex industry and being reported to police.<sup>21</sup>

## Understanding older people's experiences of sexual violence

- 6.19 The Health Law and Ageing Research Unit told us that very little is known about sexual assaults in aged care, even though these incidents must be reported by law.<sup>22</sup> The number of reported incidents in aged care is published annually, but it is 'unknown what, if any' deeper analyses had been made of the data. The Unit called for more investment in research.<sup>23</sup>
- 6.20 Even less is known about the experience of sexual violence of older people outside of aged care,<sup>24</sup> which may be where most older people experience sexual violence.<sup>25</sup>

## Understanding LGBTIQ+ people's experiences of sexual violence

- 6.21 There are extensive gaps in data about the experiences of LGBTIQ+ people.<sup>26</sup> Victoria Police also noted the gap in data and qualitative research specific to these communities and families.<sup>27</sup>

<sup>20</sup> Submission 50 (Project Respect).

<sup>21</sup> Consultation 45 (Sex Work Law Reform Victoria).

<sup>22</sup> Submission 3 (Health Law and Ageing Research Unit, Monash University). For a summary of the available statistics on reported sexual assaults, also noting the issue of under-reporting: see generally, Australian Association of Gerontology, *A Fair Future for Older Women Who Experience Sexual Abuse: What Needs to Be Done* (Report, 2019) 11–13 <<https://www.aag.asn.au/news-publications/policy-papers/a-fair-future-for-older-women-who-experience-sexual-abuse>>. The Royal Commission into Aged Care Quality and Safety heard that the best estimate of unlawful sexual contact was 50 incidents a week: Alison Branley and Loretta Lohberger, 'Aged Care Royal Commission Hears There Are around 50 Sexual Assaults a Week of Residents Nationally', *ABC News* (online, 22 October 2020) <<https://www.abc.net.au/news/2020-10-22/aged-care-royal-comm-told-of-50-sex-assaults-a-week/12801806>>.

<sup>23</sup> Submission 3 (Health Law and Ageing Research Unit, Monash University).

<sup>24</sup> See, eg, Australian Association of Gerontology, *A Fair Future for Older Women Who Experience Sexual Abuse: What Needs to Be Done* (Report, 2019) 20 <<https://www.aag.asn.au/news-publications/policy-papers/a-fair-future-for-older-women-who-experience-sexual-abuse>>; Rae Kaspiew, Rachel Carson and Helen Rhoades, *Elder Abuse: Understanding Issues, Frameworks and Responses* (Research Report No 35, Australian Institute of Family Studies (Cth), 28 February 2016) 6–7, 11 <<https://apo.org.au/node/62300>>. For discussion of the barriers to reporting: see Submission 1 (Dr Catherine Barrett).

<sup>25</sup> Rosemary Mann et al, *Norma's Project—A Research Study into the Sexual Assault of Older Women in Australia* (Report, Australian Research Centre in Sex, Health and Society, La Trobe University, 30 June 2014) 28 <<https://apo.org.au/node/40334>>. But see Australian Association of Gerontology, *A Fair Future for Older Women Who Experience Sexual Abuse: What Needs to Be Done* (Report, 2019) 14 <<https://www.aag.asn.au/news-publications/policy-papers/a-fair-future-for-older-women-who-experience-sexual-abuse>>.

<sup>26</sup> Consultation 22 (First roundtable on the experience of LGBTIQ+ people).

<sup>27</sup> Submission 68 (Victoria Police).

## Understanding culturally and linguistically diverse communities' experiences

- 6.22 The Victorian Multicultural Commission suggested there was a need to improve data and research on the experience of sexual violence within culturally and linguistically diverse communities, and their use of services and systems and the outcomes. This should include reviewing and implementing guidelines for collecting data across the criminal justice system.<sup>28</sup>
- 6.23 It supported including requirements in funding agreements for organisations to report on how the diversity of their clients compared with the demographics in their area.<sup>29</sup>
- 6.24 Springvale Monash Legal Service said there was a need to prioritise research into the 'specific barriers to reporting' that may be faced by people from culturally and linguistically diverse communities, given 'this cohort appears to disproportionately under-report' sexual violence.<sup>30</sup>

## Understanding the experiences of children and young people

- 6.25 Child Protection told us that there was no law enforcement data on child sexual exploitation. Data about child sexual exploitation is not captured by the sexual assault sector, and departmental data is not shared.<sup>31</sup> The Royal Commission into Institutional Responses to Child Sexual Abuse also identified key gaps in data on child sexual abuse broadly that have or are being addressed (see Figure 9).<sup>32</sup>
- 6.26 Sexual Assault Services Victoria told us there was a need for research on harmful sexual behaviour in children and young people, and its connection with family violence.<sup>33</sup>
- 6.27 We heard there were opportunities to ask more questions about sexual violence through existing surveys for young people, such as through a national survey of secondary students on sexual health.<sup>34</sup>

## We need more research on people who commit sexual violence

- 6.28 We lack understanding of the behaviours and characteristics of those who commit sexual violence.<sup>35</sup> More research is essential in helping us understand how to prevent sexual offending, and to design programs to reduce the risk of re-offending.
- 6.29 Victoria Police supported more research in this area, to identify trends and help us understand when support services should engage with people responsible for sexual violence to reduce the risk of offending.<sup>36</sup>
- 6.30 Others supported more research into the causes of sexual offending and risks of re-offending,<sup>37</sup> and the need for more information about people who commit sexual offending who do not end up in the criminal justice system.<sup>38</sup>

28 Submission 54 (Victorian Multicultural Commission).

29 Ibid.

30 Submission 55 (Springvale Monash Legal Service).

31 Consultation 57 (Department of Health and Human Services).

32 *Royal Commission into Institutional Responses to Child Sexual Abuse: Final Report* (Report, December 2017) Recommendations 2.1, 12.1–12.3, 12.15 <<https://www.childabuseroyalcommission.gov.au/final-report>>.

33 Submission 17 (Sexual Assault Services Victoria).

34 Consultation 51 (Associate Professor Debbie Ollis and Professor Amanda Keddie); referring to the 'National Survey of Australian Secondary Students and Sexual Health': see generally 'Young People and Sexual Health Publications', *La Trobe University* (Web Page, 19 April 2021) <<https://www.latrobe.edu.au/arcs/hs/publications/young-people-and-sexual-health>>.

35 Australia's National Research Organisation for Women's Safety (ANROWS), *National Research Agenda to Reduce Violence against Women and Their Children: (ANRA) 2020–2022* (Report, 20 October 2020) 11, 23 <<https://www.anrows.org.au/about/national-research-agenda-to-reduce-violence-against-women-and-their-children/>>.

36 Submission 68 (Victoria Police).

37 See, eg, Submission 44 (Dr Patrick Tidmarsh and Dr Gemma Hamilton) suggesting that 'meta-analyses on research into the origins of sexual offending [could] guide a focus on primary prevention strategies'. See also Australian Institute of Family Studies (Cth), *Who Abuses Children?* (CFCA Resource Sheet, 1 September 2014) <<https://aifs.gov.au/cfca/publications/who-abuses-children>>; *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016) vol 6, 145–8 (in relation to family violence perpetration) <<http://rcfv.archive.royalcommission.vic.gov.au/Report-Recommendations.html>>.

38 Haley Clark, Antonia Quadara and Australian Institute of Family Studies (Cth), *Insights into Sexual Assault Perpetration: Giving Voice to Victim/Survivors' Knowledge* (Research Report No 18, Australian Institute of Family Studies (Cth), December 2010) 6 <<https://aifs.gov.au/publications/insights-sexual-assault-perpetration>>.



## What should we make a priority in understanding our responses to sexual violence?

### Services responding to sexual violence

- 6.31 We need to know more about our formal responses to sexual violence, including health, legal and community services. There is limited national data on these services.<sup>39</sup> These services all collect data, but do so inconsistently, and the data is not linked to that of other organisations.<sup>40</sup>
- 6.32 Victoria's new Family Violence Data Collection Framework provides a detailed guide to help organisations collect data more consistently, including about the diversity of their clients.<sup>41</sup> However, the framework is yet to be implemented.
- 6.33 In her latest report, the Family Violence Reform Implementation Monitor said there was a 'critical lack of data on the demographic characteristics of people accessing services' and 'numerous gaps in data on demand and service delivery'.<sup>42</sup> She said that implementing the framework and identifying ways to improve data collection should be priorities.<sup>43</sup>
- 6.34 The Victorian Government has committed to developing a family violence and sexual assault data dictionary to help define data elements within databases consistently.<sup>44</sup>

### We need to improve data collection, sharing and reporting

- 6.35 The Sexual Assault Strategy provides an opportunity to improve data collection, sharing and reporting. As Victoria Police observed, there are opportunities to improve the sharing of information and databases, and to improve 'regular system wide' reporting mechanisms to 'allow for greater whole of system analysis'.<sup>45</sup>
- 6.36 This work should be included in the Sexual Assault Strategy and taken forward through the revised governance structure proposed in Chapter 4. One aim of that structure is to enable information sharing between partners. In that chapter, we recommend a multi-agency protocol with feedback processes, which is another opportunity for sharing data.
- 6.37 In Chapter 22 we recommend establishing an independent body with a broad scope. Its functions could include supporting data collection and research into sexual violence, and evaluating responses to sexual violence. We discuss there the relationship between this body and existing bodies.
- 6.38 We discuss below some priorities for this work.

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39 Australian Institute of Health and Welfare (Cth), *Sexual Assault in Australia* (In Focus Report, 28 August 2020) 14 <<https://www.aihw.gov.au/reports/domestic-violence/sexual-assault-in-australia/contents/summary>>.

40 Submission 68 (Victoria Police). See also Australian Bureau of Statistics, *Bridging the Data Gaps for Family, Domestic and Sexual Violence* (Catalogue No 4529.0.00.002, 25 November 2013) <<https://www.abs.gov.au/statistics/people/crime-and-justice/bridging-data-gaps-family-domestic-and-sexual-violence/latest-release>>; Australian Institute of Health and Welfare (Cth), *Family, Domestic and Sexual Violence in Australia: Continuing the National Story 2019* (Report, 5 June 2019) 122 <<https://www.aihw.gov.au/reports/domestic-violence/family-domestic-sexual-violence-australia-2019>>.

41 Victorian Government, 'Victorian Family Violence Data Collection Framework', VIC.GOV.AU (Web Page, 8 January 2020) <<http://www.vic.gov.au/victorian-family-violence-data-collection-framework>>.

42 Family Violence Reform Implementation Monitor, *Report of the Family Violence Reform Implementation Monitor* (Report, 1 November 2020) 138, 136 <<http://www.fvrim.vic.gov.au/fourth-report-parliament-1-november-2020-tabled-may-2021>>.

43 Ibid 151, 138.

44 Victorian Government, *Family Violence Reform Rolling Action Plan 2020–2023: Activities Index* (Combined Activity Summary) 22, 34 <<https://www.vic.gov.au/family-violence-reform-rolling-action-plan-2020-2023>>.

45 Submission 68 (Victoria Police).

## The Sexual Assault Strategy should examine opportunities to improve data collection

- 6.39 A key step is to identify how we can improve the way we use and share the data we already have,<sup>46</sup> and adjust systems to improve our data.<sup>47</sup>
- 6.40 This approach was taken with family violence reforms. A key step was to develop a Family Violence Data Portal, which brings together data held by a broad range of organisations, including the police, courts, family violence services and emergency services.
- 6.41 Several organisations told us that data should be used and shared more effectively than it is now. Springvale Monash Legal Service told us that there could be support for community legal centres to allow their data to be used for research.<sup>48</sup> Star Health noted that, while it had data on the use of services, more could be done to improve statewide data collection on people in the sex industry.<sup>49</sup>
- 6.42 The Commission for Children and Young People said that data about the use of support services for children and young people should be publicly available. It should include waiting times for counselling and drug and alcohol services, broken down by region.<sup>50</sup>
- 6.43 As a first step, it would be useful for the high-level governance mechanism we recommend in Chapter 4 to identify the existing data and better ways of sharing and using it.
- 6.44 Another model that can be explored is the use of statewide dashboards to measure and monitor key data supplied by key services. This has proved useful for the family violence sector during COVID-19.<sup>51</sup>

## We should replace legacy databases

- 6.45 Many of the key agencies responding to sexual violence are unable to collect quality data.<sup>52</sup>
- 6.46 Sexual Assault Services Victoria told us that its system was 'inadequate and does not provide meaningful data to inform research and evaluation of services and client outcomes'. There is an 'urgent need for a coordinated system for data collection' between itself, family violence services, child protection, Sexual Offences and Child Abuse Investigation Teams (SOCITs) and the Victims Assistance Program.<sup>53</sup>
- 6.47 As Chapter 12 discusses, the Victorian Government has received a review of government-funded victim support services. The report recommends investing in a database that would enable referrals between agencies supporting victims of crime.
- 6.48 Chapter 5 also discusses the limits of Victoria Police's electronic referral systems. Victoria Police's ability to collect quality data is limited by its ageing database.<sup>54</sup>
- 6.49 As part of the family violence reforms, the Magistrates' and Children's Courts are developing a new case management system to improve the data that is captured by courts. In our recent report on committals, we recommended linking this new system to the case management systems of higher courts.<sup>55</sup>

46 Consultation 8 (Family Violence Reform Implementation Monitor).

47 Consultation 75 (Family Safety Victoria (No 2)).

48 Submission 55 (Springvale Monash Legal Service).

49 Consultation 48 (Star Health and Project Respect).

50 Submission 57 (Commission for Children and Young People (Vic)).

51 Family Violence Reform Implementation Monitor, *Report of the Family Violence Reform Implementation Monitor* (Report, 1 November 2020) 114, 136 <<http://www.fvrim.vic.gov.au/fourth-report-parliament-1-november-2020-tabled-may-2021>>.

52 Ibid 30.

53 Submission 17 (Sexual Assault Services Victoria).

54 Allie Coyne, 'Victoria Police Extends Life of 25-Yr-Old LEAP Database', *iNews* (online, 28 October 2016) <<https://www.itnews.com.au/news/victoria-police-extends-life-of-25-yr-old-leap-database-440240>>; Victorian Auditor-General's Office, 'Crime Data', VAGO (Web Page, 2021) <<https://www.audit.vic.gov.au/report/crime-data>>.

55 Victorian Law Reform Commission, *Committals* (Report No 41, March 2020) Recommendation 2. See also [3.31], [3.33]–[3.35].



- 6.50 There is an obvious need to overhaul the ageing databases of sexual assault agencies and the police. Investing in new data systems will help us target our resources and efforts more effectively in the future.
- 6.51 We recommend that the Victorian Government should support key organisations to modernise their databases as soon as is practicable. We recognise that these are major projects that will take time and resources, especially as the aim is to share information with other social services.
- 6.52 In the meantime, the Victorian Government should develop the indicators needed to measure the effectiveness of responses to sexual violence. This work can feed into the design of new databases.

## **We should improve our understanding of what works**







### **We should measure outcomes**

- 6.53 The Sexual Assault Strategy should define the broader aims of our responses to sexual violence, including beyond the justice system (see Chapter 4).<sup>56</sup>
- 6.54 This can build on the work being done in family violence reform. The Victorian Government published a Family Violence Outcomes Framework in 2016, refreshed significantly in 2020. It includes 29 indicators to assess progress (see Figure 10). The government will publish its first annual report using these indicators in November 2021.<sup>57</sup>

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Submission 17 (Sexual Assault Services Victoria).  
Department of Premier and Cabinet (Vic), *Family Violence Outcomes Framework: Measurement and Monitoring Implementation Strategy* (Report) 17 <<http://www.vic.gov.au/family-violence-outcomes-framework>>.

**Figure 10: Selected outcomes, indicators and measures under Victoria's Family Violence Outcomes Framework<sup>58</sup>**

OUTCOMES	INDICATOR	MEASURE	SOURCE	DATA AVAILABILITY
The family violence system is accessible, and services and programs are available and equitable	Increase equitable access to services and programs	Number/proportion of funding allocated to programs and organisations that support priority communities	Cross-government	
		Prevention-focused measure to be developed	TBD	
	Increase availability of services and programs when and where they are needed	Number/proportion of Victorians agree they know where to get advice or support for family violence	DHHS	
The family violence system intervenes early to identify and respond to family violence	Increase early identification and engagement of people using family violence to prevent escalation and minimise risk	Measure to be developed	TBD	
	Increase early identification and supports for people at risk of using family violence	Measure to be developed	TBD	
The family violence system is person-centred and responsive	Increased involvement of people with lived experience in the design and delivery of services and programs	Number/proportion of people with lived experience on family violence governance groups	Cross-government	
		Prevention-focused measure to be developed	TBD	
	Increased responsiveness to the needs and circumstances of individuals and communities	Number/proportion of clients who agree they were given a choice in what happens next	FSV	
		Number of multicultural, ethno-specific and faith-based organisations working with the Family Violence Regional Integration Committees	FSV	
		Number of organisations engaged with the Disability Family Violence Practice Leaders	FSV	

 Data is available now    Data exists but is currently being improved

- 6.55 Indicators and measures like this (see Figure 10) can help identify, for example, the cultural appropriateness of services.<sup>59</sup> The Victorian Aboriginal Legal Service noted that social indicators should be informed by the views of Aboriginal people, and that this information should be available in the form of data and evaluations for Aboriginal organisations.<sup>60</sup>

### We should define what works for people experiencing sexual violence

- 6.56 A clear statement of what outcomes we want to achieve would help us focus on the voices of the people who experience sexual violence. The Family Violence Outcomes Framework includes as an overall aim that 'victim survivors, vulnerable children and their families are safe and supported to recover and thrive'. This includes increasing their confidence in the justice system and making them feel supported and understood.<sup>61</sup>
- 6.57 People want different things from the justice system. These needs and their experiences should be reflected more clearly in how we measure the performance of the criminal justice system. A shared outcomes framework can direct attention to these needs.
- 6.58 This is a key gap in the data. Victoria Police told us that there should be more research about, and feedback from, people who had gone through the criminal justice system. It observed that this data was not 'routinely collected' or 'collected in a format that can be easily analysed'.<sup>62</sup>
- 6.59 Sexual Assault Services Victoria suggested there is a need for more research on the experience of the service system, and on what determines successful outcomes. It also suggested research on trauma-informed approaches within legal and criminal systems.<sup>63</sup>
- 6.60 There are different ways of gathering this information, such as through surveys or qualitative research (see box).<sup>64</sup> As discussed in Chapter 4, the multi-agency protocol should include processes for giving feedback.
- 6.61 We recommend that the Sexual Assault Strategy should include as a priority how to listen to the voices of people who experience sexual violence when defining and measuring the 'success' of our responses. This should also be a focus for the working group that we recommend below.

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59 The Family Violence Outcomes Framework includes this under the 'System' domain: *ibid* 12.

60 Consultation 52 (Victorian Aboriginal Legal Service).

61 Department of Premier and Cabinet (Vic), *Family Violence Outcomes Framework: Measurement and Monitoring Implementation Strategy* (Report, 2020) 5, 8 <<http://www.vic.gov.au/family-violence-outcomes-framework>>.

62 Submission 68 (Victoria Police).

63 Submission 17 (Sexual Assault Services Victoria).

64 The Family Violence Outcomes Framework does not yet include a source of data for its measure on improved confidence in the justice system although the Victorian Department of Justice and Community Safety does conduct an annual survey on youth justice: Department of Premier and Cabinet (Vic), *Family Violence Outcomes Framework: Measurement and Monitoring Implementation Strategy* (Report, 2020) 16 <<http://www.vic.gov.au/family-violence-outcomes-framework>>. For an Australian example of qualitative research: see Nicole Bluett-Boyd and Bianca Fileborn, *Victim/Survivor-Focused Justice Responses and Reforms to Criminal Court Practice* (Research Report No 27, Australian Institute of Family Studies (Cth), April 2014) <<https://aifs.gov.au/publications/victim-survivor-focused-justice-responses-and-reforms-criminal-court-practice>>.

### The experiences of victim survivors overseas

#### New Zealand

In New Zealand, the Ministry of Justice commissioned a study to collect baseline data on the perspectives of victim survivors of sexual violence who have had some contact with the justice system over the previous three years. The study involved 37 interviews and two questionnaires, with respondents mostly recruited through witness support services. The study will be used to assess the impact of reforms in the future.<sup>65</sup>

#### England and Wales

The Victims' Commissioner for England and Wales surveyed 491 rape survivors about their experience of the criminal justice system. This research aimed to improve understanding of their views and experiences at each stage of the criminal justice system.<sup>66</sup> The survey found, for example, a strong link between receiving specialist support and their engagement with the criminal justice system (see Chapter 12).

In another recent review of rape in the criminal justice system, the government committed to conducting targeted research to improve its understanding of the experiences of rape survivors, what they want from support services, and how to best meet the needs of those disproportionately affected by rape.<sup>67</sup>

## We should find what works in responding to sexual violence

Research so far has focused on 'describing the problem of sexual assault rather than evaluating what is effective to achieve its eradication.'—Sexual Assault Services Victoria<sup>68</sup>

- 6.62 The National Research Agenda has identified that we do not yet know 'what works' in preventing and responding to violence against women and their children.<sup>69</sup> The main way of identifying what works is by evaluating programs. Evaluations help us build on good practice. They reveal what works and help to make sure no one is harmed by reforms.<sup>70</sup>

65 Tania Boyer, Sue Allison and Helen Creagh, *Improving the Justice Response to Victims of Sexual Violence: Victims' Experiences* (Research Report, Ministry of Justice (NZ), August 2018) <<https://www.justice.govt.nz/assets/Documents/Publications/Improving-the-justice-response-to-victims-of-sexual-violence-victims-experiences.pdf>>.

66 Julian Molina and Sarah Poppleton, *Rape Survivors and the Criminal Justice System* (Report, 20 October 2020) <<https://victimscommissioner.org.uk/published-reviews/rape-survivors-and-the-criminal-justice-system/>>.

67 Ministry of Justice (UK), *End-to-End Rape Review Report on Findings and Actions* (Report, 18 June 2021) [62] <<https://www.gov.uk/government/publications/end-to-end-rape-review-report-on-findings-and-actions>>.

68 Submission 17 (Sexual Assault Services Victoria).

69 Australia's National Research Organisation for Women's Safety (ANROWS), *National Research Agenda to Reduce Violence against Women and Their Children: (ANRA) 2020–2022* (Report, 20 October 2020) 13–15 <<https://www.anrows.org.au/about/national-research-agenda-to-reduce-violence-against-women-and-their-children/>>.

70 Submission 7 (Dr Bianca Fileborn, Dr Rachel Loney-Howes, Dr Tully O'Neill and Sophie Hindes).

6.63 Throughout this report, we have identified responses to sexual violence that appear promising and effective. But it is hard to tell which models, or aspects of models, are most effective. This is true of:

- multi-disciplinary models of working (see Chapter 5)<sup>71</sup>
- alternative, informal and anonymous reporting to police (see Chapter 7)<sup>72</sup>
- victim advocates (see Chapter 12)<sup>73</sup>
- interventions for people responsible for proven sexual violence (see Chapter 13).

### We should improve evaluations

6.64 The Royal Commission on Family Violence recognised a need to improve standards for evaluating family violence programs. It recommended that:

- Evaluations should be properly resourced.
- Their outcomes should be published where appropriate.
- Programs should be funded for long enough to support an evaluation.<sup>74</sup>

6.65 The latest family violence action plan includes commitments that focus on evaluations, including:

- an evaluation of the family violence reforms at the Magistrates' Court of Victoria and the specialist court reforms
- a systematic review of research on the effectiveness of family violence initiatives
- measures to build capability for using evaluations.<sup>75</sup>

6.66 We recommend that the Sexual Assault Strategy should include a similar commitment. However, we also heard suggestions to improve the effectiveness of evaluations, including:

- focusing more on assessing impact and cultural change, which requires longer evaluation timelines<sup>76</sup>
- having a more rigorous evaluation of clinical programs for sexual assault and sexually abusive treatment services<sup>77</sup>
- 'capturing' data early so you have something against which to evaluate reforms<sup>78</sup>
- greater recognition of the complexity involved in achieving long-term cultural change.<sup>79</sup>

6.67 These issues should be addressed in the Sexual Assault Strategy. We also recommend that evaluations should be published to improve transparency. Currently, some evaluations of the multi-disciplinary centres and other pilots run by Victoria Police are not publicly available.

71 James Leslie Herbert and Leah Bromfield, 'Better Together? A Review of Evidence for Multi-Disciplinary Teams Responding to Physical and Sexual Child Abuse' (2019) 20(2) *Trauma, Violence, & Abuse* 214.

72 Submission 7 (Dr Bianca Fileborn, Dr Rachel Loney-Howes, Dr Tully O'Neill and Sophie Hindes).

73 Victims' Commissioner for England and Wales, *Victim Advocates: A Rapid Evidence Assessment* (Report, February 2019) 22–5 <<https://victimscommissioner.org.uk/published-reviews/victim-advocates-a-rapid-evidence-assessment/>>.

74 *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016) Recommendation 203 <<http://rcfv.archive.royalcommission.vic.gov.au/Report-Recommendations.html>>.

75 Victorian Government, *Family Violence Reform Rolling Action Plan 2020–2023: Activities Index* (Combined Activity Summary) 33 <<https://www.vic.gov.au/family-violence-reform-rolling-action-plan-2020-2023>>.

76 See Family Violence Reform Implementation Monitor, *Report of the Family Violence Reform Implementation Monitor* (Report, 1 November 2020) 30 <<http://www.fvrim.vic.gov.au/fourth-report-parliament-1-november-2020-tabled-may-2021>>; Consultation 51 (Associate Professor Debbie Ollis and Professor Amanda Keddie). See also Consultation 13 (Intermediary Pilot Program, Department of Justice and Community Safety).

77 Submission 10 (Carolyn Worth AM and Mary Lancaster).

78 Consultation 8 (Family Violence Reform Implementation Monitor).

79 Consultation 51 (Associate Professor Debbie Ollis and Professor Amanda Keddie).

- 6.68 In addition to the key reforms proposed in this report, we recommend that the Sexual Assault Strategy should include a commitment to regular evaluations of other reforms relating to sexual violence. This would provide a sound basis for improving their effectiveness. The Centre for Innovative Justice, for example, suggested including in evaluations of restorative justice programs whether these programs met the 'justice needs' of participants, and how the relationship between the criminal justice system and restorative justice influences outcomes.<sup>80</sup>

## Recommendation

- 14 The Victorian Government should, as part of its Sexual Assault Strategy:
- identify key gaps in data, research and evaluation on the experiences of and responses to sexual violence and develop measures to address these gaps
  - identify the data that should be shared and mechanisms for sharing the data among key partners
  - identify opportunities to build on existing data on sexual violence
  - fund the modernisation of data systems for key agencies
  - develop measures and indicators to support shared goals and outcomes
  - identify ways to include measures of progress that reflect the experiences of people who have experienced sexual violence
  - commit to a consistent practice of requiring, resourcing, planning for and publishing regular evaluations.

## Our understanding of the criminal justice system must improve

- 6.69 In this inquiry, we were especially interested in understanding the response of the criminal justice system. We found, however, that we did not know much more than we did in 2004, when we published our last report on sexual offences (see box).

### Our 2004 recommendations on data

Recommendations 4–6 recommended establishing 'an integrated process for the collection of reliable statistics'. This should, if possible, allow offences to be tracked from the time they were reported until the case was completed. The database should include information on the incidence of offences, the characteristics of victims and offenders, the police reports and prosecution rates, as well as prosecution outcomes and the factors that may affect them.

Recommendation 7 recommended developing a program for uniform data collection by agencies and services responding to sexual violence. This should include developing standards, systems and providing training on how to record accurate data on relevant characteristics of those using services, to be forwarded to a centralised agency.

Recommendation 168 recommended that the integrated process should consider how to collect information relating to complainants and offenders with cognitive impairment.<sup>81</sup>

- 6.70 Nearly 20 years on, it remains challenging to propose reforms to the criminal justice system because of the lack of a solid evidence base. During this inquiry, we tried to understand:
- trends and reports of sexual offences and outcomes through the criminal justice process
  - when and why there were delays
  - how far reforms (for example, to jury directions) had made a difference in the courts
  - when and why cases stop progressing through the criminal justice process (commonly referred to as attrition).

### Reforms to data collection in the criminal justice system should be a priority

- 6.71 The challenges we faced in building an evidence base for our proposals demonstrate the need for more regularly published data. Without such data, it is difficult to know what is not working and how to deal with any problems. Such data will also improve transparency, enable a richer public debate about the criminal justice system, and provide a firmer foundation for reforms in the future. This could also improve the research base on the policing or prosecution of family, domestic and sexual violence.<sup>82</sup>
- 6.72 The Department of Justice and Community Safety should establish a working group with a focus on improving information about the justice system's response to sexual offences. The Commission for Sexual Safety that we propose in Chapter 22 should be represented on this working group, but those within the justice system are best placed to carry out functions that relate to their own organisations, such as identifying data needs and addressing delays. We discuss some priorities for this working group below.
- 6.73 The working group should also be involved at an early stage with the design of some of the key reforms proposed in this inquiry, such as restorative justice and victim advocates. This will ensure that any new reforms will be designed with data collection in mind.
- 6.74 This section focuses on the criminal justice system. We know almost nothing about outcomes in cases related to sexual offending in the civil justice system, including sexual harassment cases, which are often settled confidentially.<sup>83</sup> However, the Australian Government has recently agreed to ask the newly established Sexual Harassment Council to collect data from agencies handling workplace sexual harassment, including settlement outcomes.<sup>84</sup>

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82 There has been some more recent research on predictors of reporting to police: Isabella Voce and Hayley Boxall, *Who Reports Domestic Violence to Police? A Review of the Evidence* (Trends & Issues in Crime and Criminal Justice No 559, Australian Institute of Criminology (Cth), 25 September 2018) <<https://aic.gov.au/publications/tandi/tandi559>>. There is some, although now dated, research on prosecutorial decision making, although not in Victoria: Denise Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases* (Trends & Issues in Crime and Criminal Justice No 291, Australian Institute of Criminology (Cth), January 2005) <<https://aic.gov.au/publications/tandi/tandi291>>.

83 See Submission 27 (Victoria Legal Aid).

84 Australian Government, *A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces* (Report, 8 April 2021) 7–8 <<https://www.ag.gov.au/rights-and-protections/publications/roadmap-for-respect>>; Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020) Recommendation 3 <<https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>>.



## What we know about the criminal justice system is limited

- 6.75 Table 8 maps some of the key information about the criminal justice system (see Appendix D for more detail). This shows that we have:
- good data about the numbers of cases in the justice system and the outcomes, with the most transparent reporting and analysis available for police and sentencing data
  - some data about the progress of cases during the prosecution and the court stages, although only some of this is published
  - some basic data on who reports sexual violence and who is identified as an offender, and some data on the contexts of the offending, mostly from police data
  - limited data on procedural stages or matters within courts
  - reasonable data on time taken between key stages of the process, but no data on the reasons for the time taken
  - limited data on the reasons police reports or charges do not progress.

**Table 8: Table of data available on criminal justice system, adapted from Appendix D**

Information	Do we know this?
<b>Police</b>	
Numbers of people reporting	Yes
Characteristics of people reporting	To some degree—age, gender, Aboriginal status
Contexts	To a reasonable degree—location type, relationship type, whether it involves family violence, local government area, the time between incident and report
Police outcomes	To some degree—some categories are broad
The reasons for police outcomes	To a limited degree—broad categories are available
Time taken to progress	The time between report and outcome
Reasons for time taken	No
Experiences of complainants	No
<b>Prosecution</b>	
Number of cases	Yes
Prosecution outcomes	Yes
The reasons for prosecution outcomes	To a limited degree—broad categories available
Time taken to progress	The time between filing hearing and trial
Procedural matters (eg applications for joint trials, confidential communications or to introduce sexual history evidence)	No
People referred for support services	Yes

Information	Do we know this?
Experiences of complainants	No, but a research project has been undertaken on communication with complainants
<b>Courts</b>	
Number of cases	Yes
Characteristics of complainants	Some—age, gender, cognitive impairment
Court outcomes	Yes
Time taken to progress	Yes (between key stages and between key time periods)
Procedural matters (eg adjournments, reasons for adjournments, jury directions)	No
Reasons for outcomes	To a limited degree (and not possible for jury verdicts)
Sentences	Yes
Experiences of complainants	No

## Access to data and its context should be improved

- 6.76 Even when data were available, it was not always easy to access or analyse. It was difficult for us to get a ‘system-wide’ view of how the criminal justice system is performing, as the data had to be extracted by request from each organisation.
- 6.77 We often need more context than is now available to interpret the data. For example, looking at conviction rates by themselves does not tell us much. Incentives to plead guilty and encourage early settlement may cause cases to resolve earlier, which can be a good thing. It should be possible to compare prosecution and resolution rates for sexual offences and other cases, as well as convictions.<sup>85</sup> The relationship between delays in reporting and conviction rates should also be analysed.
- 6.78 We can improve public understanding and transparency by publishing criminal justice data on sexual offending in a more accessible and user-friendly way. There are good examples of such reports and analysis in other places (see box).<sup>86</sup>

### Examples of public reporting

The NSW Bureau of Crime Statistics publishes summaries of key data about sexual offences in the criminal justice system.<sup>87</sup> It has also published reports analysing trends, such as a recent spike in sexual assault reports.<sup>88</sup>

In England and Wales, the Office of National Statistics publishes an overview of sexual offending in England and Wales, bringing together a range of official data, including prosecution data.<sup>89</sup> The Rape Monitoring Group, a multi-agency group involving organisations within the criminal justice system, also publishes annually data on how rape cases are dealt with at all stages of the justice process in an interactive dashboard, with links to useful information.<sup>90</sup>

The United Kingdom Government has also recently committed to publishing regular scorecards on rape in the criminal justice system. This will include reporting on timeliness, quality and 'victim engagement in each part of the system', including at a regional or local level. It has also committed to making the data collected by police, prosecution and the courts 'more consistent and focused on identifying where the system needs further improvement'.<sup>91</sup>

In Northern Ireland, the Public Prosecution Service publishes an annual thematic bulletin on sexual offences, together with data tables. This includes broad data on the reasons for not prosecuting, the number of days for a decision on prosecution, as well as court outcomes.<sup>92</sup>

Canada has published reports and interactive dashboards on the state of the criminal justice system. These identify progress against indicators under an outcomes framework for the criminal justice system. Indicators include, for example, the time cases take to complete and victim satisfaction with police responses.<sup>93</sup>

- 6.79 The Victorian Government has already committed to including sexual assault data within the family violence data portal run by the Crime Statistics Agency. The portal already includes data from police, the Magistrates' Court of Victoria and the Children's Court of Victoria. It is not yet clear what further data will be included in relation to sexual violence.
- 6.80 To provide a complete picture of sexual violence, we recommend that the family violence data portal should also include data from centres against sexual assault (CASAs), forensic medical examinations, the Office of Public Prosecutions and the higher courts. This expansion would need more resourcing. It may also be useful to brand this data set differently so that people understand that it extends beyond family violence.

87 'Sexual Assault Offences', *NSW Bureau of Crime Statistics and Research* (Web Page, 22 July 2021) <[https://www.bocsar.nsw.gov.au/Pages/bocsar\\_pages/Sexual-assault.aspx](https://www.bocsar.nsw.gov.au/Pages/bocsar_pages/Sexual-assault.aspx)>. These present the annual statistics from each stage of the criminal justice system, but as they do not track cases across the system this is not a true 'attrition' study.

88 Jackie Fitzgerald, *Why Did Sexual Assault Reports Spike in March 2021?* (Bureau Brief No BB155, June 2021) <[https://www.bocsar.nsw.gov.au/Pages/bocsar\\_publication/Pub\\_Summary/BB/BB155-Summary-Why-did-sexual-assault-reports-spike-in-March-2021.aspx](https://www.bocsar.nsw.gov.au/Pages/bocsar_publication/Pub_Summary/BB/BB155-Summary-Why-did-sexual-assault-reports-spike-in-March-2021.aspx)>.

89 Office for National Statistics (UK), *Sexual Offending: Victimisation and the Path through the Criminal Justice System* (Report, 13 December 2018) <<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/sexualoffendingvictimisationandthepaththroughthecriminaljusticesystem/2018-12-13>>.

90 'Rape Monitoring Group—Interactive Data Dashboard', *HMICFRS* (Web Page, 2018) <<https://www.justiceinspectorates.gov.uk/hmicfrs/news/news-feed/rape-monitoring-group-interactive-data-dashboard/>>.

91 Ministry of Justice (UK), *End-to-End Rape Review Report on Findings and Actions* (Report, 18 June 2021) [17], [41], [91] <<https://www.gov.uk/government/publications/end-to-end-rape-review-report-on-findings-and-actions>>.

92 Public Prosecution Service (Northern Ireland), *Cases Involving Sexual Offences 2019/20* (Statistical Bulletin, Northern Ireland Statistics and Research Agency, 5 November 2020) <<https://www.ppsni.gov.uk/sites/ppsnifiles/publications/Sexual%20Offences%20Publication%202019-20%20%28and%2018-19%29%20Final.pdf>>.

93 Department of Justice (Canada), 'Canada's State of the Criminal Justice System', *State of the Criminal Justice System* (Web Page, April 2021) <<https://www.justice.gc.ca/socjs-esjp/en/wb-bd-contx>>; Department of Justice (Canada), *State of the Criminal Justice System Annual Report* (Report, 20 January 2021) <<https://justice.gc.ca/eng/cj-jp/state-etat/2021rpt-rap2021/index.html>>.

- 6.81 While an expanded portal is a good start, the data still needs to be put into context and analysed to inform public debate and policy. The statistical reports of the Sentencing Advisory Council provide a model for explaining trends in a more accessible way for the public.
- 6.82 We recommend that the proposed working group should ensure that a similar report or analysis is published annually on sexual offending. This should begin with existing data, but as with the family violence portal, should include more data as it is collected.
- 6.83 The report should include data on other justice options outside the criminal justice system that we recommend, such as the restorative justice scheme recommended in Chapter 9 and the victim conferences discussed in Chapter 10.
- 6.84 This report could be published by the Crime Statistics Agency or in partnership with the Victims of Crime Commissioner. It could supplement the annual report that we recommend the Commissioner publishes (Chapter 4), and the Commissioner's involvement could enrich the analysis with the views of those who have experienced sexual violence. It could also be published by the Commission for Sexual Safety we propose in Chapter 22.

### **Better data should be collected on delays in the criminal justice system**

- 6.85 We were asked in this inquiry to look at how to reduce delays (discussed in Chapter 19). However, as we observed in our recent inquiry on committals, it is hard from existing data to identify the causes of any delay. While there is data on the time between key stages of the criminal justice system in most cases, this does not by itself tell us if there were avoidable delays, or the reasons for delays.<sup>94</sup> For example, while we can tell that a police investigation took longer than usual, this may well have been justified by the complexity of the case.
- 6.86 The Productivity Commission reports annually on the performance of criminal justice systems in Australia. The indicators for courts provide insights to the size of backlogs, how long cases are taking to complete and clearance rates. However, they do not identify avoidable delays and their causes.<sup>95</sup>
- 6.87 To properly understand where delays are happening, we need to begin by measuring the time between key stages of the criminal justice system and the time from report to finalisation. We already have this data.
- 6.88 For example, the Crime Statistics Agency can identify the time between key stages and the time from report to finalisation (including by courts), using police files. The prosecution has unpublished data that measures the time between the first hearing in court after charges are filed and when a trial starts.<sup>96</sup> The courts have data on the key stages during which cases are finalised—although as we discussed in our committals inquiry, data on indictable cases is not shared between the lower and the higher courts.<sup>97</sup> Courts can identify whether cases resolved at the door of the court, on the first day or during a trial.
- 6.89 We recommend that the working group should agree upon a way to record and report on key data on the progress of cases across the criminal justice system. This should be shared with other key partners such as sexual assault services, and a subset of this data should be published in the annual report.
- 6.90 A second measure is needed so the reasons for delays can be understood. In England and Wales, the courts must record the reasons trials do not proceed on the first day of trial. Reasons range from why the prosecution or defence were not ready to an interpreter being unavailable. The Ministry of Justice publishes this information.<sup>98</sup>

<sup>94</sup> Victorian Law Reform Commission, *Committals* (Report No 41, March 2020) [3.22]–[3.25], [3.33].

<sup>95</sup> Productivity Commission (Cth), *Report on Government Services 2021* (Report, 22 January 2021) chs 6–7 <<https://www.pc.gov.au/research/ongoing/report-on-government-services/2021/justice>>.

<sup>96</sup> Data Provided by the Office of Public Prosecutions (Vic) to the Victorian Law Reform Commission, 12 July 2021.

<sup>97</sup> Victorian Law Reform Commission, *Committals* (Report No 41, March 2020) [3.24], [3.31], [3.33]–[3.34] Recommendation 2.

<sup>98</sup> Ministry of Justice (UK), *Trial Effectiveness at the Criminal Courts Tool* (Spreadsheet, 24 September 2020) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/944739/trials\\_tool.xlsx](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/944739/trials_tool.xlsx)>.

- 6.91 This provides a much clearer evidence base for addressing delays. We consider this model should be used across the criminal justice system, such as when police investigations take longer than a set period.
- 6.92 We recommend that the working group identifies ways to record agreed reasons for delay throughout the criminal justice system. This information should be used to provide feedback and reduce delays. In Chapter 19 we discuss the need for the working group to address these delays.

### **We should measure the impacts of reforms**

- 6.93 This inquiry was asked to build on previous reforms. This was challenging for several reasons.
- 6.94 First, several reforms have not yet been in place long enough for the data to be useful, especially because of the effects of coronavirus (COVID-19).<sup>99</sup> It can often take four to five years after changes to the law are made before it is possible to evaluate whether they are having their intended effect.<sup>100</sup>
- 6.95 Secondly, it is a complex challenge to identify the impact of the reform. For example, it is not possible to identify how a jury responded to a change in the law, such as a new jury direction. It is also hard to isolate the impact of one reform from other causes.
- 6.96 Thirdly, the data did not identify the effects of many procedural reforms. For example, there was no practical way to identify the number of applications to introduce confidential communications or evidence about sexual history.
- 6.97 Another example of this is the use of jury directions. In Chapter 20, we discuss the need for more research and data on reforms that aim to improve the understanding of juries, including jury directions, and a proposal for a permanent body to advise on and research these reforms.
- 6.98 When implementing reforms, we recommend developing at an early stage an evaluation plan. This should include how to collect data or conduct research to measure their effectiveness. For some reforms, qualitative evaluations will be the most practical option.

### **We should understand why cases do not progress**

- 6.99 To understand the progress of cases through the justice system (or their 'attrition'), we need to track them from the time they are reported until they are concluded. The Crime Statistics Agency recently conducted an attrition study of sexual offences that updated a study published in 2017.<sup>101</sup> The study looked at sexual offence incidents reported to police from July 2015 to June 2017.<sup>102</sup> Both studies identified the stages at which cases fell out of the justice system, and the broad reasons cases did not progress (see Figure 11). They also analysed the factors that made cases more or less likely to progress through the system (see Figure 12).

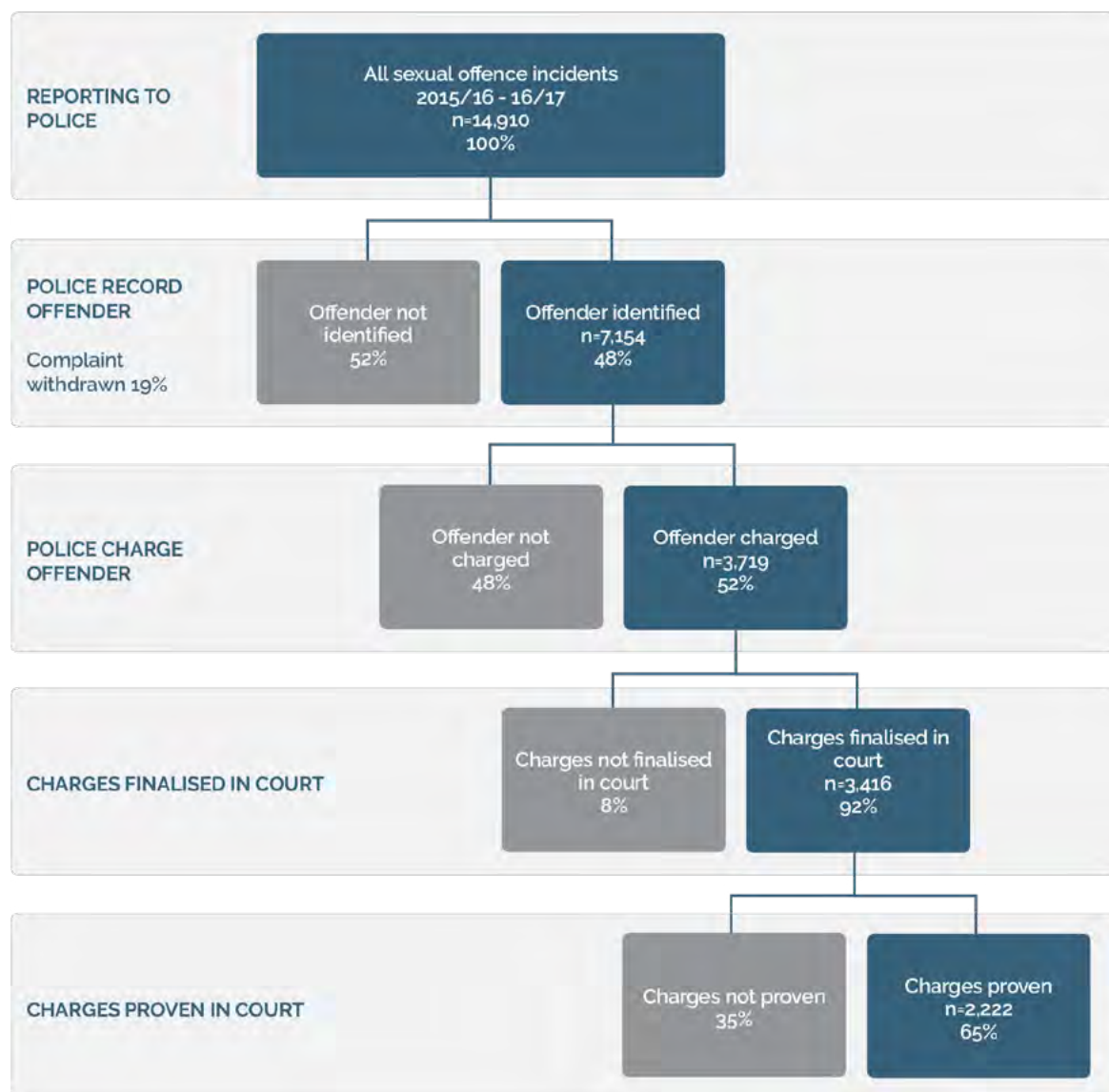
99 Submission 59 (County Court of Victoria).

100 Submission 47 (Criminal Bar Association).

101 S Bright et al, *Attrition of Sexual Offence Incidents through the Victorian Criminal Justice System: 2021 Update* (Report, Crime Statistics Agency, 2021). This updated Melanie Millstead and Cleave McDonald, 'Attrition of Sexual Offence Incidents across the Victorian Criminal Justice System' (Research Paper, Crime Statistics Agency Victoria, 2017) <<http://www.crimestatistics.vic.gov.au/research-and-evaluation/publications/attrition-of-sexual-offence-incidents-across-the-victorian>>.

102 As only 63% of matters recorded in 2017–18 had been heard in court, the study only included offences from the previous years so that enough matters could be finalised for the analysis.

**Figure 11: Sexual offences incident attrition at each stage of the criminal justice system, 2015/16–2016/17<sup>103</sup>**



**Figure 12: What factors are related to progression of contact offence incidents?<sup>104</sup>**

('Contact' offences include rape, indecent assault and incest).

<p><b>Offence type</b></p> <ul style="list-style-type: none"> <li>Incest incidents were <b>more likely</b> to proceed (complaint not withdrawn) than rape incidents.</li> <li>Indecent assault incidents were <b>more likely</b> to have charges laid than rape incidents.</li> </ul> <p><b>Incidents involving a non-sexual co-occurring offence</b></p> <ul style="list-style-type: none"> <li><b>More likely</b> to proceed (complaint not withdrawn).</li> <li><b>More likely</b> to have an offender identified.</li> <li><b>More likely</b> to have charges laid.</li> <li>Incidents with a Crimes against the person co-offence were <b>less likely</b> to be proven in court.</li> </ul> <p><b>Relationship between victim survivor and offender</b></p> <ul style="list-style-type: none"> <li>Incidents involving current or former partners or acquaintances were <b>less likely</b> to proceed (i.e., <b>more likely</b> to withdraw complaints) than stranger incidents. However, incidents involving other family were <b>more likely</b> to proceed (i.e., <b>less likely</b> to withdraw complaints) than stranger incidents.</li> <li>Incidents where the victim survivor and offender were known to each other (current or former partners, other family or acquaintances) were <b>more likely</b> to have an offender identified but <b>less likely</b> to have charges laid than stranger incidents.</li> <li>Current and former partner incidents were <b>less likely</b> to be proven in court than stranger incidents.</li> </ul> <p><b>Offender sex</b></p> <p>Female offenders were <b>less likely</b> to have charges laid than male offenders.</p> <p><b>Offender age</b></p> <p>Offenders 18-24 years old were <b>more likely</b> to have charges laid.</p>	<p><b>Victim survivor age</b></p> <ul style="list-style-type: none"> <li>Incidents with victim survivors aged under 10 years old were <b>more likely</b> to proceed (complaint not withdrawn).</li> <li>Incidents with victim survivors aged 17 years or younger were <b>less likely</b> to have an offender identified and victim survivors aged 18-24 years old were <b>more likely</b> to have an offender identified.</li> <li>Incidents with victim survivors aged 10-24 years old were <b>more likely</b> to have charges laid.</li> <li>Incidents with victim survivors aged 10-17 were <b>more likely</b> to have charges finalised in court.</li> </ul> <p><b>Geographical location</b></p> <ul style="list-style-type: none"> <li>Incidents in regional Victoria were <b>more likely</b> to have an offender identified and <b>more likely</b> to have charges laid than metropolitan Melbourne.</li> <li>Incidents in justice facilities were <b>less likely</b> to have charges laid and <b>less likely</b> to have charges finalised than metropolitan Melbourne incidents.</li> </ul> <p><b>Incident location type</b></p> <ul style="list-style-type: none"> <li>Incidents in 'community' (e.g., schools, train stations) or 'other' locations (e.g., bars, shops) were <b>more likely</b> to proceed (complaint not withdrawn) than residential incidents.</li> <li>'Other' locations were <b>more likely</b> to have an offender identified than residential locations.</li> </ul> <p><b>Time between incident occurring and being reported</b></p> <ul style="list-style-type: none"> <li>Incidents reported &gt;12 months after occurring were <b>more likely</b> to proceed (complaint not withdrawn) and <b>more likely</b> to have offender identified.</li> <li>Incidents reported 2 weeks-6 months after occurring were <b>less likely</b> to have offender identified.</li> </ul>
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<p><b>Offenders with prior offences</b></p> <ul style="list-style-type: none"> <li>• Prior sexual offenders were <b>more likely</b> to have charges laid.</li> <li>• Prior justice procedure offenders were <b>less likely</b> to have charges finalised in court.</li> <li>• Prior drug offenders were <b>less likely</b> to have charges proven in court.</li> </ul> <p><b>Victim survivor sex</b></p> <ul style="list-style-type: none"> <li>• Incidents with female victim survivors were <b>less likely</b> to proceed (i.e., <b>more likely</b> to withdraw complaints) than male victim survivors.</li> <li>• Incidents with female victim survivors were <b>more likely</b> to have an offender identified.</li> <li>• Incidents with female victim survivors were <b>more likely</b> to be proven in court.</li> </ul>	<ul style="list-style-type: none"> <li>• Incidents reported &gt;6 months after occurring were <b>more likely</b> to have charges laid.</li> </ul> <p><b>Time between incident being reported and charged</b></p> <ul style="list-style-type: none"> <li>• Incidents charged &gt;12 months after reporting were <b>less likely</b> to have charges finalised in court and charges were <b>less likely</b> to be proven in court.</li> <li>• Incidents charged 2 weeks-6 months after reporting were <b>more likely</b> to be proven in court.</li> </ul>
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- 6.100 The latest study found differences in outcomes between categories of sexual offence. A higher proportion of sexual offences that did not include physical contact (for example, child exploitation material) were proved in court. They were also more likely to progress when reported more than two weeks after the incident, while offences involving physical contact were less likely to progress if reported during the same timeframe.
- 6.101 The latest study found that cases were less likely to be withdrawn by police if:
- the incident took place in a non-residential location
  - the parties were strangers or non-partner family members
  - incidents were reported to police more than 12 months after they occurred
  - the most serious offence was incest.
- 6.102 The latest study also examined whether there was a difference in patterns of attrition in specific contexts, including sexual violence within family violence and incidents involving Aboriginal offenders. However, it did not find any overall difference in attrition rates for these contexts.

### Current attrition studies have gaps

- 6.103 Neither of the Crime Statistics Agency's attrition studies included data from the prosecution and the 2017 study did not include higher court data. However, as the police files listed the incidents where charges were laid and the incidents that were finalised in court, it could identify that about 10 per cent of all sexual offence incidents reported to the police dropped out of the criminal justice system at the prosecution stage. Court outcomes were also reported in police files.
- 6.104 For both the police and prosecution, the data suggests areas to explore. For example, the study shows that a high number of complaints are withdrawn or are recorded by police as 'no offence disclosed', meaning there is further information that indicates that no offence occurred.

- 6.105 Some people told us there was a need for data on why cases do not proceed for some patterns of abuse, such as child sexual abuse<sup>105</sup> or sexual offending within family violence.<sup>106</sup> As noted earlier, the attrition study shows no significant difference in rates of attrition for contact offence cases involving family violence compared with other contact offence cases.
- 6.106 However, it also shows that, for contact offences, cases involving an intimate partner or an acquaintance are less likely to progress than cases involving a stranger or another family member. This could be an area to explore further.
- 6.107 Our previous inquiry on sexual offences included a study of prosecution outcomes. However, the data did 'not allow reliable conclusions to be drawn about the way in which [data on the characteristics of complainants] and other factors affect prosecution outcomes'.<sup>107</sup>
- 6.108 This remains the case today. The data provided by the Office of Public Prosecutions includes a broad breakdown of the reasons cases were closed. This follows the criteria in its prosecution guidelines, which provide that a prosecution may only proceed if there is a 'reasonable prospect of conviction' and it is 'in the public interest'.<sup>108</sup>

### **We need to know more about why cases do not progress**

- 6.109 As Stuart Grimley MP told us:
- we must know the reasons why sexual assault cases are being withdrawn, not pursued and not prosecuted in order to address Victoria's low rates of reporting and high rates of attrition.<sup>109</sup>
- 6.110 A barrier to understanding why cases do not progress is that the reasons cases do not progress cannot be readily analysed from police databases. The Code of Practice requires that, if a decision is made to end an investigation, the officer making the decision must document the reasons. If a person reporting a sexual offence chooses to withdraw their report, a written statement by the complainant should be made to that effect.<sup>110</sup>
- 6.111 A manual review of police incident narratives may improve understanding of why cases do not progress (for example, understanding why people withdrew their complaints).<sup>111</sup> This would require significantly more work.
- 6.112 A study of why cases do not progress was done following our previous inquiry into sexual offences. This study attempted to identify factors that influenced police outcomes. It could identify some attitudes and factors that drove police decision making, although a lack of detail in the police data limited the study.<sup>112</sup>
- 6.113 The study attempted to identify the outcomes of people from diverse groups. For many groups, this could only be done through a qualitative review, because of the limited and variable quality of the data recorded by police in case files.<sup>113</sup>

105 Consultation 65 (Commission for Children and Young People).

106 Consultation 32 (Anonymous member, Victim Survivors' Advisory Council).

107 Victorian Law Reform Commission, *Sexual Offences* (Interim Report, June 2003) [2.94], 95–6.

108 Office of Public Prosecutions (Vic), *Policy of the Director of Public Prosecutions for Victoria* (Policy, 17 September 2020) [1] <<https://www.opp.vic.gov.au/Resources/Policy-of-the-Director-of-Public-Prosecutions-for-/Policy-of-the-Director-of-Public-Prosecutions-for->>.

109 Submission 8 (Stuart Grimley MP).

110 Victoria Police, *Code of Practice for the Investigation of Sexual Crime* (Policy, 2016) 26–9 <<https://content.police.vic.gov.au/sites/default/files/2019-01/Code-of-Practice-for-the-Investigation-of-Sexual-Crime-%282016%29.pdf>>. The reasons should be set out in a letter to the complainant and, if the complainants wishes to withdraw, in the file.

111 Millsteed and McDonald studied the reasons why cases do not progress, but were unable to use narrative case file information because it 'was not available for analysis': Melanie Millsteed and Cleave McDonald, 'Attrition of Sexual Offence Incidents across the Victorian Criminal Justice System' (Research Paper, Crime Statistics Agency Victoria, 2017) 25 <<http://www.crimestatistics.vic.gov.au/research-and-evaluation/publications/attrition-of-sexual-offence-incidents-across-the-victorian>>.

112 Statewide Steering Committee to Reduce Sexual Assault, *Study of Reported Rapes in Victoria 2000–2003* (Summary Research Report, July 2006) [12] <<https://apo.org.au/node/8211>>.

113 Ibid [59]–[61], [99]–[100], [152]–[191].

- 6.114 A recent review of a small sample of police files in New Zealand identified factors associated with whether cases progressed. In 28 per cent of the cases, the key factor was that there was no complaint or the complaint was withdrawn. The most common reasons for someone withdrawing their complaint were concerns about their mental health or stress; being 'reluctant' or 'ambivalent'; and wanting to move on. In another 28 per cent of cases, the key factor in the decision about whether the case would progress was unreliable evidence.<sup>114</sup>
- 6.115 As we note above, legacy systems are at the root of many of the issues with data collection and reporting, including in the criminal justice system. For example, Victoria Police's ageing LEAP database has many limitations, and will require significant funding to replace this.<sup>115</sup> The Office of Public Prosecutions is also upgrading its records management to move away from a paper-based office.<sup>116</sup>
- 6.116 In their submission, Dr Patrick Tidmarsh and Dr Gemma Hamilton suggested that the police should include a written statement of closure in all case files. This would include 'the rationale for any decision and, where possible, a statement from the complainant.' They explained that 'current practice' made it extremely difficult to interpret case files and to understand attrition.<sup>117</sup>
- 6.117 As a first step, we recommend that the Department of Justice and Community Safety should fund the Crime Statistics Agency to conduct a qualitative review of police and prosecution files as a baseline for future reforms. This should aim to:
- identify the quality of existing data recording the reasons for closing cases and ways to improve the consistency of the data, including to inform future changes to data systems
  - act as a baseline for measuring the impact of future reforms
  - identify what factors influence decision making.
- 6.118 As part of this review, the Crime Statistics Agency should identify what demographic data should be collected and ways to improve the recording of reasons cases do not progress. This could be done, for example, by developing a standardised set of reasons or identifying what should be included in the reasons for closing a case.
- 6.119 We also recommend that the Crime Statistics Agency should be funded to conduct a regular attrition study. As this work will usually require several years of data, we recommend that these studies should be repeated at intervals that will help measure the impact of reforms. The qualitative review of police and prosecution files should be repeated at the same time as needed.
- 6.120 To improve the quality of the attrition study, this should include prosecution and court data. Together, these studies will provide more robust data about what is happening across the criminal justice system, and could provide insights about where reforms are best targeted.

<sup>114</sup> Jan Jordan and Elaine Mossman, *Police Sexual Violence File Analysis Report. Women, Rape and the Police Investigation Process* (Report, Victoria University of Wellington, 2019) 40 <<http://researcharchive.vuw.ac.nz/handle/10063/8249>>.

<sup>115</sup> LEAP has operated since 1993. A five year project to replace it that commenced in 2006 was abandoned due to cost blowouts: Victorian Auditor-General's Office, *Crime Data* (Independent Assurance Report No 6, 5 September 2018) 23 <<https://www.audit.vic.gov.au/report/crime-data>>.

<sup>116</sup> 'Corporate Modernisation', *About Us* (Web Page, 2016) <<https://www.opp.vic.gov.au/About-Us/Our-Corporate-Services/Corporate-modernisation>>.

<sup>117</sup> Submission 44 (Dr Patrick Tidmarsh and Dr Gemma Hamilton).

## Recommendations

- 15 The Victorian Government should include, in its extension of the Family Violence Data portal, data from sexual assault services, forensic medical examinations, the Office of Public Prosecutions and the higher courts.
- 16 The Department of Justice and Community Safety should establish a working group to:
  - a. publish an annual report providing key data about the response of the criminal justice system to sexual offences, including the progression of cases and trends in the criminal justice system
  - b. identify ways to record and address the reasons for delays to sexual offence cases in the criminal justice system
  - c. identify ways to include the experiences of victim survivors in the criminal justice system as part of broader outcomes on sexual violence
  - d. develop plans for measuring the impact of reforms at an early stage.
- 17 The Victorian Government should fund the Crime Statistics Agency to publish a regular qualitative review and a regular attrition study that includes police and prosecution records. This should include a follow-up qualitative review to complement its most recent attrition study.



PART THREE: REPORTING  
SEXUAL VIOLENCE

# Reporting sexual violence: having information, options and access

**142** Overview

**142** Reporting is the first step in a justice system response

**143** People need practical information about their options

**151** People should have options to report and disclose online

**159** People need equal access to reporting no matter where  
they live

## 7. Reporting sexual violence: having information, options and access

### Overview

- Reporting sexual violence is an important but often difficult decision.
- Having enough information, options and access when it comes to reporting will help someone take the first step towards seeking justice.
- People who have experienced sexual violence, and those who support them, need clear and practical information about support, reporting and justice options. We recommend a central gateway to this information.
- People should also have a range of reporting options. They should be able to make contact with specialist police and support services online.
- Everyone should have access to support and reporting options, no matter where they live. This includes people in residential care or prison.

### Reporting is the first step in a justice system response

- 7.1 Reporting sexual violence to police is a key step towards a justice system response.<sup>1</sup> A report is what starts the criminal justice process.
- 7.2 In Victoria, and around the world, sexual offences are under-reported.<sup>2</sup> A recent study found that around 87 per cent of women who had experienced sexual assault did not report to the police.<sup>3</sup>
- 7.3 These numbers are concerning. They reflect that reporting is a complex decision, influenced by a person's circumstances, external pressures and society.<sup>4</sup> In Chapter 2 we discuss the many barriers to reporting sexual violence, such as poor responses from family and friends and concerns about the justice system.
- 7.4 Shifting these barriers will take more than just a focus on reporting. For example, in Chapter 3 we discuss how important it is to change community attitudes and in Chapter 21 we discuss reforms designed to make the justice system less traumatic for victim survivors.

1 *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report* (Executive Summary and Parts I-II, 2017) 396–7.

2 Submission 60 (Associate Professor Georgina Heydon, Associate Professor Nicola Henry, Dr Rachel Loney-Howes and Dr Tully O'Neill).

3 Australian Institute of Health and Welfare (Cth), *Family, Domestic and Sexual Violence in Australia: Continuing the National Story 2019* (Report, 5 June 2019) 17 <<https://www.aihw.gov.au/reports/domestic-violence/family-domestic-sexual-violence-australia-2019>>. This study reports on the findings of the 2016 Personal Safety Survey, a national self-report survey that measures people's experiences of violence in the last 12 months. The survey indicates that 87% of women did not contact the police about their most recent sexual assault by a male. See Australian Bureau of Statistics, *Personal Safety, Australia* (Catalogue No 4906.0, 8 November 2017) <<https://www.abs.gov.au/statistics/people/crime-and-justice/personal-safety-australia/latest-release>>. Sexual assault is defined as including 'rape; attempted rape; aggravated sexual assault (assault with a weapon); indecent assault; penetration by objects; forced sexual activity that did not end in penetration; and attempts to force a person into sexual activity': see Australian Institute of Health and Welfare (Cth), *Family, Domestic and Sexual Violence in Australia: Continuing the National Story 2019* (Report, 5 June 2019) 9, 16 <<https://www.aihw.gov.au/reports/domestic-violence/family-domestic-sexual-violence-australia-2019>>. See also *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report* (Executive Summary and Parts I-II, 2017) 165.

4 Denise Lievore, *No Longer Silent: A Study of Women's Help-Seeking Decisions and Service Responses to Sexual Assault* (Report, Australian Institute of Criminology (Cth), June 2005) 118 <<https://aic.gov.au/publications/archive/no-longer-silent>>.



- 7.5 The aim of law reform should not just be to increase reporting.<sup>5</sup> This could actually make things worse if the right conditions are not in place in the justice system. Reporting is a deeply personal decision that has implications for the person reporting and others. It is important to respect the choice of victim survivors who do not report, or do not report straight away.<sup>6</sup>
- 7.6 But there are some barriers that we can and should shift. People still do not report because they lack information about their support, reporting and justice options. They do not report because they worry about what will happen in the justice system process. Reform in these areas could assist everyone who wants to report to do so and could improve people's experience of reporting.<sup>7</sup>
- 7.7 We propose important reforms that could give people:
- enough information about their options for support, reporting and justice
  - more options in how they report
  - better access to reporting processes.
- 7.8 These reforms build on recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse. They are crucial to giving victim survivors genuine control over what they want to do after a sexual offence.<sup>8</sup>

## People need practical information about their options

- 7.9 In Chapter 3 we discuss the need for people to be able to identify and name sexual violence and know that they can report it to police. People who have experienced sexual violence also need access to clear, accessible and practical information to make an informed decision about reporting.<sup>9</sup>
- 7.10 As we discuss in Chapter 2, 'information' is a key justice need of victim survivors. This includes information at the reporting and pre-reporting stage.<sup>10</sup> People need 'practical information' about key processes, such as investigating and charging the accused. They need information about people working in the justice system, such as prosecutors, and what they do. They also need to know what the potential outcomes are, like charges, a trial, or the accused pleading guilty.<sup>11</sup>
- 7.11 People also want information about what support they will get if they engage with the justice system.<sup>12</sup> They might also want details of support services and how to connect with them ('referrals').<sup>13</sup>

5 See, eg, Wendy Larcombe, 'Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Law' (2011) 19(1) *Feminist Legal Studies* 27, 42. See also Oona Brooks-Hay, 'Doing the "Right Thing"? Understanding Why Rape Victim-Survivors Report to the Police' (2020) 15(2) *Feminist Criminology* 174, 189–91.

6 See Denise Lievore, *No Longer Silent: A Study of Women's Help-Seeking Decisions and Service Responses to Sexual Assault* (Report, Australian Institute of Criminology (Cth), June 2005) 8, 18 <<https://aic.gov.au/publications/archive/no-longer-silent>>.

7 Wendy Larcombe, 'Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Law' (2011) 19(1) *Feminist Legal Studies* 27, 34, 41; *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report* (Executive Summary and Parts I–II, 2017) 399.

8 See Denise Lievore, *No Longer Silent: A Study of Women's Help-Seeking Decisions and Service Responses to Sexual Assault* (Report, Australian Institute of Criminology (Cth), June 2005) 118 <<https://aic.gov.au/publications/archive/no-longer-silent>>.

9 Submission 22 (knowmore legal service). See also Denise Lievore, *No Longer Silent: A Study of Women's Help-Seeking Decisions and Service Responses to Sexual Assault* (Report, Australian Institute of Criminology (Cth), June 2005) vi, 49, 153 <<https://aic.gov.au/publications/archive/no-longer-silent>>; *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report* (Executive Summary and Parts I–II, 2017) Recommendation 4.

10 Nicole Bluett-Boyd and Bianca Fileborn, *Victim/Survivor-Focused Justice Responses and Reforms to Criminal Court Practice* (Research Report No 27, Australian Institute of Family Studies (Cth), April 2014) 27 <<https://aifs.gov.au/publications/victim-survivor-focused-justice-responses-and-reforms-criminal-court-practice>>.

11 Haley Clark, 'What Is the Justice System Willing to Offer?' Understanding Sexual Assault Victim/Survivors' Criminal Justice Needs' (2010) 85 *Family Matters* 28, 31.

12 Denise Lievore, *No Longer Silent: A Study of Women's Help-Seeking Decisions and Service Responses to Sexual Assault* (Report, Australian Institute of Criminology (Cth), June 2005) 121 <<https://aic.gov.au/publications/archive/no-longer-silent>>.

13 Nicole Bluett-Boyd and Bianca Fileborn, *Victim/Survivor-Focused Justice Responses and Reforms to Criminal Court Practice* (Research Report No 27, Australian Institute of Family Studies (Cth), April 2014) 27 <<https://aifs.gov.au/publications/victim-survivor-focused-justice-responses-and-reforms-criminal-court-practice>>.

- 7.12 These materials would help them understand their rights and what options they have to make the best decision for themselves about what to do.<sup>14</sup> Research indicates that a clear understanding of what will happen if they report could make the process less uncertain and overwhelming, and make it easier to take the first step.<sup>15</sup>

[N]ot everyone knows to ask for a SOCIT unit. There is not enough literature or education amongst the public.—Nicole<sup>16</sup>

- 7.13 We heard that people in Victoria need more access to information than they currently have. Several victim survivors said that they needed to know more about how to get help, how to contact police and the justice system process. They also wanted to know 'the consequences of both reporting and not reporting'.<sup>17</sup> One person said they had to 'really search ... for the right number' to contact a Sexual Offences and Child Abuse Investigation Team (SOCIT).<sup>18</sup> Sexual Assault Services Victoria (SAS Victoria) said that increasing awareness of how to access the justice system and support services is a 'priority'.<sup>19</sup>

## Current sources of information are limited and difficult to navigate

There needs to be 'a central website that is well designed and considered. A lot of government websites are very difficult to navigate ... it has to be streamlined'—Danielle<sup>20</sup>

- 7.14 People can currently access information on websites hosted by different organisations including Victoria Police,<sup>21</sup> the Victorian Government (Victims of Crime website),<sup>22</sup> specialist support services (such as SAS Victoria),<sup>23</sup> or legal services (such as the Office of Public Prosecutions or Victoria Legal Aid).<sup>24</sup>
- 7.15 On its website, Victoria Police has an information booklet on reporting sexual violence to the police. This is available in different languages and Easy English.<sup>25</sup> The Victorian Government Victims of Crime website has an overview of the whole justice process (including reporting and trials) with some information focused on sexual offences.<sup>26</sup> Specialist sexual assault support services have information on how to contact support

14 Haley Clark, "What Is the Justice System Willing to Offer?" Understanding Sexual Assault Victim/Survivors' Criminal Justice Needs' (2010) 85 *Family Matters* 28, 31.

15 Marta Garnelo et al. *Applying Behavioral Insights to Intimate Partner Violence: Improving Services for Survivors in Latin America and the Caribbean* (Report, Behavioural Insights Ltd, 2019) 25–6.

16 Consultation 59 (Ashleigh Rae, Nicole Lee, Penny).

17 This was raised in multiple responses to our online feedback form: Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021). Another person suggested a step-by-step video 'to demystify the criminal justice process': Consultation 35 (A victim survivor of sexual assault).

18 Ibid.

19 Submission 17 (Sexual Assault Services Victoria).

20 Consultation 81 (Danielle, a victim survivor).

21 'Reporting to Police Resources', *Victoria Police* (Web Page, July 2021) <<http://www.police.vic.gov.au/resources-and-fact-sheets-0>>.

22 Victorian Government, 'Sexual Assault', *Victims of Crime* (Web Page, 2 June 2021) <<http://www.victimsofcrime.vic.gov.au/the-crime/types-of-crime/sexual-assault>>.

23 See, eg. 'Reporting Sexual Assault to Police', *Sexual Assault Services Victoria* (Web Page) <<https://www.sasvic.org.au/reporting-sexual-assault-to-police>>.

24 'Reporting Sexual Assault to the Police', *Victoria Legal Aid* (Web Page, 3 September 2020) <<https://www.legallaid.vic.gov.au/find-legal-answers/sex-and-law/sexual-assault/reporting-sexual-assault-to-police>>; 'Victims: Information for Victims of Crime to Understand Your Role, Provide Support, Assistance and Help', *Office of Public Prosecutions Victoria* (Web Page, 2017) <<https://victimsandwitnesses.opv.vic.gov.au/victims/victims>>.

25 See Victoria Police, *Reporting Sexual Offences to Police* (Booklet, 2020) <[https://www.police.vic.gov.au/sites/default/files/2020-03/Reporting%20Sexual%20Offences\\_A6%20booklet\\_web.pdf](https://www.police.vic.gov.au/sites/default/files/2020-03/Reporting%20Sexual%20Offences_A6%20booklet_web.pdf)>.

26 Victorian Government, 'Sexual Assault', *Victims of Crime* (Web Page, 2 June 2021) <<http://www.victimsofcrime.vic.gov.au/the-crime/types-of-crime/sexual-assault>>.

services and report to the police.<sup>27</sup> The Office of Public Prosecutions has information for victims about going to court.<sup>28</sup>

- 7.16 But this information does not give the reader a clear sense of what their end-to-end experience might be if they report, what rights and supports they will have at each stage and their range of options. A victim survivor would have to already know to search for these organisations, and then piece together the information they each provide. Yet, as one victim survivor told us she 'didn't know anyone would help her, so she didn't think about it'.<sup>29</sup>

It would '1000%' help to know more about options other than the criminal justice system.—Geraldine, Victim Survivors' Advisory Council<sup>30</sup>

- 7.17 When the information is difficult to navigate, victim survivors are left to make sense of this volume and variety of information themselves. This is a problem because research indicates that if the outcomes are uncertain, or the process too complex, people are less likely to engage with it.<sup>31</sup>
- 7.18 Of course, sexual assault support services, other community organisations and police can also help people understand their options in person or over the phone. But this type of information seeking requires victim survivors to commit to face-to-face contact, which some may not want to do or be ready to do.<sup>32</sup>
- 7.19 The Sexual Assault Crisis Line could also provide anonymous advice and support, independently from the justice system. But it would need to be more widely promoted and funded as a 24-hour service.<sup>33</sup> Other phonelines, such as the national 1800 RESPECT line are not specific to sexual assault.<sup>34</sup>

## **We recommend a central 'gateway' to information and support**

- 7.20 We see the value in developing a central information source that people can turn to for their information needs (and to connect with support). We recommend that the Victorian Government set up a central website to do this.

27 See, eg, 'Helpful Information: Reporting Sexual Abuse to the Police', *WestCASA* (Web Page, 2021) <<https://westcasa.org.au/helpful-info/reporting-sexual-abuse-to-the-police/>>; 'Reporting Sexual Assault to Police', *Sexual Assault Services Victoria* (Web Page) <<https://www.sasvic.org.au/reporting-sexual-assault-to-police/>>.

28 'Victims: Information for Victims of Crime to Understand Your Role, Provide Support, Assistance and Help', *Office of Public Prosecutions Victoria* (Web Page, 2017) <<https://victimsandwitnesses.opp.vic.gov.au/victims/victims>>.

29 Consultation 31 (Geraldine, Deputy Chairperson of the Victim Survivors' Advisory Council).

30 Ibid.

31 Marta Garnelo et al, *Applying Behavioral Insights to Intimate Partner Violence: Improving Services for Survivors in Latin America and the Caribbean* (Report, Behavioural Insights Ltd, 2019) 7, 25.

32 See, eg, Michelle L Munro-Kramer, Alexandra C Dulin and Caroline Gaither, 'What Survivors Want: Understanding the Needs of Sexual Assault Survivors' (2017) 65(5) *Journal of American College Health* 297, 303.

33 See Submissions 10 (Carolyn Worth AM and Mary Lancaster), 17 (Sexual Assault Services Victoria), 44 (Dr Patrick Tidmarsh and Dr Gemma Hamilton).

34 Submission 44 (Dr Patrick Tidmarsh and Dr Gemma Hamilton).

## Why a central gateway?

- 7.21 The Royal Commission into Institutional Responses to Child Sexual Abuse proposed a national website and helpline that would be a 'gateway to accessible advice and information' and connect people with support services.<sup>35</sup> The Commonwealth Government at first noted this recommendation 'for further consideration'. But it has since pointed to its National Redress Scheme website, as well as its new website on implementing the Royal Commission's recommendations. These websites have links to support services, but they are likely not quite the 'gateway' the Royal Commission was aiming for.<sup>36</sup>
- 7.22 Building on the original recommendation of the Royal Commission, we recommend that a Victorian 'gateway' to information, advice and support is created. The Royal Commission focused on child sexual abuse, but we see value in a website for sexual violence more broadly.<sup>37</sup>
- 7.23 The Royal Commission into Family Violence recommended a website with information on identifying family violence and how to access support.<sup>38</sup> The Orange Door website was set up in line with the recommendation.
- 7.24 We agree with the Royal Commission into Institutional Responses to Child Sexual Abuse that a website is needed as 'a visible, central point of contact' for victim survivors.<sup>39</sup> Victim advocates have also called for a 'well-publicised central contact point'.<sup>40</sup> This was also an idea that came from a victim survivor.

One idea for change is a 'streamlined and well designed website dedicated to articulating reporting, legal procedure, the steps, services, support'—Danielle<sup>41</sup>

- 7.25 Like the two Royal Commissions, we recognise that a website, done well, could be part of an effective response to a social problem.<sup>42</sup> For people who have experienced sexual violence, websites have value as a 'comprehensive' source of information and options.<sup>43</sup> Websites also enable people to access information anonymously. This may be especially important for victim survivors who would otherwise not approach mainstream services.<sup>44</sup>

35 *Royal Commission into Institutional Responses to Child Sexual Abuse: Final Report* (Report, December 2017) Recommendation 9.5 <<https://www.childabuseroyalcommission.gov.au/final-report>>.

36 Australian Government, *Annual Progress Report 2020* (Implementation of recommendations from the Final Report of the Royal Commission into Institutional Responses to Child Sexual Abuse, Report, 2020) 138 <<https://www.childabuseroyalcommissionresponse.gov.au/annual-progress-reporting>>; Australian Government, *Annual Progress Report 2019* (Implementation of recommendations from the Final Report of the Royal Commission into Institutional Responses to Child Sexual Abuse, Report, 2019) 100 <<https://www.childabuseroyalcommissionresponse.gov.au/annual-progress-reporting>>; Australian Government, *Australian Government Response to the Royal Commission into Institutional Responses to Child Sexual Abuse* (Report, Attorney-General's Department (Cth), 13 June 2018) 34 <<https://apo.org.au/node/176271>>. In relation to the government's reference to the National Redress Scheme website, it should be noted that the Royal Commission into Institutional Responses to Child Sexual Abuse observed that more was needed: 'While the Australian Government has announced funding for a website and telephone helpline to provide information about the Commonwealth Redress Scheme, we have identified a need from a larger group of people for a broader range of information and support': *Royal Commission into Institutional Responses to Child Sexual Abuse: Final Report* (Report, December 2017) Vol 9, 178 <<https://www.childabuseroyalcommission.gov.au/final-report>>.

37 On the value of websites for sexual violence specifically: see Katherine W Bogen et al, 'Supporting Students in Responding to Disclosure of Sexual Violence: A Systematic Review of Online University Resources' (2019) 25(1) *Journal of Sexual Aggression* 31; Emily M Lund and Katie B Thomas, 'Necessary But Not Sufficient: Sexual Assault Information on College and University Websites' (2015) 39(4) *Psychology of Women Quarterly* 530; Michelle L Munro-Kramer, Alexandra C Dulin and Caroline Gaither, 'What Survivors Want: Understanding the Needs of Sexual Assault Survivors' (2017) 65(5) *Journal of American College Health* 297.

38 *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016) Recommendation 10 <<http://rcfv.archive.royalcommission.vic.gov.au/Report-Recommendations.html>>.

39 *Royal Commission into Institutional Responses to Child Sexual Abuse: Final Report* (Report, December 2017) vol 9, 178 <<https://www.childabuseroyalcommission.gov.au/final-report>>.

40 See Submission 10 (Carolyn Worth AM and Mary Lancaster). See also Submission 17 (Sexual Assault Services Victoria).

41 Submission 15 (Danielle).

42 On the value of websites: see *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016) vol 2, 26 <<http://rcfv.archive.royalcommission.vic.gov.au/Report-Recommendations.html>>; *Royal Commission into Institutional Responses to Child Sexual Abuse: Final Report* (Report, December 2017) vol 9, 178 <<https://www.childabuseroyalcommission.gov.au/final-report>>.

43 Michelle L Munro-Kramer, Alexandra C Dulin and Caroline Gaither, 'What Survivors Want: Understanding the Needs of Sexual Assault Survivors' (2017) 65(5) *Journal of American College Health* 297, 303.

44 Ibid.

- 7.26 Like the Royal Commission into Institutional Responses to Child Sexual Abuse, we think this central website would be a 'gateway' not just to information, but also to advice and support. We recommend that it enables people to directly connect with support services online or by phone. This would assist people to move seamlessly from deciding to access information to actively seeking support.
- 7.27 Later in this chapter, we recognise the value of people being able to connect with support services in a range of ways, including online. This reflects what we were told in submissions and consultations—that some people may find it easier or will need to access information and support through text, phone or online systems. A central gateway that integrates a website with phone and online support could make this possible. A better resourced and 24-hour Sexual Assault Crisis Line, for example, could be part of the gateway we propose.

### What could the central gateway look like?

- 7.28 A website would offer people practical information in a user-friendly format. We have seen how websites overseas have given victim survivors tailored information on their options for support, reporting and justice, and connected them with support or police.
- 7.29 One example is Callisto, a not-for-profit website in the United States of America focused on campus-based sexual violence.<sup>45</sup> It spells out different options people have following sexual violence and the risks and benefits of each. For example, 'Engage in Restorative Justice', 'Find Other Victims' or 'Talk to an Attorney'. It also provides broader information on how to 'Help a Friend', 'Practice Self-Care', 'Talk to Someone' or 'Report the Incident'. It has a downloadable form that people can fill out and save if they want to record the details of the violence, in case they decide to report to police at a later stage.

**Figure 13: Information resources on Callisto**



- 7.30 Another example is the West Midlands Police website in the United Kingdom, which enables a person to shape the advice they receive.<sup>46</sup> For example, they can select options such as 'I have been sexually assaulted but don't want to report it to police at the moment', with the choice to add further details about themselves, such as 'I do not speak English very well' or 'This happened more than once'.
- 7.31 We are not endorsing either of these platforms. This would require independent evaluation, which is not yet available, although Callisto does provide testimonials from users—for example, that it 'was easy to understand, and had many answers to the questions I was having'.<sup>47</sup> A report from Callisto found that all its users said they would recommend the website to someone else and that people accessing it were six times more likely to report their experience to police or their institution.<sup>48</sup>

### Some principles should guide the central website

- 7.32 We agree with the principles collectively set out by the Royal Commission into Institutional Responses to Child Sexual Abuse and the Royal Commission into Family Violence on their proposed websites—that any website should:
- build on and integrate existing services<sup>49</sup>
  - be trauma-informed<sup>50</sup>
  - speak to various audiences (including victim survivors, friends and family, bystanders, and the general community) because family and friends are often the people to whom sexual violence is first disclosed<sup>51</sup>
  - have information tailored to diverse needs and experiences (for example, information in different languages, material that addresses specific experiences of sexual violence, like child sexual abuse)<sup>52</sup>
  - discuss support options and enable people to connect with them online or via phone<sup>53</sup>
  - discuss reporting and justice options.<sup>54</sup>
- 7.33 Established design principles for legal help-seeking websites should also inform the website design (see Figure 14).

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46 'Sexual Assault', *West Midlands Police* (Web Page) <<https://www.west-midlands.police.uk/your-options/sexual-assault>>.

47 Callisto, *Year 3 of Combating Sexual Assault: Empowering Survivors. And Advancing Justice* (2017–2018 Academic Year Report, Callisto, 2018) 10 <[https://static1.squarespace.com/static/5ff5d891409193661a0718c0/t/604139ce25f8f753eb7608bc/1614887385338/Callisto\\_Year\\_3\\_final.pdf](https://static1.squarespace.com/static/5ff5d891409193661a0718c0/t/604139ce25f8f753eb7608bc/1614887385338/Callisto_Year_3_final.pdf)>.

48 Ibid 3.

49 *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016) Recommendation 10 <<http://rcfv.archive.royalcommission.vic.gov.au/Report-Recommendations.html>>; *Royal Commission into Institutional Responses to Child Sexual Abuse: Final Report* (Report, December 2017) vol 9, 176, 178 <<https://www.childabuseroyalcommission.gov.au/final-report>>.

50 *Royal Commission into Institutional Responses to Child Sexual Abuse: Final Report* (Report, December 2017) vol 9, 179 <<https://www.childabuseroyalcommission.gov.au/final-report>>.

51 Denise Lievore, *No Longer Silent: A Study of Women's Help-Seeking Decisions and Service Responses to Sexual Assault* (Report, Australian Institute of Criminology (Cth), June 2005) 6 <<https://aic.gov.au/publications/archive/no-longer-silent>>; *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016) vol 2, 26 <<http://rcfv.archive.royalcommission.vic.gov.au/Report-Recommendations.html>>.

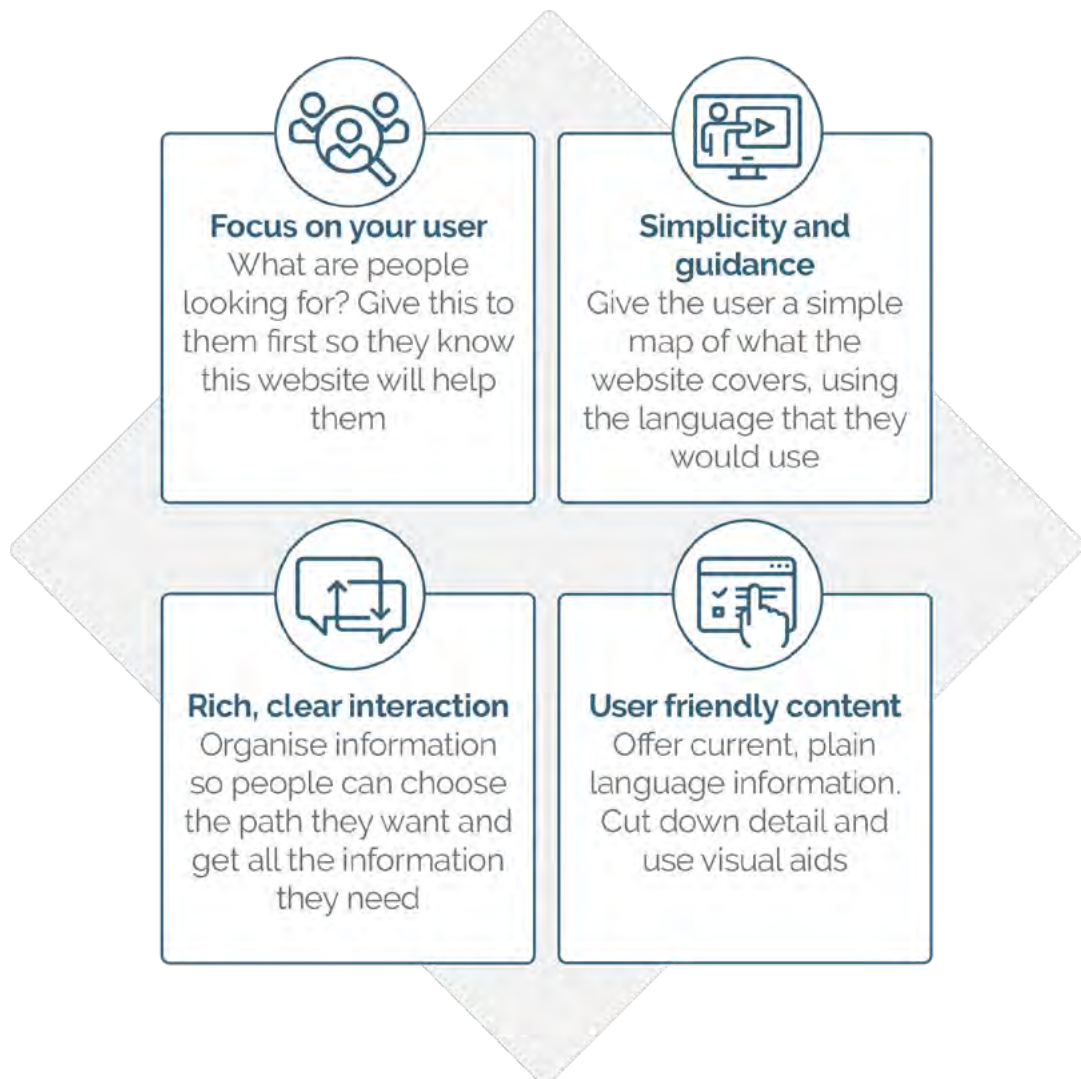
52 See *Royal Commission into Institutional Responses to Child Sexual Abuse: Final Report* (Report, December 2017) vol 9, 178 <<https://www.childabuseroyalcommission.gov.au/final-report>>. On the need to improve community understandings of child sexual abuse: see Submission 57 (Commission for Children and Young People (Vic)). On the need for information tailored for young people specifically, see Consultation 85 (Roundtable on the experience of children and young people).

53 *Royal Commission into Institutional Responses to Child Sexual Abuse: Final Report* (Report, December 2017) Recommendation 9.5 <<https://www.childabuseroyalcommission.gov.au/final-report>>.

54 Ibid. It could also facilitate referrals from Victoria Police: see Consultation 89 (Sexual Assault Services Victoria (No 2)).



**Figure 14: Key design principles for legal help-seeking websites by Stanford University Legal Design Lab<sup>55</sup>**



- 7.34 A website specifically about sexual violence should have additional features. People can find it difficult to identify they have been sexually assaulted so there should be information on identifying sexual violence and consent.<sup>56</sup> There are widespread misconceptions in the community about sexual violence, but websites can play a role in challenging these myths and validating victim survivor experiences.<sup>57</sup> We discuss giving the public this kind of information in Chapter 3.
- 7.35 We suggest that to meet victim survivors' information needs (discussed above), the website should have practical information on
- *Support options.* The site should give information on the supports available for victim survivors throughout the justice process, including victim advocates, intermediaries, and victim legal representation.

<sup>55</sup> 'Design Principles', *A Better Legal Internet* (Web Page) <<http://betterinternet.law.stanford.edu/design-guide/design-principles/>>.  
<sup>56</sup> See Emily M Lund and Katie B Thomas, 'Necessary But Not Sufficient: Sexual Assault Information on College and University Websites' (2015) 39(4) *Psychology of Women Quarterly* 530, 531.  
<sup>57</sup> Ibid. See more broadly Denise Lievore, *No Longer Silent: A Study of Women's Help-Seeking Decisions and Service Responses to Sexual Assault* (Report, Australian Institute of Criminology (Cth), June 2005) 120 <<https://aic.gov.au/publications/archive/no-longer-silent>>. The comprehensive document already prepared by Victoria Police and the Australian Institute of Family Studies which identifies and dispels common societal misunderstandings about sexual harm could be a useful source to build on: Australian Institute of Family Studies (Cth) and Victoria Police, *Challenging Misconceptions about Sexual Offending: Creating an Evidence-based Resource for Police and Legal Practitioners* (Report, 2017) <<https://www.police.vic.gov.au/sites/default/files/2019-01/For-Internet--Challenging-Misconceptions-Report.pdf>>.



- *Reporting options.* The site should explain the different ways to report, what it means to report and someone's rights when reporting. This could include advice for people who are not sure if they want to report (such as how to access a 'just in case' forensic examination or self-record details of the violence).
  - *Justice options.* The site should explain how the criminal justice process works and what someone could expect to get from it. It should also give information on other justice options such as civil litigation, victims' compensation, redress schemes and making a complaint to the E-Safety Commissioner, as well as any new options introduced after this inquiry, such as restorative justice and truth telling.
- 7.36 Knowing about these options early can help people understand that they can have support to report (such as a victim advocate) and do not have to contact police to get a justice outcome (if they decided on the truth-telling option).
- 7.37 In terms of design—in line with the Royal Commission—the website should be a part of the support service structure, linked to other websites including family violence and specialist sexual assault service websites.<sup>58</sup> The new Commission that we recommend in Chapter 22 would be ideally placed to oversee the operation of this gateway.
- 7.38 This gateway to information and support should be accessible to everyone in the Victorian community, so it should provide information and access to support in a range of languages and formats and be tailored to diverse needs.<sup>59</sup> Like the Orange Door website, it should be user-tested to make sure it provides a safe and accessible experience.<sup>60</sup>

## Recommendation

- 18 The Victorian Government should set up a central website (or expand an existing website) to provide people with practical information on sexual violence and their options for support, reporting and justice. It should:
- a. enable people to connect with support services online or via phone, 24 hours a day
  - b. discuss how to identify sexual violence, support options, reporting options and justice options, and possible outcomes
  - c. be user-friendly and tailored to different audiences, including victim survivors, friends and family and bystanders, and people with diverse needs and experiences.

<sup>58</sup> *Royal Commission into Institutional Responses to Child Sexual Abuse: Final Report* (Report, December 2017) vol 9, 178 <<https://www.childabuseroyalcommission.gov.au/final-report>>.

<sup>59</sup> See also *Royal Commission into Institutional Responses to Child Sexual Abuse: Final Report* (Report, December 2017) vol 9, 178 <<https://www.childabuseroyalcommission.gov.au/final-report>>.

<sup>60</sup> The development of The Orange Door website involved researching and testing with users: Victorian Government, 'Create a Website to Provide Information for Victims, Families, Friends and Communities', *VIC.GOV.AU* (Web Page, 18 May 2020) <<https://www.vic.gov.au/family-violence-recommendations/create-website-provide-information-victims-families-friends-and>>.

## People should have options to report and disclose online

### Reporting options are limited

When it comes to engaging with the criminal justice system, survivors want options. This includes options in the reporting process.—Dr Bianca Fileborn and colleagues<sup>61</sup>

- 7.39 We have been told that it is important for victim survivors to have a choice of *how* they report. The Royal Commission also recommended 'a range of channels' for reporting to police.<sup>62</sup>
- 7.40 Currently, in Victoria, there are only two ways anyone can report sexual offences to police:
- in-person: to a SOCIT team, at a multi-disciplinary centre or at their local police station
  - over the phone: by calling triple-0 or their local SOCIT team.
- 7.41 People who have experienced historical child sexual abuse can also report to Victoria Police's SANO Taskforce, in-person or by calling or emailing them.
- 7.42 Reporting sexual violence to police (or another authority) is different from telling (or 'disclosing' to) someone you know.<sup>63</sup> It can have more serious outcomes for a victim survivor, including an investigation being started without their consent.<sup>64</sup>

### Online reporting is one way to expand reporting options

- 7.43 It is possible in some Australian states to report sexual violence to the police online. Police forces in New South Wales, Queensland and the Australian Capital Territory all have online reporting options.<sup>65</sup> Other online 'reporting' options exist in Australia and overseas run by organisations other than police, such as universities, support services and other institutions (see Table 9).
- 7.44 These platforms often have different names: alternative reporting, online reporting, confidential (or anonymous) reporting or informal reporting. While they are all called 'reporting', some involve reporting to an institution other than the police. Others may be called online 'disclosure' options because they enable disclosures to support services that do not go to police.<sup>66</sup>

61 Submission 7 (Dr Bianca Fileborn, Dr Rachel Loney-Howes, Dr Tully O'Neill and Sophie Hindes). See also Submission 22 (knowmore legal service).

62 Submission 22 (knowmore legal service); *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report* (Executive Summary and Parts I-II, 2017) Recommendation 4.c.

63 'Difference between Disclosure and Reporting', *Australian National University* (Web Page) <<https://www.anu.edu.au/students/health-safety-wellbeing/violence-sexual-assault-support/difference-between-disclosure-and>>. Other authorities that might receive reports of sexual violence include employers and universities, eg through informal online reporting platforms, discussed later in this chapter.

64 Victoria Police, *Reporting Sexual Offences to Police* (Booklet, 2020) 6 <[https://www.police.vic.gov.au/sites/default/files/2020-03/Reporting%20Sexual%20Offences\\_A6%20booklet\\_web.pdf](https://www.police.vic.gov.au/sites/default/files/2020-03/Reporting%20Sexual%20Offences_A6%20booklet_web.pdf)>.

65 See 'ACT Policing: Reporting Historic Sexual Assault', *Australian Federal Police* (Web Page) <[https://forms.afp.gov.au/online\\_forms/actpolicing\\_reporting\\_sexual\\_assault](https://forms.afp.gov.au/online_forms/actpolicing_reporting_sexual_assault)>; 'Alternative Reporting Options', *Queensland Police Service* (Web Page, 26 October 2020) <<https://www.police.qld.gov.au/units/victims-of-crime/adult-sexual-assault/alternative-reporting-options>>; 'Sexual Assault Reporting Option', *New South Wales Police Force* (Web Page) <[https://www.police.nsw.gov.au/crime/sex\\_crimes/adult\\_sexual\\_assault/sexual\\_assault\\_categories/sexual\\_assault\\_reporting\\_option](https://www.police.nsw.gov.au/crime/sex_crimes/adult_sexual_assault/sexual_assault_categories/sexual_assault_reporting_option)>.

66 Eg 'Sexual Assault Disclosure Scheme', *Bravehearts* (Web Page) <<https://bravehearts.org.au/SADS>>.

- 7.45 These online reporting models usually enable people to:
- provide information about an alleged assault by answering tick-box and open-ended questions about the assault and the accused
  - have the option to
    - report anonymously (without leaving their contact details)
    - identify themselves and be contacted by support services or police
  - access broader information about how to report or address the violence in another way (for example, by seeking support or telling friends and family).

**Table 9: Examples of current online reporting and disclosure options**

Type	Description
Police	<p>Example: Sexual Assault Reporting Option (SARO)<sup>67</sup></p> <ul style="list-style-type: none"> <li>• informal report via a downloadable form</li> <li>• can remain anonymous or leave contact details</li> <li>• provides support service details</li> </ul> <p>Other police-run platforms have online forms; the option to release forensic medical results to police; and guaranteed response times.<sup>68</sup></p>
Support service	<p>Example: Sexual Assault Disclosure Scheme (SADS)<sup>69</sup></p> <ul style="list-style-type: none"> <li>• national platform</li> <li>• for adults reporting child sexual abuse</li> <li>• can remain anonymous</li> <li>• follow up contact from the support service</li> <li>• de-identified reports given to the police and the support service and the person reporting is contacted by the support service if police want to make contact</li> </ul> <p>The SARA platform is also discussed below.</p>
University	<p>Example: UNSW Sexual Misconduct Portal<sup>70</sup></p> <ul style="list-style-type: none"> <li>• online reports can be made to the University</li> <li>• allows reports from victim survivors, witnesses and support people</li> <li>• can remain anonymous</li> <li>• options for follow up contact—such as being contacted about their options, details of support services or special consideration for their studies</li> </ul>
Institutional	<p>The Office of the E-Safety Commissioner hosts an online reporting form for image-based abuse.<sup>71</sup></p> <p>The Victorian Equal Opportunity and Human Rights Commission has an online complaint form.<sup>72</sup></p>

67 'Sexual Assault Reporting Option', *New South Wales Police Force* (Web Page) <[https://www.police.nsw.gov.au/crime/sex\\_crimes/adult\\_sexual\\_assault/sexual\\_assault\\_categories/sexual\\_assault\\_reporting\\_option](https://www.police.nsw.gov.au/crime/sex_crimes/adult_sexual_assault/sexual_assault_categories/sexual_assault_reporting_option)>.

68 'Alternative Reporting Options', *Queensland Police Service* (Web Page, 26 October 2020) <<https://www.police.qld.gov.au/units/victims-of-crime/adult-sexual-assault/alternative-reporting-options>>.

69 'Sexual Assault Disclosure Scheme', *Bravehearts* (Web Page) <<https://bravehearts.org.au/SADS>>.

70 'UNSW Sexual Misconduct Portal', *UNSW Sydney* (Web Page) <<https://www.edi.unsw.edu.au/sexual-misconduct/make-report>>.

71 'Image-Based Abuse Report', *ESafety Commissioner* (Web Page) <<https://forms.esafety.gov.au/Infiniti/Produce/wizard/de0b7c64-140a-4796-9846-3c7a3b4e5426/?portal=1>>.

72 'Make a Complaint', *Victorian Equal Opportunity and Human Rights Commission* (Web Page) <<https://makeacomplaint.humanrights.vic.gov.au/>>.

- 7.46 Some online reporting systems allow a person's de-identified report to be passed on to police without their contact details.<sup>73</sup> Others allow bystanders or third parties to report sexual violence.<sup>74</sup> Callisto, discussed above, has an optional 'matching' service which gives a person the choice to be contacted if the details that they provide about the perpetrator match the information provided in another report.<sup>75</sup>
- 7.47 From 2013–2020, Victoria also had a confidential online 'reporting' form, the Sexual Assault Reporting Anonymously (SARA) platform, run through a support service.<sup>76</sup> This service, the South Eastern Centre Against Sexual Assault (SECASA), would pass de-identified reports to the police and give people the option of receiving a follow-up call from a counsellor at SECASA.
- 7.48 The Victorian Crime Stoppers website, run by Victoria Police, receives anonymous reports of 'sex crimes'.<sup>77</sup> But this is a broader crime reporting platform. It does not try to engage victim survivors specifically. It also does not have other features common to sexual violence reporting platforms, such as the option to receive follow-up support.

## Online reporting has benefits

- 7.49 Online reporting options for sexual violence can have important benefits:
- It gives victim survivors a way to 'break their silence'.<sup>78</sup>
  - It can meet their justice needs, by enabling them to tell their story or to contribute to preventing future violence.<sup>79</sup>
  - It connects people with support.<sup>80</sup>
  - It enables a formal report to police.<sup>81</sup>
  - It gives victim survivors information on their justice options.<sup>82</sup>
  - It gives police and other institutions (such as universities) intelligence and data on sexual offences to help prevent future violence.<sup>83</sup>
- 7.50 Confidential online reporting options may be more accessible than the usual reporting pathways to police. They may be easier to access for people living in institutional contexts, such as women in prison.<sup>84</sup> They could also meet wider communication needs by using written (or non-verbal) reports and languages other than English.<sup>85</sup>
- 7.51 We heard strong support for confidential online reporting options in our inquiry. Associate Professor Georgina Heydon and colleagues stated that confidential online reporting had 'significant potential' for meeting victim survivors' therapeutic needs and assisting police.<sup>86</sup> Associate Professors Anastasia Powell and Asher Flynn agreed

73 Such as 'Sexual Assault Disclosure Scheme', *Bravehearts* (Web Page) <<https://bravehearts.org.au/SADS>>.

74 'UNSW Sexual Misconduct Portal', *UNSW Sydney* (Web Page) <<https://www.edi.unsw.edu.au/sexual-misconduct/make-report>>.

75 'Callisto', *Callisto* (Web Page, 2020) <<https://mycallisto.org/>>.

76 Submissions 10 (Carolyn Worth AM and Mary Lancaster), 60 (Associate Professor Georgina Heydon, Associate Professor Nicola Henry, Dr Rachel Loney-Howes and Dr Tully O'Neill); 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, 635–6.

77 'Report Crime Information', *Crime Stoppers Victoria* (Web Page) <<https://www.crimestoppersvic.com.au/report-a-crime>>.

78 Submission 10 (Carolyn Worth AM and Mary Lancaster). See also Sexual Assault Services Victoria and centres against sexual assault in Consultation 78 (Roundtable on reporting).

79 Submission 60 (Associate Professor Georgina Heydon, Associate Professor Nicola Henry, Dr Rachel Loney-Howes and Dr Tully O'Neill); Consultation 5 (Associate Professors Anastasia Powell and Asher Flynn) (on prevention).

80 Submissions 10 (Carolyn Worth AM and Mary Lancaster), 44 (Dr Patrick Tidmarsh and Dr Gemma Hamilton); Georgina Heydon, Nicola Henry and Rachel Loney-Howes, *Models of Reporting Sexual Assault to Police* (Critical Policy Brief, Gendered Violence and Abuse Research Alliance, 2021).

81 Submission 60 (Associate Professor Georgina Heydon, Associate Professor Nicola Henry, Dr Rachel Loney-Howes and Dr Tully O'Neill); Consultation 5 (Associate Professors Anastasia Powell and Asher Flynn); Sexual Assault Services Victoria and centres against sexual assault in Consultation 78 (Roundtable on reporting).

82 Submissions 44 (Dr Patrick Tidmarsh and Dr Gemma Hamilton), 60 (Associate Professor Georgina Heydon, Associate Professor Nicola Henry, Dr Rachel Loney-Howes and Dr Tully O'Neill).

83 Submission 7 (Dr Bianca Fileborn, Dr Rachel Loney-Howes, Dr Tully O'Neill and Sophie Hindes). See also Submission 10 (Carolyn Worth AM and Mary Lancaster). This can include matching alleged offenders from different reports: Submission 60 (Associate Professor Georgina Heydon, Associate Professor Nicola Henry, Dr Rachel Loney-Howes and Dr Tully O'Neill); Consultation 5 (Associate Professors Anastasia Powell and Asher Flynn).

84 Submissions 22 (knowmore legal service), 45 (Victims of Crime Commissioner); *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report* (Executive Summary and Parts I–II, 2017) Recommendation 6. See also *ibid* 410.

85 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, 639.

86 Submission 60 (Associate Professor Georgina Heydon, Associate Professor Nicola Henry, Dr Rachel Loney-Howes and Dr Tully O'Neill).

that confidential online reporting could ‘make a real difference’.<sup>87</sup> Dr Bianca Fileborn and colleagues said that the limited research available shows that confidential online reporting could help police and assist victim survivors to report and seek support.<sup>88</sup> We also heard support from people who worked with the previous SARA platform and others.<sup>89</sup>

- 7.52 Some people saw online reporting options as another way to make reporting more accessible (along with reporting over the phone or from your own home).<sup>90</sup> Others focused on the benefits in enabling informal reporting to a support service rather than police.<sup>91</sup>

### **The benefits of the SARA platform**

- It received many disclosures, receiving over 2,000 reports of sexual violence.<sup>92</sup>
- It connected people with support. Half the people using it agreed to follow-up contact from the sexual assault service.<sup>93</sup>
- It provided a private and accessible way for people to disclose ‘at a time they wanted’. SARA received many disclosures from people at night.<sup>94</sup>
- It collected detailed information about alleged offences and the accused.<sup>95</sup>
- It led to people making formal and informal reports to police.<sup>96</sup>

A victim survivor who had used SARA spoke highly of the experience. She was contacted by a ‘very knowledgeable and supportive’ counsellor, and this report was ‘fundamental’ to her decision to later speak to the police.<sup>97</sup> A sexual assault advocate said that SARA enabled people (who would otherwise not report) to both report and get support: ‘these are really significant enough strengths’.<sup>98</sup>

- 7.53 As discussed earlier, online service platforms (including apps) are starting to be seen as positive interventions for sexual violence.<sup>99</sup> Research also indicates that online forums for disclosing sexual violence can satisfy victim survivors’ justice needs (for example, to have a voice or to feel validated).<sup>100</sup> These are not reporting platforms, but like reporting platforms, they offer a different form of recognition from that of the criminal justice process.

## **Confidential online reporting raises some risks**

- 7.54 Supporters of online reporting models have said how important it is to make sure that

87 Consultation 5 (Associate Professors Anastasia Powell and Asher Flynn).  
88 Submission 7 (Dr Bianca Fileborn, Dr Rachel Loney-Howes, Dr Tully O’Neill and Sophie Hindes).  
89 Submissions 10 (Carolyn Worth AM and Mary Lancaster), 17 (Sexual Assault Services Victoria), 44 (Dr Patrick Tidmarsh and Dr Gemma Hamilton), 45 (Victims of Crime Commissioner); Consultations 45 (Sex Work Law Reform Victoria), 50 (End Rape on Campus). Others were open to the idea when it was proposed in consultations: Consultations 11 (Family violence and sexual assault practitioners focusing on disability inclusion), 17 (Roundtable consultation focused on the experience of women with disability), 79 (Commissioner for Aboriginal Children and Young People and Manager, Koori Advisory and Engagement).  
90 See, eg, Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021); Submission 7 (Dr Bianca Fileborn, Dr Rachel Loney-Howes, Dr Tully O’Neill and Sophie Hindes).  
91 See, eg, Submission 60 (Associate Professor Georgina Heydon, Associate Professor Nicola Henry, Dr Rachel Loney-Howes and Dr Tully O’Neill).  
92 Ibid.  
93 Submissions 10 (Carolyn Worth AM and Mary Lancaster), 60 (Associate Professor Georgina Heydon, Associate Professor Nicola Henry, Dr Rachel Loney-Howes and Dr Tully O’Neill).  
94 Consultation 5 (Associate Professors Anastasia Powell and Asher Flynn).  
95 Submission 60 (Associate Professor Georgina Heydon, Associate Professor Nicola Henry, Dr Rachel Loney-Howes and Dr Tully O’Neill). This submission also discusses an (unpublished) analysis of SARA files which shows that bystanders and third parties also used SARA to report sexual violence.  
96 Ibid.  
97 Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021).  
98 Consultation 82 (Katherine Dowson, South Eastern Centre Against Sexual Assault).  
99 Laura Tarzia et al, ‘Technology Doesn’t Judge You’: Young Australian Women’s Views on Using the Internet and Smartphones to Address Intimate Partner Violence’ (2017) 35(3) *Journal of Technology in Human Services* 199, 205–13.  
100 See, eg, Michael Salter, ‘Justice and Revenge in Online Counter-Publics: Emerging Responses to Sexual Violence in the Age of Social Media’ (2013) 9(3) *Crime Media Culture* 225, 237; Bianca Fileborn, ‘Online Activism and Street Harassment: Digital Justice or Shouting into the Ether?’ (2014) 2(1) *Griffith Journal of Law and Human Dignity* 32, 43–8.

someone's report is not used in a way they do not expect.<sup>101</sup> A first and key concern we heard about online reporting is that this may be impossible to ensure. The law may require disclosures of reports through search warrants, freedom of information requests and subpoenas.<sup>102</sup>

- 7.55 This is not a hypothetical concern—in the past, the SARA platform was subject to search warrants and police requests for people's contact details.<sup>103</sup> In our roundtable on reporting, Victoria Police confirmed that their 'interest is being able to obtain that information if needed'. They gave examples of situations where a child was at risk or there was a pattern of offending.<sup>104</sup> SAS Victoria stressed that if these platforms are designed for victim survivors, then 'the police may need to get [the information] another way'.<sup>105</sup>
- 7.56 Secondly, making an online report and then a formal statement to police could lead to disadvantage in court. If there are differences between someone's two reports, this could be used to discredit their account in court.<sup>106</sup> We heard this concern from a range of people, including sexual assault support services, Victoria Police, the Criminal Bar Association and SAS Victoria.<sup>107</sup> This risk does exist for anyone who makes a disclosure and then a formal report, although the impact of any differences may be greater when someone's initial report is both written and detailed.
- 7.57 A third concern relates to weaknesses in existing models. We were told that police-run reporting forms in other Australian states were poorly designed: too lengthy and not trauma-informed.<sup>108</sup> Victoria Police also noted the risk of not understanding the status of the 'report'. People have reported sexual violence to an app (such as dating and ride-share apps) without these reports being passed on to police. Indeed, some people using SARA did think they had reported to police.<sup>109</sup>
- 7.58 Fourthly, there were other concerns about how effective an online reporting model was. For example, Victoria Police was concerned about other effects of an online reporting model, including more delays in the criminal justice process.<sup>110</sup> We heard scepticism about online reporting from people who have experienced sexual violence. Some felt that online reporting would not have addressed the many reasons they did not report.<sup>111</sup> Others thought it could even create a less supportive reporting experience and that reforms should instead focus on improving how victim survivors are treated in the justice system.<sup>112</sup> We discuss these types of reform in other chapters (Chapters 12 and 21).

101 Submission 7 (Dr Bianca Fileborn, Dr Rachel Loney-Howes, Dr Tully O'Neill and Sophie Hindes).

102 Criminal Bar Association in Consultations 78 (Roundtable on reporting), 95 (Victoria Legal Aid (No 2)).

103 Sexual Assault Services Victoria and centres against sexual assault in Consultations 78 (Roundtable on reporting), 82 (Katherine Dowson, South Eastern Centre Against Sexual Assault).

104 Victoria Police in Consultation 78 (Roundtable on reporting).

105 See their comments in *ibid*.

106 There are jury directions that seek to counter misconceptions that jurors might have about differences in a person's account: *Jury Directions Act 2015* (Vic) s 54D; Judicial College of Victoria, '4.26 Differences in a Complainant's Account', *Criminal Charge Book* (Online Manual, 2 October 2017) <<https://www.judicialcollege.vic.edu.au/eManuals/CCB/65339.htm>>. This risk could be partly addressed by extending these directions to cover online reports (see Ch 20).

107 Submission 68 (Victoria Police); Criminal Bar Association, Sexual Assault Services Victoria and centres against sexual assault in Consultation 78 (Roundtable on reporting).

108 Submissions 7 (Dr Bianca Fileborn, Dr Rachel Loney-Howes, Dr Tully O'Neill and Sophie Hindes), 10 (Carolyn Worth AM and Mary Lancaster), 60 (Associate Professor Georgina Heydon, Associate Professor Nicola Henry, Dr Rachel Loney-Howes and Dr Tully O'Neill).

109 Consultation 82 (Katherine Dowson, South Eastern Centre Against Sexual Assault).

110 Submission 68 (Victoria Police).

111 Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021).

112 Submission 15 (Danielle).



- 7.59 Finally, there is still a lack of research on or evaluation of online reporting models; this is an 'emerging area of police and service system practice', but studies are starting to be published.<sup>113</sup>
- 7.60 These risks highlight the need for online reporting options to be well resourced and supported with strong protocols around data management.<sup>114</sup> Some of these risks and the ways they could be managed are discussed further below.

### **We recommend an online pathway to support and reporting**

- 7.61 Seeking support and reporting are difficult processes, but they can be made easier. Making these processes more accessible could shift some barriers to reporting faced by people who have experienced sexual violence. We see the benefits of making support and reporting more accessible online.
- 7.62 But the risks of online reporting models are real and need to be managed. The risks seem to be due to online reporting models blurring the line between disclosing sexual violence (to seek support or make sense of what happened) and reporting it (which has legal outcomes).
- 7.63 We recommend an online pathway to (1) sexual assault support services and (2) specialist SOCIT police. Keeping online contact with support services and police separate would make the most of the benefits of online reporting, while helping to manage its risks.

### **People should be able to disclose to a support service, online**

- 7.64 The support for online reporting platforms was mostly due to their value in connecting victim survivors with support services. Those involved in studying the SARA model confirm 'its primary purpose was to connect survivors with support services'.<sup>115</sup> As we discuss in Chapter 12, this can be an end in itself. While reaching out for support could be a step towards making a formal report, there should be no 'pressure' on victim survivors to do so.<sup>116</sup>
- 7.65 We can see that online reporting models like SARA made it less difficult for victim survivors to disclose their experiences. They could disclose at a time and from a place that suited them, taking a potential first step towards reporting.
- 7.66 We also heard that some victim survivors found it easier to access support through text, phone calls and online systems. One LGBTIQ+ support service explained that being able to text a support service can be 'a toe in the water' instead of 'a very confronting emotional phone call'.<sup>117</sup> We note earlier how technology can enable more anonymity for a person seeking help. Importantly, services like the Sexual Assault Crisis Line do allow for anonymous contact.<sup>118</sup>

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113 Submission 45 (Victims of Crime Commissioner). See, eg, 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. Further studies are expected to be published in 2021, including 'Alternative and Confidential Reporting Options for Sexual Assault: An Exploration of Their Purpose, Use and Potential in Australia', *Digital Ethnography Research Centre* (Web Page, 24 May 2020) <<https://digital-ethnography.com/alternative-and-confidential-reporting-options-for-sexual-assault-an-exploration-of-their-purpose-use-and-potential-in-australia/>>.

114 Consultation 82 (Katherine Dowson, South Eastern Centre Against Sexual Assault); Submissions 60 (Associate Professor Georgina Heydon, Associate Professor Nicola Henry, Dr Rachel Loney-Howes and Dr Tully O'Neill), 17 (Sexual Assault Services Victoria).

115 Submission 60 (Associate Professor Georgina Heydon, Associate Professor Nicola Henry, Dr Rachel Loney-Howes and Dr Tully O'Neill). See also Consultation 82 (Katherine Dowson, South Eastern Centre Against Sexual Assault).

116 Submission 7 (Dr Bianca Fileborn, Dr Rachel Loney-Howes, Dr Tully O'Neill and Sophie Hindes).

117 Consultation 22 (First roundtable on the experience of LGBTIQ+ people).

118 See Submission 17 (Sexual Assault Services Victoria).



- 7.67 Young people might prefer online support options.<sup>119</sup> Research indicates that young people might feel a greater sense of control in online interactions and be more likely to disclose experiences of sexual violence.<sup>120</sup> People in regional communities may also find it a more private way to access support.<sup>121</sup> Djirra indicated that phone counselling options have increased service use by women in Aboriginal communities.<sup>122</sup>
- 7.68 We see value in victim survivors connecting with specialist sexual assault support services in a range of ways, including online. SAS Victoria was positive about how it was resourced to keep engaging with clients in different ways during coronavirus (COVID-19) restrictions.<sup>123</sup>

### People should be able to contact police online

- 7.69 We recommend greater access to police online. As discussed earlier, the Royal Commission recommended that police forces set up a range of channels (including online) for reporting child sexual abuse. In response, the Victorian Government noted Crime Stoppers as an online reporting pathway and the option to report by phone.<sup>124</sup> The Royal Commission's recommendation could extend to sexual violence more broadly, and more could be done to implement its recommendation.
- 7.70 Victoria Police should make it possible to connect with SOCIT teams online, including to start a report of sexual violence. This could build on existing police practice in Victoria, such as reporting to the SANO Taskforce via email.
- 7.71 Being able to contact police online is just one way to make police reporting more accessible. We also discuss the need to enable reporting from a safe place (such as a community support service) in Chapters 8 and 17.

### Key principles should guide online engagement

- 7.72 Our research, submissions and consultations have identified some important principles for online disclosure or reporting. We have added principles that might address some of the risks with online reporting.

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119 See Consultations 68 (Youthlaw), 79 (Commissioner for Aboriginal Children and Young People and Manager, Koori Advisory and Engagement).

120 See, in order, Laura Tarzia et al, "Technology Doesn't Judge You": Young Australian Women's Views on Using the Internet and Smartphones to Address Intimate Partner Violence' (2017) 35(3) *Journal of Technology in Human Services* 199, 200–1; Ruth Webber, 'Sexual Assault in Relationships: Seeking Help on a Q&A Website' (2014) 67(3) *Australian Social Work* 363, 364–6.

121 Consultation 76 (YACVic and YACVic Young People).

122 Submission 9 (Djirra).

123 Consultation 89 (Sexual Assault Services Victoria (No 2)).

124 Victorian Government, *Annual Report 2020—Royal Commission into Institutional Responses to Child Sexual Abuse* (Report, December 2020) 22 <<https://content.vic.gov.au/sites/default/files/2020-12/RCIIR%20to%20Child%20Sexual%20Abuse%20Annual%20Report20.pdf>>.

### Principles for online disclosure or reporting

- Give people clear information on what they will be asked, who will receive these details, how they will respond and how long the response will take.<sup>125</sup>
- Respond to people quickly. Some submissions called for 24-hour staffing for a SARA-like model,<sup>126</sup> others pointed to the danger of not receiving a quick response. For example, Youthlaw felt that if 'a young person reporting sexual harm doesn't hear back, they will drop off and won't engage further'.<sup>127</sup>
- Do not ask too much detail about the alleged offence, accused or person reporting—get enough to connect someone, but not details that could be used against them in court.<sup>128</sup> Do not provide people with the option to stay anonymous unless this can be guaranteed.
- Be clear about when and how the information provided by the person disclosing or reporting can be provided to others (for example, under court subpoena).
- Use victim-centred design—any online police form should be co-designed with support services.<sup>129</sup> It should ask minimal, open-ended and optional questions. Any form should avoid misconceptions about sexual violence (for example, by focusing on the victim's clothing and actions). It should give victim survivors an option to connect with support services.<sup>130</sup>
- Any platform or form should be as accessible as possible. For example, it should enable verbal and written contact, or contact in languages other than English.<sup>131</sup>
- Any platform or form should be adequately resourced.<sup>132</sup>
- The platform should be monitored—for example, for whether people receive an adequate response or go on to make a formal report— and comprehensively evaluated.<sup>133</sup>

7.73 If someone wanted to make an anonymous report to the police just to provide intelligence on sexual violence in the community, they could still use the Crime Stoppers form or helpline. But Crime Stoppers has a limited role as an online reporting option for sexual violence since it is not a victim-centred platform, in line with the principles that we identify (such as follow-up support).

125 Submissions 7 (Dr Bianca Fileborn, Dr Rachel Loney-Howes, Dr Tully O'Neill and Sophie Hinds), 60 (Associate Professor Georgina Heydon, Associate Professor Nicola Henry, Dr Rachel Loney-Howes and Dr Tully O'Neill); Consultation 79 (Commissioner for Aboriginal Children and Young People and Manager, Koori Advisory and Engagement).

126 Submission 44 (Dr Patrick Tidmarsh and Dr Gemma Hamilton).

127 Consultation 68 (Youthlaw). See also Consultation 79 (Commissioner for Aboriginal Children and Young People and Manager, Koori Advisory and Engagement).

128 Consideration should be given to whether this information can still be gathered in a free-form way, given the potential dangers of specific questions or tick-boxes contradicting later statements: see Submission 60 (Associate Professor Georgina Heydon, Associate Professor Nicola Henry, Dr Rachel Loney-Howes and Dr Tully O'Neill).

129 Submission 7 (Dr Bianca Fileborn, Dr Rachel Loney-Howes, Dr Tully O'Neill and Sophie Hinds).

130 Ibid; Submission 60 (Associate Professor Georgina Heydon, Associate Professor Nicola Henry, Dr Rachel Loney-Howes and Dr Tully O'Neill).

131 Submissions 7 (Dr Bianca Fileborn, Dr Rachel Loney-Howes, Dr Tully O'Neill and Sophie Hinds), 60 (Associate Professor Georgina Heydon, Associate Professor Nicola Henry, Dr Rachel Loney-Howes and Dr Tully O'Neill); Consultations 5 (Associate Professors Anastasia Powell and Asher Flynn), 17 (Roundtable consultation focused on the experience of women with disability); 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, 639.

132 Submission 17 (Sexual Assault Services Victoria); Consultation 82 (Katherine Dowson, South Eastern Centre Against Sexual Assault).

133 See, eg, Consultation 79 (Commissioner for Aboriginal Children and Young People and Manager, Koori Advisory and Engagement).

## Recommendations

- 19 The Victorian Government should resource sexual assault support services to receive and respond to disclosures of sexual violence online and through a central website.
- 20 Victoria Police, in collaboration with sexual assault support services, should develop an online pathway to reporting sexual offences. It should:
  - a. be victim-centred
  - b. require people to leave minimal details
  - c. be clear about who will respond and when (aiming for response times that are as short as practicable)
  - d. provide people with details of the central website and how to seek support in Recommendation 18.

## People need equal access to reporting no matter where they live

- 7.74 We heard that people living in institutional contexts face unique barriers to reporting. These include:
  - People not having access to a trusted person they can tell.<sup>134</sup>
  - People's disclosures being minimised or not believed by staff or carers.<sup>135</sup>
  - Staff or carers not knowing how to respond to disclosures, including when and how to report to police.<sup>136</sup>
  - People not always having access to specialist sexual assault support services.<sup>137</sup>
  - Police not always coming to prisons or mental health in-patient units to take someone's report.<sup>138</sup>
- 7.75 These barriers were experienced by children and young people in residential care, people in mental health in-patient units, women in prison and people in residential aged care. One roundtable participant said that in these situations, 'justice is not even in the picture'.<sup>139</sup>
- 7.76 These concerns are serious. As the Health Law and Ageing Research Unit told us: 'all citizens of Victoria should have the same legal and human rights and access to the same services irrespective of their place of residence'.<sup>140</sup> The barriers listed above raise complex issues of staff training and clear institutional reporting pathways. Many of the reforms needed will be specific to these contexts, which all have their own regulatory frameworks, oversight mechanisms and responsible government departments.

134 People in mental health in-patient units may not trust staff enough to disclose to them: Consultation 66 (Consultation focused on people who have a lived experience of states of mental and emotional distress commonly labelled as 'mental health challenges').

135 Submissions 3 (Health Law and Ageing Research Unit, Monash University), 21 (Victorian Aboriginal Child Care Agency), 57 (Commission for Children and Young People (Vic)); Consultations 11 (Family violence and sexual assault practitioners focusing on disability inclusion), 32 (Anonymous member, Victim Survivors' Advisory Council), 66 (Consultation focused on people who have a lived experience of states of mental and emotional distress commonly labelled as 'mental health challenges').

136 Submission 3 (Health Law and Ageing Research Unit, Monash University).

137 Ibid; Submission 57 (Commission for Children and Young People (Vic)); Consultation 66 (Consultation focused on people who have a lived experience of states of mental and emotional distress commonly labelled as 'mental health challenges').

138 Consultation 66 (Consultation focused on people who have a lived experience of states of mental and emotional distress commonly labelled as 'mental health challenges').

139 Consultation 11 (Family violence and sexual assault practitioners focusing on disability inclusion).

140 Submission 3 (Health Law and Ageing Research Unit, Monash University).

- 7.77 We also note the important reform recommendations of recent Commonwealth and Victorian inquiries. They have looked into these concerns closely. These include the Royal Commission into Institutional Responses to Child Sexual Abuse, the Royal Commission into Victoria's Mental Health System, the Commonwealth Royal Commission into Aged Care Quality and Safety and reports of the Victorian Ombudsman, the Commission for Children and Young People and the Mental Health Complaints Commission.<sup>141</sup> Their recommendations are at different stages of implementation.
- 7.78 Together these inquiries and our submissions and consultations identify common factors that, if in place, would make sure that people in residential and institutional environments can report to police if they want (and have support to do so):
- *Information.* Everyone should have access to information about their support, reporting and justice options and how to make a complaint about their service provider.<sup>142</sup>
  - *Safe spaces to disclose.* Everyone should have access to trusted and independent people to whom they can disclose sexual violence, for example an independent visitor.<sup>143</sup>
  - *Being believed.* All disclosures of sexual violence should be taken seriously by staff.<sup>144</sup>
  - *Clear guidelines.* Staff should have clear guidance on how to respond to sexual violence.<sup>145</sup>

141 Commission for Children and Young People (Vic), *In Our Own Words* (Report, 27 November 2019) <<https://ccyp.vic.gov.au/upholding-childrens-rights/systemic-inquiries/in-our-own-words/>>; Commission for Children and Young People (Vic), *...As a Good Parent Would...* (Final Report, August 2015) <<https://ccyp.vic.gov.au/upholding-childrens-rights/systemic-inquiries/as-a-good-parent-would/>>; Mental Health Complaints Commissioner (Vic), *The Right to Be Safe: Ensuring Sexual Safety in Acute Mental Health Inpatient Units* (Sexual Safety Project Report, March 2018) <<https://www.mhcc.vic.gov.au/sites/default/files/2021-01/The-right-to-be-safe-sexual-safety-project-report.pdf>>; *Royal Commission into Aged Care Quality and Safety* (Final Report, 1 March 2021) <<https://agedcare.royalcommission.gov.au/publications/final-report>>; *Royal Commission into Victoria's Mental Health System* (Final Report, 3 February 2021) <<https://finalreport.rcvmhs.vic.gov.au/>>; *Royal Commission into Institutional Responses to Child Sexual Abuse: Final Report* (Report, December 2017) <<https://www.childabuseroyalcommission.gov.au/final-report>>; Victorian Ombudsman, *Investigation into Complaints about Assaults of Five Children Living in Child Protection Residential Care Units* (Investigation Report PP No 177, 29 October 2020) <<https://www.ombudsman.vic.gov.au/our-impact/investigation-reports/investigation-into-complaints-about-assaults-of-five-children-living-in-child-protection-residential-care-units-1/>>.

142 Commission for Children and Young People (Vic), *In Our Own Words* (Report, 27 November 2019) Recommendation 6 <<https://ccyp.vic.gov.au/upholding-childrens-rights/systemic-inquiries/in-our-own-words/>>; Commission for Children and Young People (Vic), *...As a Good Parent Would...* (Final Report, August 2015) Recommendation 9 <<https://ccyp.vic.gov.au/upholding-childrens-rights/systemic-inquiries/as-a-good-parent-would/>>; Mental Health Complaints Commissioner (Vic), *The Right to Be Safe: Ensuring Sexual Safety in Acute Mental Health Inpatient Units* (Sexual Safety Project Report, March 2018) 69 (Recommendations—Orientation) <<https://www.mhcc.vic.gov.au/sites/default/files/2021-01/The-right-to-be-safe-sexual-safety-project-report.pdf>>; *Royal Commission into Institutional Responses to Child Sexual Abuse: Final Report* (Report, December 2017) Recommendations 6.6 (Standard 6), 7.7 <<https://www.childabuseroyalcommission.gov.au/final-report>>. See also Recommendations 12.10, 15.9. For children who have complaints made on their behalf, this should include information about compensation: Commission for Children and Young People (Vic), *...As a Good Parent Would...* (Final Report, August 2015) Recommendation 3 <<https://ccyp.vic.gov.au/upholding-childrens-rights/systemic-inquiries/as-a-good-parent-would/>>. This might also require the establishment of complaints or oversight bodies: *Ibid.*

143 Commission for Children and Young People (Vic), *...As a Good Parent Would...* (Final Report, August 2015) Recommendation 3 <<https://ccyp.vic.gov.au/upholding-childrens-rights/systemic-inquiries/as-a-good-parent-would/>>; *Royal Commission into Institutional Responses to Child Sexual Abuse: Final Report* (Report, December 2017) Recommendation 15.4(c) (regarding youth detention) <<https://www.childabuseroyalcommission.gov.au/final-report>>; Victorian Ombudsman, *Investigation into Complaints about Assaults of Five Children Living in Child Protection Residential Care Units* (Investigation Report PP No 177, 29 October 2020) Recommendation 3 <<https://www.ombudsman.vic.gov.au/our-impact/investigation-reports/investigation-into-complaints-about-assaults-of-five-children-living-in-child-protection-residential-care-units-1/>>. Another option is a dedicated staff member with a sexual violence portfolio: Commission for Children and Young People (Vic), *...As a Good Parent Would...* (Final Report, August 2015) Recommendation 2 (Expert specialist practitioner for every residential care unit) <<https://ccyp.vic.gov.au/upholding-childrens-rights/systemic-inquiries/as-a-good-parent-would/>>.

144 In its report on out-of-home care, the Commission for Children and Young People recommended 'a rigorous and thorough investigation when a sexual abuse allegation is made, without predetermining the validity of the allegation': Commission for Children and Young People (Vic), *...As a Good Parent Would...* (Final Report, August 2015) Recommendation 3 <<https://ccyp.vic.gov.au/upholding-childrens-rights/systemic-inquiries/as-a-good-parent-would/>>. See also Department of Health (Vic), *Promoting Sexual Safety, Responding to Sexual Activity, and Managing Allegations of Sexual Assault in Adult Acute Inpatient Units* (Chief Psychiatrist's Guideline, June 2012) 20–1. This Guideline was endorsed by the *Royal Commission into Victoria's Mental Health System* (Final Report, 3 February 2021) Recommendation 13 <<https://finalreport.rcvmhs.vic.gov.au/>>. To ensure appropriate staff responses to sexual violence, staff training is also needed: see Commission for Children and Young People (Vic), *...As a Good Parent Would...* (Final Report, August 2015) Recommendation 9 <<https://ccyp.vic.gov.au/upholding-childrens-rights/systemic-inquiries/as-a-good-parent-would/>>; Mental Health Complaints Commissioner (Vic), *The Right to Be Safe: Ensuring Sexual Safety in Acute Mental Health Inpatient Units* (Sexual Safety Project Report, March 2018) 83 (Recommendations—Trauma-informed care responses) <<https://www.mhcc.vic.gov.au/sites/default/files/2021-01/The-right-to-be-safe-sexual-safety-project-report.pdf>>.

145 See, in relation to child sexual abuse, *Royal Commission into Institutional Responses to Child Sexual Abuse: Final Report* (Report, December 2017) Recommendation 7.7 <<https://www.childabuseroyalcommission.gov.au/final-report>>. See also Department of Health (Vic), *Promoting Sexual Safety, Responding to Sexual Activity, and Managing Allegations of Sexual Assault in Adult Acute Inpatient Units* (Chief Psychiatrist's Guideline, June 2012) 20 <<https://www2.health.vic.gov.au:443/about/key-staff/chief-psychiatrist/chief-psychiatrist-guidelines/promoting-sexual-safety>>.

- *Access to support.* People should be assisted to access specialist sexual assault counselling.<sup>146</sup> We recommend elsewhere that centres against sexual assault (CASAs) should be resourced to meet this need (see Chapter 4).
- *Mandatory reporting to police.* All child sexual abuse (or suspected child sexual abuse) must be reported to police, even if other regulatory or reportable conduct schemes exist.<sup>147</sup>
- *Reporting to police—supported decision making and access for adults.* Adults who have experienced sexual violence should receive the supports they need (such as access to a counsellor-advocate) to make an informed decision about reporting.<sup>148</sup> If they do want to report, they should be supported to do so.<sup>149</sup>
- *Police and service providers working together.* Police and service providers need clear guidelines or protocols about how they work together on allegations of sexual violence.<sup>150</sup>

- 7.79 Work on implementing the recommendations of these inquiries must continue until these common factors are achieved. To support this, in Chapter 4, we propose a working group of regulators be set up as part of the Sexual Assault Strategy. The working group should develop and implement best practice across different residential contexts.
- 7.80 With respect to the specific issue of reporting, one area of concern was whether Victoria Police investigate all complaints of sexual violence that institutions or regulatory schemes refer to it.<sup>151</sup> In Chapter 4, we also recommend that the working group of regulators should map the criminal justice response to institutional complaints and work with Victoria Police to address these concerns. Victoria Police agreed that it was important for people to have clear pathways to reporting, regardless of where they live.<sup>152</sup> They are open to suggestions for reform regarding particular institutional contexts.
- 7.81 In the next chapter, we also recommend that Victoria Police SOCIT teams should build relationships with organisations in their regions, which should also cover residential services and other institutions.

146 See Mental Health Complaints Commissioner (Vic), *The Right to Be Safe: Ensuring Sexual Safety in Acute Mental Health Inpatient Units* (Sexual Safety Project Report, March 2018) 83 (Recommendations—Trauma-informed care responses) <<https://www.mhcc.vic.gov.au/sites/default/files/2021-01/The-right-to-be-safe-sexual-safety-project-report.pdf>>; Department of Health (Vic), *Promoting Sexual Safety, Responding to Sexual Activity, and Managing Allegations of Sexual Assault in Adult Acute Inpatient Units* (Chief Psychiatrist's Guideline, June 2012) 22, 28 <<https://www2.health.vic.gov.au/443/about/key-staff/chief-psychiatrist/chief-psychiatrist-guidelines/promoting-sexual-safety>>. See also Commission for Children and Young People (Vic), *"...As a Good Parent Would..."* (Final Report, August 2015) Recommendation 3 <<https://ccyp.vic.gov.au/upholding-childrens-rights/systemic-inquiries/as-a-good-parent-would/>>.

147 *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report* (Executive Summary and Parts I-II, 2017) Recommendations 32, 34; Victorian Ombudsman, *Investigation into Complaints about Assaults of Five Children Living in Child Protection Residential Care Units* (Investigation Report PP No 177, 29 October 2020) Recommendation 5 <<https://www.ombudsman.vic.gov.au/our-impact/investigation-reports/investigation-into-complaints-about-assaults-of-five-children-living-in-child-protection-residential-care-units-1/>>. See also *Crimes Act 1958* (Vic) s 327 (the failure to disclose offence).

148 Mental Health Complaints Commissioner (Vic), *The Right to Be Safe: Ensuring Sexual Safety in Acute Mental Health Inpatient Units* (Sexual Safety Project Report, March 2018) 91 (Recommendations—Reporting suspected and alleged sexual assaults to Victoria Police) <<https://www.mhcc.vic.gov.au/sites/default/files/2021-01/The-right-to-be-safe-sexual-safety-project-report.pdf>>.

149 See Department of Health (Vic), *Promoting Sexual Safety, Responding to Sexual Activity, and Managing Allegations of Sexual Assault in Adult Acute Inpatient Units* (Chief Psychiatrist's Guideline, June 2012) 25 <<https://www2.health.vic.gov.au/443/about/key-staff/chief-psychiatrist/chief-psychiatrist-guidelines/promoting-sexual-safety>>.

150 Mental Health Complaints Commissioner (Vic), *The Right to Be Safe: Ensuring Sexual Safety in Acute Mental Health Inpatient Units* (Sexual Safety Project Report, March 2018) 91 (Recommendations—Reporting suspected and alleged sexual assaults to Victoria Police); 95 (Recommendations—Working with Victoria Police to respond to suspected and alleged sexual assaults) <<https://www.mhcc.vic.gov.au/sites/default/files/2021-01/The-right-to-be-safe-sexual-safety-project-report.pdf>>; *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report* (Executive Summary and Parts I-II, 2017) Recommendation 14.

151 See, eg, Submissions 41 (Office of the Public Advocate), 48 (Victorian Disability Worker Commission), 57 (Commission for Children and Young People (Vic)).

152 Consultation 93 (Victoria Police (No 4)).



# CHAPTER 08

## Reaching all communities who experience sexual violence

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## 8. Reaching all communities who experience sexual violence

### Overview

- Some people and communities may not turn to the justice system to report sexual violence. This might be because they do not trust or feel connected to the justice system.
- The justice system needs to reach out to these communities.
- Like everyone else, they should have access to information, support and justice options.
- We recommend reforms to extend the reach of justice and support to all victim survivors.
- Community organisations should play a central role in providing people with information, support and access to justice options.
- Women and children in contact with the justice system should receive special attention and support.
- Specialist police should reach out to engage with communities in their regions.

### Community pathways to support and reporting need to be built

- 8.1 A major reason that many victim survivors do not report sexual violence is that they do not trust the justice system and do not see it as a source of support.
- 8.2 This might be because of their broader interactions with it.<sup>1</sup> For example:
- Aboriginal communities who have experienced colonisation, child removal and racism from the justice system<sup>2</sup>
  - communities who have been criminalised in the past (such as LGBTIQ+ communities)<sup>3</sup>
  - communities who face criminalisation now (such as people who work in the sex industry or women in contact with the justice system)<sup>4</sup>
  - people who have been removed from their families by police and other authorities.<sup>5</sup>

1 Consultation 30 (Djirra).

2 Submissions 9 (Djirra), 65 (Aboriginal Justice Caucus); Consultation 20 (Members of Barwon South West RAJAC and Barwon South West Dhelek Dja Action Group).

3 Consultations 22 (First roundtable on the experience of LGBTIQ+ people), 5 (Associate Professors Anastasia Powell and Asher Flynn).

4 Submissions 30 (Red Files Inc.), 58 (Law and Advocacy Centre for Women Ltd); Consultation 60 (Flat Out); Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021). At the time of writing, the Victorian Government is considering the decriminalisation of all sex work in Victoria: Calla Wahlquist, 'Victorian Government to Decriminalise Sex Work after Review Hears of Exploitation', *The Guardian* (online, 30 June 2021) <<https://www.theguardian.com/australia-news/2021/jun/30/victorian-government-to-decriminalise-sex-work-after-review-hears-of-exploitation>>. People working in the sex industry are likely to still face barriers to reporting to police due to past criminalisation and the social stigma associated with sex work.

5 Consultation 98 (Care Leavers Australasia Network); *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report* (Executive Summary and Parts I-II, 2017) 398.

Care leavers don't trust the police or the judicial system ... As children it was the police who removed them from families.—Care Leavers Australasia Network<sup>6</sup>

- 8.3 People seeking asylum and people from migrant and refugee backgrounds may not trust the justice system because they are worried about what will happen to their visa status if they report. They may not trust it because of their past experiences of the justice system.<sup>7</sup> They might have other needs, such as legal needs related to their residency status, which might influence who they turn to first.
- 8.4 Making reporting more accessible will not necessarily make people in these communities more likely to report sexual violence (see Chapter 7).

You can report online or face to face, if you have trust in who is going to come.  
—Consultation with Transgender Victoria, Bisexual Alliance and Drummond Street Services<sup>8</sup>

- 8.5 Improving relationships between communities and the justice system requires reforms beyond this inquiry.<sup>9</sup> But more can be done to make sure that people in these communities have access to information, support and justice options for sexual violence.
- 8.6 We recommend extending justice and support options to more people through community-based organisations. We also highlight the special justice and support needs of women and young people in contact with the justice system.
- 8.7 Our recommendations in this chapter reflect what we heard in consultations from those we were able to speak with in the short timeframe of our work.<sup>10</sup> But we have designed them in a way that can empower all community organisations.
- 8.8 These recommendations build on the work of the Royal Commission into Family Violence. It recognised the role community organisations can play in ensuring that family violence interventions respond to community diversity.<sup>11</sup> Both this Royal Commission and the Royal Commission into Institutional Responses to Child Sexual Abuse also saw the need to support women and children in contact with the justice system.<sup>12</sup>
- 8.9 Even with these efforts, people may still not want to make formal reports.<sup>13</sup> They may still not want to use the support and justice options we propose in this report. But they may be able to take a step closer to having their justice needs met by sharing their experiences and being heard and validated.<sup>14</sup>

6 Consultation 98 (Care Leavers Australasia Network).

7 Submissions 49 (inTouch Multicultural Centre Against Family Violence), 54 (Victorian Multicultural Commission); Consultations 46 (Safer Families Research Centre and Monash Social Inclusion Centre), 47 (Refugee Health Network and Refugee Health Program), 72 (Asylum Seeker Resource Centre).

8 Consultation 40 (Roundtable consultation with Transgender Victoria, Bisexual Alliance and Drummond Street Services).

9 Our stakeholders highlighted areas that they felt needed attention, including the legalisation of all sex work, amending the laws on visa cancellations and increasing police accountability: see, eg, Submissions 30 (Red Files Inc.) (on the decriminalisation of sex work), 40 (Law Institute of Victoria) (on visa cancellations); Consultation 52 (Victorian Aboriginal Legal Service) (on police accountability). See also Submission 5 (Murdoch Children's Research Institute and The University of Melbourne) (on the age of criminal responsibility and detention and the decriminalisation of drugs).

10 In particular, as cited throughout the chapter, our recommendations reflect multiple consultations and submissions focusing on the experiences of Aboriginal communities and people who work in the sex industry, and fewer focusing on the experiences of LGBTIQ+ communities, women seeking asylum and women from migrant and refugee backgrounds, care leavers and children and women in contact with the justice system.

11 See especially *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016)

Recommendations 139–186 <<http://rcfv.archive.royalcommission.vic.gov.au/Report-Recommendations.html>>.

12 Ibid Recommendations 183–85; *Royal Commission into Institutional Responses to Child Sexual Abuse: Final Report* (Report, December 2017) Recommendations 15.1–15.10 <<https://www.childabuseroyalcommission.gov.au/final-report>>.

13 Consultation 72 (Asylum Seeker Resource Centre). See also Submission 49 (inTouch Multicultural Centre Against Family Violence).

14 See, eg, Consultation 72 (Asylum Seeker Resource Centre).

## Community organisations can extend justice and support options to more people

### Some communities do not trust the justice system

- 8.10 When people are deciding if they want to disclose sexual violence and seek support, trust and safety are crucial factors.<sup>15</sup> The Women's Legal Service Victoria states that:

Disclosure and help-seeking for sexual violence requires a very high-level of trust and confidence in authorities by women that they will be believed, and their safety and wellbeing needs will be met.<sup>16</sup>

- 8.11 As noted in Chapter 7, it is estimated that around 87 per cent of people who have experienced sexual violence did not report it to the police.<sup>17</sup> As we discuss in Chapter 2, they may worry that they will not be believed or feel shame or embarrassment.
- 8.12 Due to their broader experiences with the justice system, some people and communities are even less likely than others to trust it as a source of support.<sup>18</sup> For example, we heard that it was unrealistic to expect people whose behaviour had been criminalised to turn to the police for help.

Women who have themselves been charged with criminal offences at some point in their lives have had the experience of being arrested, charged and in many cases imprisoned by police and courts. As victims of sexual assault, they are then asked to disclose their intensely personal experiences to these same institutions, and to trust that they will be believed.—Law and Advocacy Centre for Women<sup>19</sup>

There exists an incongruity that sex workers are expected to report crimes against them to the oppositional body that is actively policing, not protecting them.—Red Files<sup>20</sup>

15 *Royal Commission into Institutional Responses to Child Sexual Abuse: Final Report* (Report, December 2017) vol 4, 36 <<https://www.childabuseroyalcommission.gov.au/final-report>>; Denise Lievore, *No Longer Silent: A Study of Women's Help-Seeking Decisions and Service Responses to Sexual Assault* (Report, Australian Institute of Criminology (Cth), June 2005) 29–30, 38 <<https://aic.gov.au/publications/archive/no-longer-silent>>.

16 Submission 12 (Women's Legal Service Victoria).

17 This statistic is from the 2016 Personal Safety Survey, a national self-report survey that measures people's experiences of violence in the last 12 months. The survey indicates that 87% of women did not contact the police about their most recent sexual assault by a male. See Australian Bureau of Statistics, *Personal Safety, Australia* (Catalogue No 4906.0, 8 November 2017) <<https://www.abs.gov.au/statistics/people/crime-and-justice/personal-safety-australia/latest-release>>; Australian Institute of Health and Welfare (Cth), *Family, Domestic and Sexual Violence in Australia: Continuing the National Story 2019* (Report, 5 June 2019) 17 <<https://www.aihw.gov.au/reports/domestic-violence/family-domestic-sexual-violence-australia-2019>>. In this survey, sexual assault is defined as including 'rape; attempted rape; aggravated sexual assault (assault with a weapon); indecent assault; penetration by objects; forced sexual activity that did not end in penetration; and attempts to force a person into sexual activity': see Australian Institute of Health and Welfare (Cth), *Family, Domestic and Sexual Violence in Australia: Continuing the National Story 2019* (Report, 5 June 2019) 9, 16 <<https://www.aihw.gov.au/reports/domestic-violence/family-domestic-sexual-violence-australia-2019>>. See also *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report* (Executive Summary and Parts I–II, 2017) 165.

18 See, eg, Monica Campo and Sarah Tayton, *Intimate Partner Violence in Lesbian, Gay, Bisexual, Trans, Intersex and Queer Communities: Key Issues* (Child Family Community Australia Practitioner Resource, Australian Institute of Family Studies (Cth), December 2015) 5 <<https://aifs.gov.au/cfca/publications/intimate-partner-violence-lgbtq-communities>>; Andrew Day et al, *The Forgotten Victims: Prisoner Experience of Victimisation and Engagement with the Criminal Justice System* (Research Report No 1, ANROWS Australia's National Research Organisation for Women's Safety, August 2018) 31, 67 <<https://www.anrows.org.au/publications/horizons/the-forgotten-victims-prisoner-experience-victimisation-and-engagement-the>>; Jane Maree Maher et al, *Women, Disability and Violence—Barriers to Accessing Justice* (Horizons Research Report No 02/2018, ANROWS Australia's National Research Organisation for Women's Safety, April 2018) 31 <<https://apo.org.au/node/173826>>; Trishima Mitra-Kahn, Carolyn Newbiggin and Sophie Hardefeldt, *Invisible Women, Invisible Violence: Understanding and Improving Data on the Experiences of Domestic and Family Violence and Sexual Assault for Diverse Groups of Women* (Landscapes State of Knowledge Paper Issue No DD01, ANROWS Australia's National Research Organisation for Women's Safety, December 2016) 21, 72 <<http://anrows.org.au/publications/landscapes/invisible-women-invisible-violence-understanding-and-improving-data-the>>.

19 Submission 58 (Law and Advocacy Centre for Women Ltd).

20 Submission 30 (Red Files Inc.).

- 8.13 Yet women in contact with the justice system and women who work in the sex industry experience significant sexual violence.<sup>21</sup> With respect to women in contact with the justice system, a widely used estimate is that 70–90 per cent of women in prison have experienced sexual, physical or emotional harm.<sup>22</sup>
- 8.14 Indeed, many of the communities who may be less likely to turn to the justice system also face high rates of sexual violence. This includes, for example, Aboriginal communities, LGBTIQ+ communities, women from migrant and refugee backgrounds and those who have grown up in care (see Chapter 2 for a discussion of rates of sexual violence).
- 8.15 We highlighted the barriers faced by certain groups (such as Aboriginal communities and women from migrant and refugee backgrounds) in our 2004 report on sexual offences.<sup>23</sup> Nearly 20 years on, despite reforms to police training and community education, these barriers still exist.

### Community organisations can provide the trust and safety people need

- 8.16 Even if people are unlikely to report to the justice system, they might still disclose to a community organisation that they know and trust.<sup>24</sup>

Usually, a person [who had experienced sexual harm] would reach out to someone in an Aboriginal community service that they trust. The key question is how we provide the level of 'safety and trust' people need.—Members of the Barwon South West RAJAC and Dhelk Dja Action Group<sup>25</sup>

- 8.17 Compared to mainstream services, community-based organisations may be perceived as
- *safer*—we heard that community-run services create 'inherent security'.<sup>26</sup>
  - *more responsive*—they are able to identify and respond to a person's particular needs and experiences; or are more aware of the community-specific risks in seeking support.<sup>27</sup> Research indicates that when sexual assault services are both trauma-informed and culturally informed, people's wellbeing and recovery outcomes are better.<sup>28</sup>
  - *more accessible*—a familiar organisation that a person has learnt to trust. Djirra explained how 'bleing consistent, showing up, and being culturally appropriate, all help women feel safe'.<sup>29</sup>

21 Submissions 5 (Murdoch Children's Research Institute and The University of Melbourne), 13 (Australian Association of Social Workers), 30 (Red Files Inc.), 50 (Project Respect), 58 (Law and Advocacy Centre for Women Ltd); Consultation 66 (Consultation focused on people who have a lived experience of states of mental and emotional distress commonly labelled as 'mental health challenges').

22 Australia's National Research Organisation for Women's Safety (ANROWS), *Women's Imprisonment and Domestic, Family and Sexual Violence: Research Synthesis* (Report, July 2020) 5.

23 See Victorian Law Reform Commission, *Sexual Offences* (Report No 5, July 2004) [2.27]–[2.47].

24 See Consultations 14 (Sexual Assault Services Victoria), 47 (Refugee Health Network and Refugee Health Program); Submission 33 (Sex Work Law Reform Victoria); Cathy Vaughan et al, *Multicultural and Settlement Services Supporting Women Experiencing Violence: The MuSeS Project* (Research Report No 11, ANROWS Australia's National Research Organisation for Women's Safety, 25 May 2020) 34–6 <<https://apo.org.au/node/305778>>.

25 Consultation 20 (Members of Barwon South West RAJAC and Barwon South West Dhelk Dja Action Group).

26 Consultation 22 (First roundtable on the experience of LGBTIQ+ people).

27 On understanding community norms: see, eg, Submission 49 (inTouch Multicultural Centre Against Family Violence);

28 Consultation 20 (Members of Barwon South West RAJAC and Barwon South West Dhelk Dja Action Group).

28 Carlina Black, Margarita Frederico and Muriel Bamblett, 'Healing through Connection: An Aboriginal Community Designed, Developed and Delivered Cultural Healing Program for Aboriginal Survivors of Institutional Child Sexual Abuse' (2019) 49 *British Journal of Social Work* 1059, 1076–8; Josephine V Serrata et al, 'Well-Being of Latina Survivors of Intimate Partner Violence and Sexual Assault Receiving Trauma-Informed and Culturally-Specific Services' (2020) 35(2) *Journal of Family Violence* 169, 178; *Royal Commission into Institutional Responses to Child Sexual Abuse: Final Report* (Report, December 2017) vol 9, 171 <<https://www.childabuseroyalcommission.gov.au/final-report>>.

29 Consultation 30 (Djirra).

*'A safe space':* A safe service or place is somewhere that people can feel emotionally and physically secure. Their identity and life experience are not challenged, and interactions are inclusive and based on shared respect.<sup>30</sup>

- 8.18 Community organisations can build relationships of trust with victim survivors who might not otherwise report or disclose.<sup>31</sup> They can provide a 'soft landing' to community members by giving them an opportunity to speak to a 'peer professional' about their experiences first.<sup>32</sup>
- 8.19 In this way, community organisations are uniquely placed to extend the reach of support services and the justice system to people and communities who might otherwise not have their needs met.<sup>33</sup>
- 8.20 Their role can also be broader than individual support. They can facilitate community-wide conversations about difficult topics.<sup>34</sup> They can develop innovative, community-specific ways for people to prevent sexual violence.<sup>35</sup>
- 8.21 We are not suggesting that people only identify with one community or group. We know that does not reflect reality. We discuss this in Chapter 2. But our focus is on the role that familiar organisations in the community can play in helping people who would not usually engage with the justice system to meet their justice needs.
- 8.22 Table 10 gives a snapshot of some of their current activities and reform ideas. However, the most effective activities will be those designed by communities themselves, as they know what would work best.<sup>36</sup>

**Table 10: Community organisation activities that extend justice and support**

<p><b>Tailored information and community legal education</b> on how to identify sexual violence and support, reporting and justice options.</p> <p><i>Example:</i> The New Zealand Prostitutes' Collective has released a 'What to do' guide for sex workers who experience sexual violence.<sup>37</sup></p> <p><i>Idea:</i> A 'How to report' document for people who work in the sex industry in Victoria.<sup>38</sup></p>	<p><b>Prevention initiatives</b></p> <p><i>Examples:</i> 'Ugly Mugs' enables people who work in the sex industry to report experiences of sexual and other violence to a sex worker organisation, which shares this information with other workers. This empowers other workers to avoid these clients.<sup>39</sup></p> <p>Young Luv is a program for Aboriginal young women between 13 and 18 years old on consent, sexual violence and healthy relationships.<sup>40</sup></p>
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30 Department of Health and Human Services (Vic), *Part 1: Aboriginal and Torres Strait Islander Cultural Safety Framework* (Report, 2019) 7 <<https://www.dhhs.vic.gov.au/sites/default/files/documents/202004/Part%201-Aboriginal%20and%20Torres%20Strait%20Islander%20cultural%20safety%20framework-20190620.pdf>>. See also Jami Jones et al, *Rainbow Tick Standards: A Framework for LGBTIQ Cultural Safety* (Report, Rainbow Health Victoria, 3rd ed, 2020) 6–7.

31 Submission 49 (inTouch Multicultural Centre Against Family Violence).

32 Consultation 22 (First roundtable on the experience of LGBTIQ+ people).

33 See, eg, Cathy Vaughan et al, *Promoting Community-Led Responses to Violence against Immigrant and Refugee Women in Metropolitan and Regional Australia: The ASPIRE Project: Research Report* (Horizons Research Report No 7, ANROWS Australia's National Research Organisation for Women's Safety, December 2016) 6.

34 Submission 49 (inTouch Multicultural Centre Against Family Violence); Red Cross Australia, *Forced Marriage: Community Voices, Stories and Strategies* (Report, May 2019) 8–9, 48 <<https://www.redcross.org.au/getmedia/ad745e1b-c62f-4831-b8c3-a389b3037c34/Forced-Marriage-Community-Voices-Stories-and-Strategies-Australian-Red-Cross.pdf.aspx>>.

35 Submission 30 (Red Files Inc.). For discussion of Ugly Mugs: see Star Health in Consultation 48 (Star Health and Project Respect); Red Cross Australia, *Forced Marriage: Community Voices, Stories and Strategies* (Report, May 2019) 6, 10, 51 <<https://www.redcross.org.au/getmedia/ad745e1b-c62f-4831-b8c3-a389b3037c34/Forced-Marriage-Community-Voices-Stories-and-Strategies-Australian-Red-Cross.pdf.aspx>>.

36 Nicole Minckas, Geordan Shannon and Jenevieve Mannell, 'The Role of Participation and Community Mobilisation in Preventing Violence against Women and Girls: A Programme Review and Critique' (2020) 13(1) *Global Health Action* 1, 9–10.

37 New Zealand Prostitutes' Collective and New Zealand Police, *What to Do: A Guide for Sex Workers Who Have Experienced Sexual Assault* (Report, 2018) <<https://www.nzpc.org.nz/pdfs/WHAT-TO-DO-A-guide-for-sex-workers-who-have-experienced-sexual-assault.pdf>>.

38 Consultation 34 (Project Respect Women's Advisory Group).

39 Submission 30 (Red Files Inc); Star Health in Consultation 48 (Star Health and Project Respect).

40 Submission 9 (Djirra); 'Prevention of Family Violence', *Djirra* (Web Page) <<https://djirra.org.au/what-we-do/>>.

<p><b>Safe spaces to disclose harm</b> such as community support groups or peer-led support programs.<sup>41</sup></p> <p><i>Example:</i> Dilly Bag is a small group residential workshop which draws on Aboriginal cultural principles to promote healing.<sup>42</sup> Disclosures are not prompted, but often happen.<sup>43</sup></p> <p><i>Idea:</i> A 24-hour peer-led helpline for sex workers to seek support when they need it from someone who understands.<sup>44</sup></p>	<p><b>Support and/or referral</b></p> <p><i>Examples:</i> The Rainbow Door provides information, referrals to culturally informed services and short-term case management.<sup>45</sup></p> <p>Djirra told us about the 'healing journey' that Aboriginal women may go on when they use Djirra's services. For example, they might attend a retreat, then later seek a referral to Djirra's legal service to get an intervention order and use phone counselling or drug and alcohol support from Djirra's intensive case-management team.<sup>46</sup></p>
<p><b>Safe pathway to police</b> for people who do want to report</p> <p><i>Example:</i> Loddon Mallee Regional Aboriginal Justice Advisory Committee (RAJAC) has a good relationship with the local Sexual Offences and Child Abuse Investigation Team (SOCIT). Aboriginal community workers have developed discreet ways for people to report to the police.<sup>47</sup></p> <p><i>Ideas:</i> Djirra suggested that it should be easier for police to take people's statements at Djirra offices.<sup>48</sup></p> <p>Sex Work Law Reform said that sex worker organisations are well placed to 'strengthen referral pathways and support sex workers to report sexual violence'.<sup>49</sup></p>	<p><b>Safer experiences with other services</b> enabling people who want to access mainstream services.<sup>50</sup></p> <p><i>Examples:</i> InTouch provides training to family violence services.<sup>51</sup></p> <p>Centres against sexual assault (CASAs) are working with LGBTIQ+ organisations to improve their cultural safety. Rainbow Door provides community feedback to mainstream agencies.<sup>52</sup></p> <p><i>Idea:</i> Police to receive peer-led training from sex worker support agencies.<sup>53</sup></p>

41 See, eg, Consultations 79 (Commissioner for Aboriginal Children and Young People and Manager, Koori Advisory and Engagement), 30 (Djirra).

42 'Prevention of Family Violence', *Djirra* (Web Page) <<https://djirra.org.au/what-we-do/>>.

43 Consultation 30 (Djirra).

44 Consultation 34 (Project Respect Women's Advisory Group).

45 Consultation 22 (First roundtable on the experience of LGBTIQ+ people).

46 Submission 9 (Djirra).

47 Consultation 67 (Loddon Mallee Regional Aboriginal Justice Advisory Committee).

48 Submission 9 (Djirra).

49 Submission 33 (Sex Work Law Reform Victoria).

50 Consultation 22 (First roundtable on the experience of LGBTIQ+ people).

51 Submission 49 (inTouch Multicultural Centre Against Family Violence).

52 Consultation 22 (First roundtable on the experience of LGBTIQ+ people). For an earlier collaboration between sexual assault services and Aboriginal community organisations: see Lisa Thorpe, Rose Solomon and Maria Dimopoulos, *From Shame to Pride: Access to Sexual Assault Services for Indigenous People* (Report, Elizabeth Hoffman House, 2004).

53 Submission 30 (Red Files Inc.).



## The important role of community organisations is already recognised

- 8.23 The role of community organisations in responding to family and sexual violence is being increasingly recognised. The Royal Commission into Family Violence promoted the role of community organisations to ensure the diverse needs of the Victorian community are met. It proposed that community organisations train and advise mainstream services. It saw their potential to enhance the inclusiveness of these services, collaborate with them to respond to family violence, and co-design prevention efforts.<sup>54</sup>
- 8.24 The Royal Commission's recommendations paved the way for community organisations to be a bigger part of the response to family violence. These included Aboriginal community-controlled organisations, InTouch, Seniors Rights Victoria, Women with Disabilities Victoria and LGBTIQ+ organisations. Many of these family violence reforms have also improved responses to sexual violence.

## Community organisations need to be a part of the sexual assault system

These organisations and services providers are critical and need to be part of the 'mainstream', not competition.—Victorian Multicultural Commission<sup>55</sup>

- 8.25 Community organisations are already playing a crucial but underutilised role in responding to sexual violence.<sup>56</sup> Their activities are ad hoc, informal and not funded long-term. This needs to change. We recommend that community organisations are supported to become a key part of the response to sexual violence.

## Community organisations need to be funded

- 8.26 The Victorian Government, through family violence reforms and other work, already funds community organisations to run primary prevention programs, support groups and referral services.<sup>57</sup> But some important programs—even those to which police refer people—do not have long-term funding.<sup>58</sup> Some programs are funded using an organisation's general budget, rather than having funding ear-marked for sexual violence.<sup>59</sup> Some organisations, such as sex worker organisations, receive little overall funding, if any.<sup>60</sup>
- 8.27 We heard many times that funding is what makes or breaks the work of community organisations on sexual violence. They are sometimes given large responsibilities without the funding to back it up.<sup>61</sup>
- 8.28 Community organisation staff also need to be well supported, given the complex and difficult nature of responding to sexual violence.<sup>62</sup>

54 See, eg, *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016) vol 5, Recommendations 139, 146, 163, 168 <<http://rcfv.archive.royalcommission.vic.gov.au/Report-Recommendations.html>>. The role of community organisations was also highlighted in the recent victim services review by the Centre for Innovative Justice: Centre for Innovative Justice, RMIT University, *Strengthening Victoria's Victim Support System: Victim Services Review* (Final Report, November 2020) 60 <<https://cij.org.au/cms/wp-content/uploads/2020/11/strengthening-victorias-victim-support-system-victim-services-review-centre-for-innovative-justice-november-2020.pdf>>.

55 Submission 54 (Victorian Multicultural Commission).

56 Consultation 79 (Commissioner for Aboriginal Children and Young People and Manager, Koori Advisory and Engagement); Submission 54 (Victorian Multicultural Commission).

57 See, eg, '2021 Grant Program—Supporting Multicultural and Faith Communities to Prevent Family Violence', *Victorian Government* (Web Page, 2 July 2021) <<https://www.vic.gov.au/dffh/prevent-family-violence-2021-grant-program>>; Department of Justice and Regulation (Vic), 'Building Safer Communities Program', *Community Crime Prevention* (Web Page, 2021) <<https://www.crimeprevention.vic.gov.au/buildingsafercommunities>>.

58 For example, Rainbow Door services: Consultation 22 (First roundtable on the experience of LGBTIQ+ people). See also Submission 9 (Djirra).

59 For example, Star Health mentioned the program known as 'Ugly Mugs': Consultation 48 (Star Health and Project Respect).

60 Consultation 45 (Sex Work Law Reform Victoria).

61 Consultation 84 (Aboriginal Justice Caucus).

62 Sexual Assault Services Victoria and centres against sexual assault in Consultation 78 (Roundtable on reporting).



## There should be specialist training on sexual violence

- 8.29 Community organisations may have limited specialist skills to identify and respond to sexual violence. In Chapter 18 we discuss the benefits of specialisation in responding to sexual violence. Building specialist skills within community organisations will ensure victim survivors receive the best response if they disclose sexual violence.
- 8.30 We heard about the importance of training and upskilling so that community organisations can deal appropriately with disclosures of sexual violence.<sup>63</sup> This could be delivered by specialist sexual assault services or through broader Family Violence Multi-Agency Risk Assessment and Management Framework (MARAM) training. In Chapter 18 we recommend extending MARAM to sexual violence.

We need to try and build some skills within our organisations not only to protect people but also to 'hold this' until we know where we need to take it—Members of the Barwon South West RAJAC and Dhelk Dja<sup>64</sup>

- 8.31 Sexual Assault Services Victoria also noted the need for community organisation staff dealing with sexual violence to be well supported.<sup>65</sup>

## Collaboration should be strengthened

- 8.32 Community organisations need to be supported to develop collaboration arrangements with specialist sexual assault services. This could enable their mutual learning. For example, CASAs could provide professional supervision for community organisation staff<sup>66</sup> and in turn receive training from community organisations on diversity and inclusiveness.<sup>67</sup>
- 8.33 CASAs already collaborate with community organisations to extend the reach of their services, so this work could be built on.

The Northern Centre Against Sexual Assault (NCASA) currently runs a weekly outreach service at the Victorian Aboriginal Health Service (VAHS). We heard that 'For NCASA, this is a good experience both to bring the service to VAHS and to learn from VAHS. It's also increased trust with NCASA, with more people coming to the main office in Heidelberg.'<sup>68</sup>

- 8.34 We heard that further mutual learning opportunities might include community outreach, co-locations and secondments.<sup>69</sup>

<sup>63</sup> See, eg, Consultations 47 (Refugee Health Network and Refugee Health Program); 84 (Aboriginal Justice Caucus). We also recommended the development of specialist training for Aboriginal community members and workers in our 2004 report on sexual: Victorian Law Reform Commission, *Sexual Offences* (Report No 5, July 2004) Recommendation 1. The Royal Commission into Family Violence also made recommendations for family violence specialist services collaborate to provide training, for example, on family violence and sexual assault for faith leaders and communities: *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016) Recommendation 163 <<http://rcfv.archive.royalcommission.vic.gov.au/Report-Recommendations.html>>.

<sup>64</sup> Consultation 20 (Members of Barwon South West RAJAC and Barwon South West Dhelk Dja Action Group). As discussed below, training packages are being developed for and delivered in Aboriginal community organisations across Victoria. See also Djirra who calls for 'specialist training and mentoring' from specialist sexual assault services: Submission 9 (Djirra).

<sup>65</sup> Sexual Assault Services Victoria highlighted that sole workers dealing with sexual violence in broader organisations could feel isolated and they need to be supported in this work, eg through group sessions: Consultation 78 (Roundtable on reporting).

<sup>66</sup> See, eg, *ibid*.

<sup>67</sup> Some consultations highlighted the opportunity for centres against sexual assault to be more inclusive: see, eg, Consultations 20 (Members of Barwon South West RAJAC and Barwon South West Dhelk Dja Action Group), 67 (Loddon Mallee Regional Aboriginal Justice Advisory Committee). See also Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021).

<sup>68</sup> Consultation 29 (Safe Pathways to Healing Working Group (North Metropolitan Aboriginal Sexual Assault Prevention and Healing Advisory Group)).

<sup>69</sup> Submission 9 (Djirra); Consultations 72 (Asylum Seeker Resource Centre), 76 (YACVic and YACVic Young People).

- 8.35 CASAs are enthusiastic about strengthening the role of community organisations and forming collaborative relationships with them. They recognise that 'there will be people who won't approach CASAs but will approach a culturally or community-specific organisation'. But they made clear that a lot of work is needed to set up these partnerships, co-locations and referrals.<sup>70</sup> Both specialist sexual assault services and community organisations would need support to do this. (See also Chapter 5 on collaboration and funding arrangements.)

### Referral networks should be built

- 8.36 Community organisations could have strong referral pathways to other services and the justice system, and could also support people to report sexual violence (if they want). This requires them to build formal collaborative relationships with other agencies in the sexual assault system. In Chapter 4, we propose a multi-agency protocol that would enable these collaborative arrangements. In Chapter 5, we note that referral arrangements could also be included in these protocols.

## Recommendations

- 21 The Victorian Government should strengthen the role of community organisations in responding to sexual violence as a priority.
- The Victorian Government should provide continued funding and support for community organisations to take on key responsibilities, including:
- providing safe spaces for people to disclose sexual violence
  - providing support to people who have experienced sexual violence and referring them to other services or the justice system
  - developing community-specific ways to prevent sexual violence and inform the community about their support and justice options
  - developing pathways to other services and the justice system, including protocols
  - collaborating with sexual assault services
  - providing training to mainstream and specialist sexual assault services on diverse needs and experiences.
- 22 The Victorian Government should review the funding arrangements of Sexual Assault Services Victoria to ensure that they can:
- provide ongoing training to community organisations on identifying and responding to sexual violence
  - provide professional supervision for community organisation staff working with sexual violence
  - develop mutual referral arrangements with community organisations
  - pursue community outreach, service co-location and secondments and establish community liaison positions in collaboration with community organisations.

## An Aboriginal sexual assault service model should be supported

### Why is an Aboriginal sexual assault service needed?

- 8.37 In our inquiry, Aboriginal community organisations were active in calling for a community-run sexual assault service.<sup>71</sup>
- 8.38 It is needed because of service gaps in the current sexual assault system, not because there is any connection between Aboriginal culture and violence. Violence is not part of Aboriginal culture, but whole of community approaches are important to respond to Aboriginal experiences of violence.<sup>72</sup>
- 8.39 An Aboriginal sexual assault service is needed to provide:
- a culturally safe and appropriate service that connects with Aboriginal healing approaches
  - more options for Aboriginal people who have experienced sexual violence (in addition to mainstream service options).<sup>73</sup>
- 8.40 It would also be an important form of self-determination. Self-determination involves responses to sexual violence being 'designed, developed, led and evaluated by ACCOs [Aboriginal Community-Controlled Organisations]'.<sup>74</sup> It is recognised as:
- the key strategy to generate sustainable and systemic change to benefit the cultural, physical, spiritual, economic, social and emotional wellbeing for Aboriginal people, families and communities.—Aboriginal Justice Caucus<sup>75</sup>

### The service need has been recognised, with pilots underway

- 8.41 The importance of Aboriginal community-controlled responses to family and sexual violence was underscored by the Royal Commission into Family Violence and the Royal Commission into Institutional Child Sexual Abuse.<sup>76</sup> The latter found that a responsive service system should address the needs of Aboriginal victim survivors through 'culturally informed ways of healing...alongside other supports'.<sup>77</sup> Our 2004 report on sexual offences also recognised calls for an Aboriginal community-specific response to sexual violence.<sup>78</sup>
- 8.42 In recent years, the federal government has invested in ongoing community efforts to ensure better and culturally safer responses to family and sexual violence against Aboriginal women and children.<sup>79</sup> The Victorian 2021–2022 budget also confirms funding for culturally safe sexual assault services.<sup>80</sup>

71 See, eg, Submissions 9 (Djirra), 21 (Victorian Aboriginal Child Care Agency), 65 (Aboriginal Justice Caucus).

72 Victorian Government, *Dhelk Dja: Safe Our Way—Strong Culture, Strong Peoples, Strong Families* (Agreement, October 2018) 7 <<http://www.vic.gov.au/dhelk-dja-partnership-aboriginal-communities-address-family-violence>>; Consultation 84 (Aboriginal Justice Caucus).

73 Submission 9 (Djirra); *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report* (Executive Summary and Parts I–II, 2017) 161. See also Carlina Black, Margarita Frederico and Muriel Bamblett, 'Healing through Connection: An Aboriginal Community Designed, Developed and Delivered Cultural Healing Program for Aboriginal Survivors of Institutional Child Sexual Abuse' (2019) 49 *British Journal of Social Work* 1059.

74 Submission 21 (Victorian Aboriginal Child Care Agency).

75 Submission 65 (Aboriginal Justice Caucus). See also Victorian Government, 'Acknowledgement of Aboriginal People and Communities in Victoria', *VIC.GOV.AU* (Web Page) <<https://www.vic.gov.au/nargneit-birrang-aboriginal-holistic-healing-framework-family-violence/acknowledgement-aboriginal>>.

76 See, eg, *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016) Recommendation 146 <<http://rcfv.archive.royalcommission.vic.gov.au/Report-Recommendations.html>>; *Royal Commission into Institutional Responses to Child Sexual Abuse: Final Report* (Report, December 2017) Recommendations 9.2, 9.7 <<https://www.childabuseroyalcommission.gov.au/final-report>>.

77 *Royal Commission into Institutional Responses to Child Sexual Abuse: Final Report* (Report, December 2017) vol 9, 80, 77–82 <<https://www.childabuseroyalcommission.gov.au/final-report>>.

78 Victorian Law Reform Commission, *Sexual Offences* (Report No 5, July 2004) [2.36]–[2.37].

79 Most recently, Marise Payne, Anne Ruston and Jane Hume, *Women's Budget Statement 2021–22* (Report, Commonwealth of Australia, 11 May 2021) 23 <<https://budget.gov.au/2021-22/content/womens-statement/index.htm>>.

80 Premier of Victoria, 'Putting the Safety of Victorian Women and Children First' (Media Release, 20 May 2021) <<https://www.premier.vic.gov.au/putting-safety-victorian-women-and-children-first>>.

- 8.43 There are currently three Aboriginal sexual assault service pilots in Victoria. Funded through Family Safety Victoria, three two-year pilots will be trialled across regional and metropolitan Victoria. The Victorian Government has also funded specialist sexual assault training programs for Aboriginal community-controlled organisations.<sup>81</sup> This reflects ongoing community efforts to ensure community engagement with sexual violence.<sup>82</sup>

### A sustainable service model must be built

- 8.44 In our inquiry, Aboriginal organisations highlighted the need for dedicated Aboriginal sexual assault services to meet the support needs of Aboriginal women, children and men.<sup>83</sup> The issues they highlight can be used to build on the current pilots and inform a sustainable service model.
- 8.45 First, we heard that this model will need to address the different needs of Aboriginal women, children and men. The Aboriginal Justice Caucus and Djirra supported specialist services that met the needs of Aboriginal women, men and children separately.<sup>84</sup> Djirra stressed that the design of the current pilot programs did not take this approach.<sup>85</sup>
- 8.46 Djirra emphasised that Aboriginal women have been unable to access other Aboriginal community-controlled services in the past, because of a perceived or real conflict of interest if that service is also engaging with the person who committed the sexual offence. They also suggested that a separate women's service would avoid conflicts between a child's interests and the interests of their parent or carer. It would also ensure women's privacy.<sup>86</sup>
- 8.47 Other Aboriginal community representatives, such as the Commissioner for Aboriginal Children and Young People and Manager (Koori Advisory and Engagement), highlighted the need for specific services for Aboriginal children and young people who want to disclose sexual violence.<sup>87</sup> The Victorian Aboriginal Child Care Agency told us that Aboriginal community-controlled organisations should be supported to respond to the needs of Aboriginal children and families who have experience sexual abuse.<sup>88</sup>
- 8.48 Such services would help address a gap in services to Aboriginal children and young people. Djirra only provides counselling for Aboriginal women over 18.<sup>89</sup> The Victorian Aboriginal Child Care Agency said that there were not enough culturally safe specialists for Aboriginal children in need of support.<sup>90</sup>
- 8.49 Secondly, a sustainable service model would also need enough and ongoing funding. The Aboriginal Justice Caucus told us that such a service needed to be properly resourced.<sup>91</sup>

81 Victorian Government, *Annual Report 2020—Royal Commission into Institutional Responses to Child Sexual Abuse* (Report, December 2020) 8 <<https://content.vic.gov.au/sites/default/files/2020-12/RCIR%20to%20Child%20Sexual%20Abuse%20Annual%20Report20.pdf>>.

82 See also the work of the Safe Pathways to Healing Working Group (North Metropolitan Aboriginal Sexual Assault Prevention and Healing Advisory Group, Dhek Dja North Metro Action Group); Lisa Thorpe, Rose Solomon and Maria Dimopoulos, *From Shame to Pride: Access to Sexual Assault Services for Indigenous People* (Report, Elizabeth Hoffman House, 2004).

83 See, eg, Submissions 9 (Djirra), 65 (Aboriginal Justice Caucus).

84 Submission 65 (Aboriginal Justice Caucus).

85 Submission 9 (Djirra).

86 Ibid.

87 Consultation 79 (Commissioner for Aboriginal Children and Young People and Manager, Koori Advisory and Engagement).

88 Submission 21 (Victorian Aboriginal Child Care Agency).

89 Consultation 30 (Djirra).

90 Submission 21 (Victorian Aboriginal Child Care Agency).

91 Submission 65 (Aboriginal Justice Caucus); Consultation 84 (Aboriginal Justice Caucus).

## Recommendation

- 23 Building on the experience of the current pilots, the Victorian Government should fund and support the development of permanent Aboriginal sexual assault services that respond to the different needs of Aboriginal women, children and men.

### The needs of women and young people in contact with the justice system need to be a priority

- 8.50 Women and children and young people in contact with the justice system need specialised attention to ensure their support and justice needs are met. This includes:
- women and young people who have experienced sexual violence
  - children and young people using harmful sexual behaviour.

### The overlap between women's victimisation and incarceration is concerning

'An integral part of improving the response of the criminal justice system to sexual offences is to reduce the trauma of victim-survivors within the system', including those who are convicted of offences.—Murdoch Children's Research Institute and the University of Melbourne<sup>92</sup>

- 8.51 Multiple submissions and consultations emphasised the high rates of sexual violence among women in prison.<sup>93</sup> Earlier we noted the high estimated rates of women in prison (60–90 per cent) who have experienced sexual, physical or emotional violence. These rates are likely to be even higher for Aboriginal women.<sup>94</sup>
- 8.52 Despite their high rates of sexual victimisation, women in contact with the justice system are unlikely to report to police. This could be because of the stigma related to their offending, past experiences of discrimination or a fear that they will not be believed. They may be worried about being charged with other offences or being misidentified as a perpetrator (as sometimes happens in family violence situations).<sup>95</sup>
- 8.53 The Royal Commission into Family Violence considered the needs of women in prison. Given the overlap between women's experiences of family violence and their incarceration, it made recommendations to help identify women in prison who have experienced family violence. It also made recommendations to improve the support they receive in prison and through reintegration programs. It noted the commitment of Corrections Victoria to ensuring people have access to sexual assault services.<sup>96</sup>

<sup>92</sup> Submission 5 (Murdoch Children's Research Institute and The University of Melbourne).

<sup>93</sup> See, eg, *ibid*: Submissions 13 (Australian Association of Social Workers), 58 (Law and Advocacy Centre for Women Ltd); Consultations 60 (Flat Out), 66 (Consultation focused on people who have a lived experience of states of mental and emotional distress commonly labelled as 'mental health challenges').

<sup>94</sup> Submissions 5 (Murdoch Children's Research Institute and The University of Melbourne), 13 (Australian Association of Social Workers), 58 (Law and Advocacy Centre for Women Ltd).

<sup>95</sup> Submission 58 (Law and Advocacy Centre for Women Ltd).

<sup>96</sup> *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016) vol 5, 238–9, 241–4, Recommendations 183–5 <<http://rcfv.archive.royalcommission.vic.gov.au/Report-Recommendations.html>>.

## Women's support needs are still not met

- 8.54 We heard that women victim survivors in prison still do not have their support needs met:
- *while they are in prison.* Women do not have enough access to support services, including services that respond to diverse needs.<sup>97</sup> CASA outreach support to prisons was described as 'amazing' but 'saturated'.<sup>98</sup> We heard about a lack of culturally appropriate support for Aboriginal people and people from multicultural communities in prison.<sup>99</sup> Women in prison might also not receive support that meets their complex health, social and trauma needs.<sup>100</sup>
  - *when they are released from prison.* The support that they were receiving in prison might end—for example, because they moved to a different region or otherwise find it difficult to connect with support services in the community.<sup>101</sup> They might not be eligible for community treatment programs because of their offending history.<sup>102</sup>
- 8.55 We heard that this represents a missed opportunity, as prison 'can be containing' for some women and can separate them from the stressors and risks in their everyday life.<sup>103</sup> It may provide 'a window in which they might be motivated to address longstanding issues'.<sup>104</sup>
- 8.56 Despite the important recommendations of the Royal Commission on Family Violence on women in prison, it seems that more needs to be done to improve the justice system's response here, especially for women who have experienced sexual violence.

## Children and young people in contact with the justice system need support

### Early intervention and treatment for young people using harmful sexual behaviour

- 8.57 Harmful sexual behaviour by children and young people makes up a large part of child sexual abuse.<sup>105</sup> It is widely accepted to be different to sexual offending by adults.<sup>106</sup> For example, harmful sexual behaviour does not indicate that the young person will offend as an adult.<sup>107</sup> Such behaviour may be found in the context of experiences of family

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97 Submission 22 (knowmore legal service); Consultation 53 (Elizabeth Morgan House and a victim survivor of sexual assault); See also Australia's National Research Organisation for Women's Safety (ANROWS), *Women's Imprisonment and Domestic, Family and Sexual Violence: Research Synthesis* (Report, July 2020).

98 Consultation 66 (Consultation focused on people who have a lived experience of states of mental and emotional distress commonly labelled as 'mental health challenges').

99 Submission 58 (Law and Advocacy Centre for Women Ltd); Consultations 53 (Elizabeth Morgan House and a victim survivor of sexual assault), 66 (Consultation focused on people who have a lived experience of states of mental and emotional distress commonly labelled as 'mental health challenges'); Australia's National Research Organisation for Women's Safety (ANROWS), *Women's Imprisonment and Domestic, Family and Sexual Violence: Research Synthesis* (Report, July 2020) 11.

100 Consultation 66 (Consultation focused on people who have a lived experience of states of mental and emotional distress commonly labelled as 'mental health challenges').

101 Submission 17 (Sexual Assault Services Victoria); Consultation 53 (Elizabeth Morgan House and a victim survivor of sexual assault).

102 Australia's National Research Organisation for Women's Safety (ANROWS), *Women's Imprisonment and Domestic, Family and Sexual Violence: Research Synthesis* (Report, July 2020) 9.

103 Consultation 66 (Consultation focused on people who have a lived experience of states of mental and emotional distress commonly labelled as 'mental health challenges'). See also Consultation 53 (Elizabeth Morgan House and a victim survivor of sexual assault).

104 Consultation 66 (Consultation focused on people who have a lived experience of states of mental and emotional distress commonly labelled as 'mental health challenges'). See also Consultation 53 (Elizabeth Morgan House and a victim survivor of sexual assault). More broadly, prison is recognised as a traumatising place for victim survivors of sexual offences; Submission 5 (Murdoch Children's Research Institute and The University of Melbourne); Australia's National Research Organisation for Women's Safety (ANROWS), *Women's Imprisonment and Domestic, Family and Sexual Violence: Research Synthesis* (Report, July 2020) 5; Bianca Fileborn and Mary Stathopoulos, 'Can Prisons Be Supportive of Victim/Survivors' Needs? Considering the Role of Prison Culture and Alternative Responses' (Conference Paper, Australian and New Zealand Critical Criminology Conference, 12 July 2012) 66, 67–8 <[https://www.utas.edu.au/\\_data/assets/pdf\\_file/0006/418749/Changing\\_the\\_way\\_we\\_think\\_about\\_change\\_-\\_Australian\\_and\\_New\\_Zealand\\_Critical\\_Criminology\\_Conference\\_Proceedings\\_2012.pdf](https://www.utas.edu.au/_data/assets/pdf_file/0006/418749/Changing_the_way_we_think_about_change_-_Australian_and_New_Zealand_Critical_Criminology_Conference_Proceedings_2012.pdf)>.

105 For example, some studies estimate that siblings are responsible for up to 40% of child sexual abuse: Antonia Quadara et al, *Conceptualising the Prevention of Child Sexual Abuse* (Research Report No 33, Australian Institute of Family Studies (Cth), June 2015) 17 <<https://aifs.gov.au/publications/conceptualising-prevention-child-sexual-abuse>>. See also 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/>>.

106 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) 25 <<https://www.anrows.org.au/project/good-practice-in-delivering-and-evaluating-interventions-for-young-people-with-harmful-sexual-behaviours/>>.

107 *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016) vol 2, 220 <<http://rcfv.archive.royalcommission.vic.gov.au/Report-Recommendations.html>>.



violence, child neglect and sometimes sexual or other assault.<sup>108</sup>

- 8.58 We agree with submissions and consultations that children and young people using harmful sexual behaviour need to be supported to stay out of contact with the justice system.<sup>109</sup>
- 8.59 Victoria takes a mostly therapeutic and rehabilitative response to this behaviour. First, children and young people (up to 18) can be voluntarily referred to a Sexually Abusive Behaviour Treatment Services before they come into contact with the justice system. These are age-appropriate services that provide therapeutic treatment (for up to two years) to help someone to stop using harmful sexual behaviour.<sup>110</sup> Secondly, children and young people can be diverted from the criminal justice system through a Therapeutic Treatment Order made by the Children's Court.<sup>111</sup>
- 8.60 There was wide support for Victoria's therapeutic response to children and young people in submissions and consultations.<sup>112</sup>
- 8.61 We heard that it was generally working well,<sup>113</sup> but there is currently:
- a lack of available treatment services
  - a need for more initiatives (such as early intervention).
- 8.62 Waiting lists for services are long, which means people cannot access timely treatment.<sup>114</sup> Services are not readily available in rural and regional areas.<sup>115</sup>

The effect of this is postcode injustice where children do not have the same level of access to these therapeutic and diversionary options based on where they live.—Victoria Legal Aid<sup>116</sup>

The Victorian Aboriginal Child Care Agency also highlighted the need for a culturally appropriate and holistic models of care for Aboriginal young people.<sup>117</sup>

- 8.63 There is also a need for:
- early intervention and prevention initiatives for harmful sexual behaviour.<sup>118</sup> For example, Jesuit Social Services mentioned an online tool they were developing to encourage young people to seek information and help.<sup>119</sup> Unlike existing treatment programs that respond to someone's use of harmful sexual behaviour, these initiatives aim to prevent it from happening.
  - a range of responses to harmful sexual behaviour. For example, the Gatehouse Centre proposed the use of restorative justice and Circles of Support and Accountability (see Chapters 9 and 13).<sup>120</sup>

108 Antonia Quadara et al, *Conceptualising the Prevention of Child Sexual Abuse* (Research Report No 33, Australian Institute of Family Studies (Cth), June 2015) 17–18 <<https://aifs.gov.au/publications/conceptualising-prevention-child-sexual-abuse>>; *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016) vol 2, 220-1 <<http://rcfv.archive.royalcommission.vic.gov.au/Report-Recommendations.html>>.

109 Submissions 14 (Gatehouse Centre, Royal Children's Hospital), 21 (Victorian Aboriginal Child Care Agency); Consultation 73 (Family Safety Victoria (No 1)).

110 Victorian Government, *Annual Report 2018—Royal Commission into Institutional Responses to Child Sexual Abuse* (Report, February 2019) 10 <<https://apo.org.au/node/223711>>.

111 *Children, Youth and Families Act 2005* (Vic) pt 4.8 div 3. This can occur before they are charged or once a case is in the Children's Court: *ibid* ss 185, 349(2).

112 Submissions 10 (Carolyn Worth AM and Mary Lancaster), 14 (Gatehouse Centre, Royal Children's Hospital), 27 (Victoria Legal Aid), 40 (Law Institute of Victoria), 44 (Dr Patrick Tidmarsh and Dr Gemma Hamilton); Consultation 61 (Children's Court of Victoria).

113 Submissions 27 (Victoria Legal Aid), 40 (Law Institute of Victoria), 68 (Victoria Police); Consultation 61 (Children's Court of Victoria).

114 Submissions 14 (Gatehouse Centre, Royal Children's Hospital), 27 (Victoria Legal Aid). The Victorian Aboriginal Child Care Agency also highlighted the long time it takes to get an order: Submission 21 (Victorian Aboriginal Child Care Agency).

115 Submission 21 (Victorian Aboriginal Child Care Agency).

116 Submission 27 (Victoria Legal Aid).

117 Submission 21 (Victorian Aboriginal Child Care Agency). They also recommended 'tailored funding packages' to assist children and young people to access care.

118 Submissions 14 (Gatehouse Centre, Royal Children's Hospital), 44 (Dr Patrick Tidmarsh and Dr Gemma Hamilton); Consultation 73 (Family Safety Victoria (No 1)). See also Gemma McKibbin, Nick Halfpenny and Cathy Humphreys, 'Respecting Sexual Safety: A Program to Prevent Sexual Exploitation and Harmful Sexual Behaviour in out-of-Home Care' (2019) *Australian Social Work* 1.

119 Submission 24 (Jesuit Social Services).

120 Submission 14 (Gatehouse Centre, Royal Children's Hospital).



## What are the needs and experiences of young people in contact with the justice system?

- 8.64 We did not focus more broadly on children and young people in contact with the justice system and their experiences of sexual violence. Our timeframes did not allow us to engage with all groups who experience sexual violence.
- 8.65 However, our wider consultations (on children and young people) suggest that young people in contact with the justice system face specific barriers to reporting to the police. As with women, these can relate to past experiences of discrimination or a fear that they will not be believed.

[D]epending on their previous experiences with police, they might choose not to approach police or trust that that they will be treated well.—Roundtable on the experience of children and young people<sup>121</sup>

- 8.66 Young people in contact with the justice system are also likely to have experiences of sexual violence. Young people in residential care, who are over-represented in the justice system, have considerable experiences of sexual violence.<sup>122</sup> Research indicates a connection between young people's own experience of sexual abuse and later offending, especially sexual offending.<sup>123</sup>
- 8.67 The Royal Commission into Institutional Responses to Child Sexual Abuse also recommended that young people in detention should have access to therapeutic treatment, inside and when they leave detention, as well as advocacy or other support.<sup>124</sup> In response, the Victorian Government has outlined the individualised case management it has in place for young people.<sup>125</sup> The Royal Commission also supported initiatives to keep children and young people using harmful sexual behaviour out of the justice system, including primary prevention, early intervention and rehabilitative treatment.<sup>126</sup>

## The overlap between victimisation and contact with the justice system must be addressed

- 8.68 We recommend that the connection between women and children's sexual victimisation and contact with the justice system should be a priority area in the Victorian Government's Sexual Assault Strategy. We discuss the Sexual Assault Strategy in Chapter 1.
- 8.69 The Strategy should address women, children and young people in contact with the justice system more broadly—including children engaging in harmful sexual behaviour.

121 Consultation 85 (Roundtable on the experience of children and young people).

122 Commission for Children and Young People (Vic), *Out of Sight: Systemic Inquiry into Children and Young People Who Are Absent or Missing from Residential Care* (Report, 2021) 18–9 <<https://ccyp.vic.gov.au/assets/Publications-inquiries/Out-of-sight-inquiry-report-Web.pdf>>; Commission for Children and Young People (Vic), *...As a Good Parent Would...* (Final Report, August 2015) 10–11 <<https://ccyp.vic.gov.au/upholding-childrens-rights/systemic-inquiries/as-a-good-parent-would/>>; Sentencing Advisory Council (Vic), *'Crossover Kids': A Comparison of Two Studies* (Factsheet, 13 December 2019) 3–4 <[https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-12/Crossover\\_Kids\\_Comparison\\_of\\_Two\\_Studies.pdf](https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-12/Crossover_Kids_Comparison_of_Two_Studies.pdf)>.

123 See, eg, Commission for Children and Young People (Vic), *Our Youth, Our Way: Inquiry into the Overrepresentation of Aboriginal Children and Young People in the Victorian Youth Justice System* (Report, 2021) 190; Catia G Malvaso, Paul H Delfabbro and Andrew Day, 'Adverse Childhood Experiences in a South Australian Sample of Young People in Detention' (2019) 52(3) *Australian and New Zealand Journal of Criminology* 411, 413, 425. See also Submission 5 (Murdoch Children's Research Institute and The University of Melbourne); Consultation 85 (Roundtable on the experience of children and young people).

124 *Royal Commission into Institutional Responses to Child Sexual Abuse: Final Report* (Report, December 2017) Recommendation 15.7 <<https://www.childabuseroyalcommission.gov.au/final-report>>.

125 See, eg, Victorian Government, *Annual Report 2019—Royal Commission into Institutional Responses to Child Sexual Abuse* (Report, December 2019) 12–13 <<http://www.vic.gov.au/victorian-government-annual-report-2019-royal-commission-institutional-responses-child-sexual-abuse/redress-civil-litigation-report-2015>>.

126 *Royal Commission into Institutional Responses to Child Sexual Abuse: Final Report* (Report, December 2017) Recommendation 10.1 <<https://www.childabuseroyalcommission.gov.au/final-report>>.

- 8.70 The overlap regarding women's imprisonment and victimisation is a growing focus of research and advocacy. The research highlights:
- the need for 'throughcare' approaches—these ensure support starts in prison and flows with people when they leave
  - the potential of diversion (including for women on remand).<sup>127</sup>
- 8.71 A new specialist legal service, the Law and Advocacy Centre for Women, combines legal advice and representation with case management to respond to the underlying causes of women's imprisonment.<sup>128</sup> They join existing support and advocacy groups for women in contact with the justice system, such as Flat Out. The Victorian Government could consult with these researchers and organisations to identify how to improve their access to support and justice options.
- 8.72 Children's and young people's needs and current approaches can be assessed in the development of the Sexual Assault Strategy. However, both our inquiry and the Royal Commission into Institutional Responses to Child Sexual Abuse highlight the need for early intervention, for existing treatment services to be funded to meet demand, and for tailored approaches for Aboriginal young people.<sup>129</sup> The Victorian Government has indicated its commitment to all three goals, also recently announcing further funding for treatment services.<sup>130</sup>
- 8.73 Funding of therapeutic interventions for harmful sexual behaviour should continue to be a priority for government. The Sexual Assault Strategy can develop early intervention initiatives (beyond existing treatment services) and assess further funding needs.<sup>131</sup>

## Recommendations

- 24 As part of the Sexual Assault Strategy, the Victorian Government should address the support and justice needs of:
- women, children and young people in contact with the justice system who have experienced sexual violence
  - children and young people using harmful sexual behaviour.
- 25 As part of its work on Recommendation 24, the Victorian Government should strengthen the availability of early intervention, diversion and therapeutic support options within the community that address diverse needs and experiences.
- 26 The Victorian Government should fund therapeutic interventions for young people using harmful sexual behaviour to meet demand.

<sup>127</sup> See, eg, Australia's National Research Organisation for Women's Safety (ANROWS), *Women's Imprisonment and Domestic, Family and Sexual Violence: Research Synthesis* (Report, July 2020) 2. See also Andrew Day et al, *The Forgotten Victims: Prisoner Experience of Victimisation and Engagement with the Criminal Justice System* (Research Report No 1, ANROWS Australia's National Research Organisation for Women's Safety, August 2018) 42 <<https://www.anrows.org.au/publications/horizons/the-forgotten-victims-prisoner-experience-victimisation-and-engagement-the>>.

<sup>128</sup> Submission 58 (Law and Advocacy Centre for Women Ltd).

<sup>129</sup> *Royal Commission into Institutional Responses to Child Sexual Abuse: Final Report* (Report, December 2017) Recommendation 10.1, 10.3 <<https://www.childabuseroyalcommission.gov.au/final-report>>.

<sup>130</sup> Victorian Government, *Annual Report 2018—Royal Commission into Institutional Responses to Child Sexual Abuse* (Report, February 2019) 10 <<https://apo.org.au/node/223711>>; Victorian Government, *Creating Jobs, Caring for Victorians* (Budget Paper No 3, May 2021) 51.

<sup>131</sup> In its most recent annual report on implementation of the Commission's recommendations, the Victorian Government refers only to existing treatment services regarding early intervention initiatives: see Victorian Government, *Annual Report 2020—Royal Commission into Institutional Responses to Child Sexual Abuse* (Report, December 2020) 9 <<https://content.vic.gov.au/sites/default/files/2020-12/RCIIR%20to%20Child%20Sexual%20Abuse%20Annual%20Report20.pdf>>.

## How can we support all communities to report to police?

- 8.74 While not everyone will want to report to police, everyone should be able to report if they want. Community-based organisations can help to extend the reach of reporting and justice options, but more is also needed. For under-served communities to have their justice needs met, the justice system must work harder to earn their trust and reach out to them.
- 8.75 In this inquiry we heard calls for different reforms to improve trust between police and diverse communities, including community liaison positions and further police training.<sup>132</sup> We recommend further police training and specialisation elsewhere (see Chapters 17 and 18).
- 8.76 In this chapter, we discuss what else is needed to enable all communities to report to the police, if that is what they want. We recommend that specialist sexual offences police enhance their engagement with community groups in their region to create strong partnerships and referral pathways. This should include people living in residential and institutional contexts (see Chapter 7). As the Royal Commission into Institutional Responses to Child Sexual Abuse stressed, police–community engagement can have particular impact for people and communities who might face greater barriers to reporting.<sup>133</sup>

## SOCITs should strengthen their engagement with priority communities

- 8.77 We heard that community–police relations are better in places where police have spent time and effort building good relationships with local communities. We heard that some Sexual Offences and Child Abuse Investigation Teams (SOCITs) already have good relationships with local services.<sup>134</sup> Some members of the Loddon Mallee RAJAC explained that the local SOCIT has 'done their homework' with community. They provide a lot of support 'and do it quietly and confidentially'.<sup>135</sup> The Commissioner for Aboriginal Children and Young People noted good pockets of police practice in some Aboriginal communities.<sup>136</sup>
- 8.78 The SANO Taskforce has also had a positive influence on people's attitudes towards reporting. This can be linked to its specialised focus and dedicated efforts in community engagement.<sup>137</sup> The In Good Faith Foundation told us that the SANO Taskforce is willing to reach out and build relationships with support services for victim survivors of child sexual abuse. The SANO Taskforce has referral arrangements with legal and support services, who can also contact SANO on a client's behalf.<sup>138</sup> Community organisations praised SANO's flexibility in meeting with people at different locations, such as cafes, their home or at the community organisation itself.<sup>139</sup>
- 8.79 Organisations like Djirra called for similar arrangements, such as conducting interviews at Djirra.<sup>140</sup> The Royal Commission into Institutional Responses to Child Sexual Abuse also recommended that police work with community support services to make it easier for people (including people with disability, people from migrant and refugee backgrounds and people from Aboriginal communities) to report sexual violence.<sup>141</sup>

132 Submissions 17 (Sexual Assault Services Victoria), 30 (Red Files Inc.), 50 (Project Respect); Consultation 45 (Sex Work Law Reform Victoria).

133 See *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report* (Executive Summary and Parts I–II, 2017) Recommendations 4(d), 5.

134 Consultation 92 (Dr Patrick Tidmarsh).

135 Consultation 67 (Loddon Mallee Regional Aboriginal Justice Advisory Committee).

136 Consultation 79 (Commissioner for Aboriginal Children and Young People and Manager, Koori Advisory and Engagement).

137 Submissions 18 (In Good Faith Foundation), 22 (knowmore legal service).

138 Submission 18 (In Good Faith Foundation); *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report* (Executive Summary and Parts I–II, 2017) 290–1.

139 *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report* (Executive Summary and Parts I–II, 2017) 416–7. See also *ibid* 291.

140 Submission 9 (Djirra). See also Consultation 53 (Elizabeth Morgan House and a victim survivor of sexual assault).

141 *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report* (Executive Summary and Parts I–II, 2017) Recommendation 4(d), 5.

- 8.80 There is an opportunity to build on the good work that Victoria Police is already doing with priority communities (see Chapter 17). This can be achieved by making sure that good practice examples become more widespread, especially those with a focus on sexual violence.
- 8.81 We recommend that Victoria Police SOCITs do more to 'reach out' and build relationships with the community in their regional areas. They could meet regularly with community organisations, legal centres, services, and institutions in those areas, while drawing on the expertise of the Priority Communities Division. There is value in this work being done by SOCITs who have specialist skills on sexual violence. In Chapter 18 we discuss the benefits of specialisation when it comes to responding to sexual violence.
- 8.82 As part of this work, SOCIT teams could develop protocols with community organisations and services (including residential services) in their area that might include pathways to police reporting. Protocols would 'formalise, and make standard, such relationships'.<sup>142</sup> In Chapter 4, we recommend a multi-agency protocol to formalise how different organisations in the sexual assault system work together.
- 8.83 Victoria Police should also consider the appointment of specialist community engagement advisors within each SOCIT team. This could be similar to the Family Violence Service System Navigators (who focus on engaging with local services and increasing access to family violence supports for everyone in the community) discussed in Chapter 5.

### Are more community liaison positions needed?

- 8.84 In our inquiry, some organisations highlighted the value of community liaison officers. Several organisations representing people who work in the sex industry called for dedicated sex work police liaison officers.<sup>143</sup> Some referred to a sex work liaison officer in New South Wales who does outreach at King's Cross Station.<sup>144</sup>
- 8.85 Other community organisations proposed making community liaison positions more available, diverse or specialised. They commented on the variability in how well these positions were used by Victoria Police.<sup>145</sup>
- 8.86 Victoria Police told us about the challenges of police liaison positions. It may not be practical to have liaison positions for multiple communities that were available whenever they were needed. They also saw it as the responsibility of every police member to be able to 'deal with diversity'.<sup>146</sup>
- 8.87 Instead, Victoria Police suggested broad initiatives to strengthen community engagement. They saw community-led initiatives as valuable in helping people identify sexual violence, understand their justice options and receive the support they need to engage with police.<sup>147</sup>
- 8.88 Community-police partnerships focused on sexual violence would ensure that victim survivors have clear pathways to police reporting, but also benefit from all the extra support and safety of community-based organisations. Given the positive contribution that community organisations make, we think such partnerships are the best approach. It can be complemented with community liaison positions if that is what the community needs.

<sup>142</sup> Consultation 92 (Dr Patrick Tidmarsh).

<sup>143</sup> Submission 30 (Red Files Inc.); Consultations 34 (Project Respect Women's Advisory Group), 45 (Sex Work Law Reform Victoria).

<sup>144</sup> Submissions 30 (Red Files Inc.), 33 (Sex Work Law Reform Victoria).

<sup>145</sup> Consultations 23 (Sexual Assault Services Victoria Specialist Children's Services), 29 (Safe Pathways to Healing Working Group (North Metropolitan Aboriginal Sexual Assault Prevention and Healing Advisory Group)); Consultation 79 (Commissioner for Aboriginal Children and Young People and Manager, Koori Advisory and Engagement).

<sup>146</sup> Consultation 80 (Victoria Police (No 2)).

<sup>147</sup> Ibid.

## Recommendation

- 27 Victoria Police should engage with priority communities to identify and put in place measures to strengthen community engagement, with a specific focus on sexual violence. This should:
- a. build on existing good practice in Victoria Police
  - b. use Sexual Offences and Child Abuse Investigation Teams as the main avenue to build relationships with communities in their area
  - c. create pathways to reporting between police and community organisations and victim survivors in priority communities
  - d. be formalised through protocols or other measures.

# CHAPTER 09

## PART FOUR: A RANGE OF JUSTICE OPTIONS

# Restorative justice for sexual offences

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## 9. Restorative justice for sexual offences

### Overview

- Restorative justice enables people who have been affected by a crime, including the person responsible, to communicate about the damage that has been caused and work together to repair it.
- There is strong support for making restorative justice available in Victoria, as an additional justice option alongside the criminal justice system. Everyone agrees it must be done safely and well.
- This chapter sets out a restorative justice scheme with guiding principles for sexual violence cases. It includes recommendations on:
  - how to manage the risks of using restorative justice for sexual violence
  - the relationship between restorative justice and the criminal justice system
  - who should govern and have oversight of the restorative justice scheme.

### Why restorative justice?

- 9.1 People who have experienced sexual violence have a range of justice needs. Being believed, feeling in control, having a voice—these are what many victim survivors want from justice but too often do not get.
- 9.2 The criminal justice system is central to the response to sexual violence, but not every victim survivor wants the person who harmed them to go to prison. Even if that is what they want, most reports of sexual violence do not result in convictions.
- 9.3 We discuss this 'justice gap' in Chapter 1. In this chapter, we explain how restorative justice can help fill the justice gap. Restorative justice supports people involved in or affected by a crime 'to heal and put things as right as possible'.<sup>1</sup>
- 9.4 Making restorative justice available is a way of expanding the justice options for some people who have experienced sexual violence. In many cases, it will not be possible or appropriate.<sup>2</sup> But while restorative justice may not be the right option for most, for some it can be powerful.

1 *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016) vol IV, 137 <<http://rcfv.archive.royalcommission.vic.gov.au/Report-Recommendations.html>>, citing Howard Zehr, *The Little Book of Restorative Justice* (Good Books, 2002) 37. Other aims of restorative justice include to: 'support perpetrators in non-offending by increasing their insight into the impact of the harm; improve victim-survivors' experience of justice by considering their wellbeing and addressing specific needs; improve ... access to justice by offering a different avenue for addressing the harm; and to build healthy communities where relationships are strengthened'. Jane Bolitho and Karen Freeman, *The Use and Effectiveness of Restorative Justice in Criminal Justice Systems Following Child Sexual Abuse or Comparable Harms* (Report, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016) 7 <<http://www.childabuseroyalcommission.gov.au/getattachment/gf328928-a343-4c65-b98e-94e3185894c7/Restorative-justice-following-child-sexual-abuse-o>>.

2 This may be because of safety issues, or because the person responsible for the violence does not accept responsibility or does not wish to participate. The Family Violence Restorative Justice Service told us that of 33 referrals they had received, half were not suitable for restorative justice: Consultation 3 (Family Violence Restorative Justice Service). In some cases, restorative conferences involving family or community members can still be valuable, even without the person responsible. Sometimes, a person who has experienced sexual violence does not want to engage with the person responsible, but wants to explain to their parents or members of the extended family how the harm affected them and their disappointment with how the family responded: Consultation 2 (Centre for Innovative Justice).



- 9.5 It allows people who have experienced sexual violence to speak and be heard. They can influence the process. Their sense of self can be restored.<sup>3</sup>
- 9.6 For people responsible for sexual violence, restorative justice provides a way to take responsibility. They can acknowledge the effects of their actions, apologise, and do what the person harmed asks to make amends.

### Ailbhe Griffith's story

Ailbhe Griffith's experience, and the restorative justice process described here, took place in Ireland. The man who assaulted Ailbhe was charged, convicted, sentenced and imprisoned. Ailbhe requested the restorative justice process after his release from prison, while he was under post-release supervision. It was facilitated by a restorative justice organisation. Ailbhe was separately supported by an independent restorative justice practitioner with sexual violence expertise.<sup>4</sup>

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There is one man alive in this world today that I have met only twice in my life ... once, when he violently sexually assaulted me and the other, when we sat on opposite sides of a round table wishing each other a successful future ...

I would consider the journey that I have undertaken to be a cycle of healing. It began ... when a man followed me, physically attacked me, sexually assaulted me, repeatedly choked me and threatened to kill me...

The following months and indeed years I was submerged in the depths of post-traumatic stress ... I kept repeating and repeating and repeating the assault in my mind. I couldn't stop it ... I was just stuck there ...

I began to imagine sitting face-to-face with him ... Could I ever accept that he was a human? ... An interesting thing about humans is that they are much less scary than monsters ... Fear of monsters can control us; fear of humans is much less likely to ...

I wanted him to see that I was a human too ... I wanted to let this man know how I had experienced his assault on me and the full implications of this event on my life ...

I wanted him to hear about the fear and shock I felt as he assaulted me; I needed him to know how confused I was about his rage towards me ...

I wanted him to be aware of how a victim of sexual violence becomes a piece of physical evidence after such an assault and how de-humanising that experience is. I wanted him to hear me speak about the post-traumatic stress disorder, the depression, the eating disorders, the shift in my perception of reality—all of it ... [And] I needed to ask him some questions. These were questions that only this man could answer ...

[During the preparation phase for restorative justice.] it became clear to me that the man I was hoping to meet had very little empathy for me, if any ... Additionally, it became clear that an apology from him was out of the question. Finally, I was made aware [by the facilitators who were working with him] that he was willing to answer my questions ... but that he would only speak the full truth and would only be 'real' about it. All of this was acceptable for me ...

As I walked into that room I was met with a sheepish, and a very human half-smile ... My fear of this man suddenly began to evaporate ...

3 Bebe Loff, Liz Bishop and Bronwyn Naylor, Community-Based, Victim-Centred Restorative Justice for Sexual Violence—A Pilot (Report No CRG 33/14–15, Australian Institute of Criminology, July 2019) <https://www.aic.gov.au/crg/reports>.

4 Extracted from Marie Keenan and Ailbhe Griffith, 'Two Women's Journeys: Restorative Justice after Sexual Violence' in Brunilda Pali (ed), *The Praxis of Justice* (Eleven Publishing, 2019) 310–16. Additional paragraph spaces have been introduced in the extracts.

I did not hold back in telling this man what it felt like to me during his assault of me. I did not gloss over the aftermath ... All the while I was able to look directly at him with no real fear.

I told him I needed to see him as a human so that I could let go of the remaining negativity that I felt towards him. I let him know that sitting in front of him, hearing him speak to me ... was causing this to actually manifest.

I told him that I hoped he was now [able] to see me as a human and that perhaps he might remember this moment in the future and realise that others are human like me too ...

Finally, I was given the opportunity to ask the ... questions that had been lingering in my mind for all these years. I asked him whether he did intend to kill me ... He told me 'no', but it could have happened accidentally when he was choking me ... I asked him [why he did it]. Again, the answer I received was truthful, forthright and as understandable as it could ever be coming from behaviour that is so deeply irrational.

I thanked him and told him that it helped because I could now put [the] jig-saw pieces together and that left me with a full and clear picture of things. I believe that I could never have let go until I could see this for myself.

As the meeting came to an end ... I said goodbye. The moment I stepped outside that room ... I felt physically lighter ...

[F]ollowing our meeting, I received a message through one of the facilitators indicating that this person wanted to say that he was very sorry for the pain he caused me ... I could never have imagined that happening, but because I have met him, I do believe that he means it.

I am continually processing the enormous impact that this meeting has had on me ... I can honestly say that I'm still just in awe of the powerful nature of restorative justice ...

I have concluded that the man I met ... is a human rather than a monster. [He] is no angel, but he's also not a devil. The man I encountered did not really wish to be the way he was, and he had a strong desire to do something 'good' by meeting with me ...

now ... I feel nothing but compassion and pity for him ... and truly I wish him all the best in his future life. ...

[The experience] has ... changed the reaction I have when I think of the violence of that night all those years ago. When I think back now I am automatically catapulted into my restorative justice meeting with him, and therefore ... it actually generates a feeling of contentment. This is a dynamic that I could never have imagined occurring ... before this meeting, the memories I had equalled emotional pain, a strong feeling of disempowerment, fear, de-humanisation and an intense hatred for the offender.

But now, when I think back to that night, the memories of it generate a strong feeling of empowerment, fulfilment and compassion for this man. I know that for me, no amount of therapy could ever have achieved that.

## What forms can restorative justice take?

- 9.7 Restorative justice can take many forms, including:
- an exchange of letters between the person harmed and the person responsible
  - engagement between the person harmed and a representative of an institution, where the violence occurred in an institutional context, such as a church or school<sup>5</sup>
  - conferences with the person harmed and the person responsible, like Ailbhe Griffith's experience. These can also include counsellors or professional support people, a trained facilitator, and sometimes other family or community members.
- 9.8 The restorative justice scheme we recommend allows for flexible processes. It does not limit restorative justice to a particular format, but conferences are common and they are our focus in this chapter. Participants can decide whether they want to be involved. They are screened for suitability, and there is careful preparation before the conference.
- 9.9 At a conference, the person who experienced sexual violence 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 have an opportunity to speak.

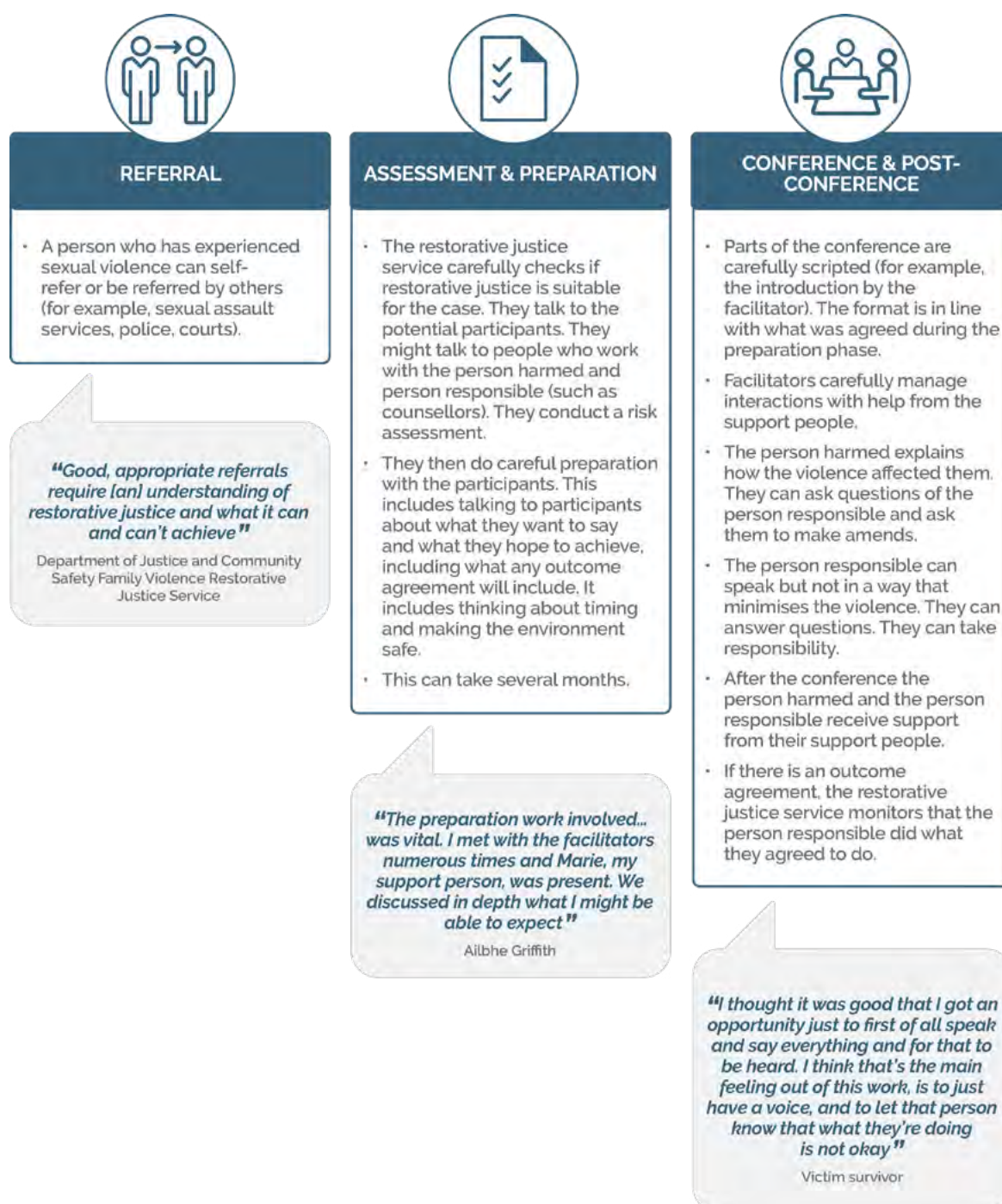
## What is an 'outcome agreement'?

- 9.10 Often conferences aim to produce an agreement (the 'outcome agreement') on what will be done to prevent future violence and promote healing. For example, the person responsible may enrol in a treatment program to address the causes of their offending, stay away from places or gatherings where the person harmed will be, give a written apology, or pay the person harmed compensation.<sup>6</sup>

5 Many redress schemes also incorporate restorative elements or forms of engagement: see Victorian Law Reform Commission, *Sexual Offences: Civil Law and Other Non-Criminal Responses* (Issues Paper H, October 2020) 5–6; Royal Commission into Institutional Responses to Child Sexual Abuse: *Criminal Justice Report* (Executive Summary and Parts I–II, 2017) 190.

6 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) 25 <<https://cij.org.au/research-projects/sexual-offences/>>.

Figure 15: Restorative justice conference flow chart<sup>7</sup>



7

The quotes in Fig. 15 come from the following sources: 'Referral' quote: Consultation 3 (Family Violence Restorative Justice Service); 'Assessment & preparation' quote: Marie Keenan and Ailbhe Griffith, 'Two Women's Journeys: Restorative Justice after Sexual Violence' in Brunilda Pali (ed), *The Praxis of Justice* (Eleven Publishing, 2019) 314; 'Conference & post-conference' quote: Bebe Loff, Liz Bishop and Bronwyn Naylor, Community-Based, Victim-Centred Restorative Justice for Sexual Violence—A Pilot (Report No CRG 33/14–15, Australian Institute of Criminology, July 2019) <https://www.aic.gov.au/crg/reports>

## Restorative justice for sexual offences has strong support

- 9.11 Other jurisdictions have seen the value of restorative justice in sexual offences and now practise it. It is supported by positive program evaluations and recent inquiries. Many people we heard from during our inquiry expressed support for it if it is done well. For all these reasons, we are convinced it is time to make restorative justice an option for sexual offences in Victoria.

### Where is restorative justice for sexual offences used?

- 9.12 For adult sexual offending in Australia, restorative justice can be used in:
- the Australian Capital Territory, where it is governed by a legislated framework
  - Queensland, where it is based on a dispute resolution model plus the courts' general powers to adjourn cases
  - New South Wales, but only in a limited way (after a criminal conviction and while the person responsible is serving their sentence).
- 9.13 Appendix E provides an overview of restorative justice for sexual offences in Australia and New Zealand where the person responsible is an adult.
- 9.14 The Queensland Government recently announced it will expand access to restorative justice, acknowledging its potential 'to deliver improved outcomes for victims, offenders and communities'.<sup>8</sup>
- 9.15 Several European countries provide restorative justice for adult sexual offending, including Belgium, Denmark and Norway.<sup>9</sup> Other countries where it can be used include England and Wales, Ireland, Canada and New Zealand.<sup>10</sup>
- 9.16 Most states in the United States offer some form of restorative justice but exclude sexual offences.<sup>11</sup> Arizona's 'RESTORE' program was one of the earliest restorative justice programs for sexual offences, running from 2003 to 2007.<sup>12</sup> It was positively evaluated and became a template for 'Project Restore—NZ'.<sup>13</sup>
- 9.17 Two examples are often cited as best practice: Project Restore—NZ and the Australian Capital Territory.<sup>14</sup>
- 9.18 In Australia and overseas, restorative justice principles are widely used in youth justice, but not usually for sexual offences. Restorative justice conferences are available for youth sexual offending in Belgium, England, the Australian Capital Territory and

8 Queensland Sentencing Advisory Council, *Penalties for Assaults on Public Officers* (Final Report, August 2020) 290 <[https://www.sentencingcouncil.qld.gov.au/\\_data/assets/pdf\\_file/0003/657732/chapter-11-institutional-responses.pdf](https://www.sentencingcouncil.qld.gov.au/_data/assets/pdf_file/0003/657732/chapter-11-institutional-responses.pdf)>.

9 Marie Keenan, Caroline O'Nolan and Estelle Zinsstag, 'Sexual Violence and Restorative Practices in Belgium, Ireland and Norway: A Thematic Analysis of Country Variations' (2016) 4(1) *Restorative Justice: An International Journal* 86; Estelle Zinsstag and Marie Keenan (eds), *Restorative Responses to Sexual Violence: Legal, Social and Therapeutic Dimensions* (Routledge, 1st ed, 2017) 6–7. It is also available for family violence in Austria, Finland, the Netherlands, Germany and Greece: Andrea Păroșanu, 'A Review of European Standards on Restorative Justice and Domestic Violence' (Occasional Papers in Restorative Justice Practice 4, Victoria University of Wellington, 2016) <[https://www.restorativecommunity.org.nz/uploads/1/2/0/1/120126684/european\\_standards.pdf](https://www.restorativecommunity.org.nz/uploads/1/2/0/1/120126684/european_standards.pdf)>.

10 See Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) [7.263]–[7.265], [7.324]; Government of Canada, 'Restorative Justice', *Department of Justice* (Web Page, 13 January 2000) <<https://www.justice.gc.ca/eng/cj-jp/rj-jr/index.html>>; Marie Keenan, Caroline O'Nolan and Estelle Zinsstag, 'Sexual Violence and Restorative Practices in Belgium, Ireland and Norway: A Thematic Analysis of Country Variations' (2016) 4(1) *Restorative Justice: An International Journal* 86; Ian D Marder, 'Restorative Justice as the New Default in Irish Criminal Justice' (2019) 16 *Irish Probation Journal* 23.

11 See Thalia González, 'The State of Restorative Justice in American Criminal Law' [2020] 6 *Wisconsin Law Review* 1147, 1163–4.

12 Mary P Koss, 'The RESTORE Program of Restorative Justice for Sex Crimes: Vision, Process, and Outcomes' (2014) 29(9) *Journal of Interpersonal Violence* 1623. Koss has since speculated that the program did not receive continued funding because of the 'tough on crime' mentality in the United States. See Allison Griner, 'The Better Way to Support Rape Victims: Put Their Needs First', *The Guardian* (online, 13 March 2018) <<http://www.theguardian.com/global/2018/mar/13/restorative-justice-putting-the-needs-of-victims-first>>.

13 Shirley Jülich and Fiona Landon, 'Achieving Justice Outcomes: Participants of Project Restore's Restorative Processes' in Estelle Zinsstag and Marie Keenan (eds), *Restorative Responses to Sexual Violence: Legal, Social and Therapeutic Dimensions* (Routledge, Taylor & Francis Group, 2017) 192, 192; Mary P Koss, 'The RESTORE Program of Restorative Justice for Sex Crimes: Vision, Process, and Outcomes' (2014) 29(9) *Journal of Interpersonal Violence* 1623.

14 Consultation 38 (Australian Association for Restorative Justice); 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) 31 <<https://cij.org.au/research-projects/sexual-offences/>>; Royal Commission into Family Violence: *Report and Recommendations* (Final Report, March 2016) vol IV, 142 <<http://rcfv.archive.royalcommission.vic.gov.au/Report-Recommendations.html>>.



South Australia.<sup>15</sup> In Victoria, restorative justice conferences can be part of treatment programs for children and young people displaying harmful sexual behaviours, as we discuss below.

## What do evaluations of restorative justice suggest?

### Restorative justice can benefit the person harmed

- 9.19 Evaluations indicate that, for criminal offending generally, restorative justice meets various justice needs.<sup>16</sup> It is viewed by many victims of crime as 'fairer, more satisfying, more respectful, and more legitimate' than what the criminal justice system offers.<sup>17</sup>
- 9.20 There have been only a few small evaluations of restorative justice for sexual offences, but they show there can be powerful benefits for the person harmed. A 2016 review considered evaluations of fifteen restorative justice programs that all dealt with sexual offences. The review found participation in restorative justice was 'very beneficial' for the people who had been harmed where programs met certain conditions. These conditions included providing safety and being responsive to their needs.<sup>18</sup>
- 9.21 In a study facilitated by the South Eastern Centre Against Sexual Assault (SECASA), eight people who had experienced sexual violence said restorative justice should be made available to other victim survivors.<sup>19</sup> The mother of one participant said the process had:
- enabled her to live her life, it was a part of the process that stopped her taking her life.<sup>20</sup>
- 9.22 A 2018 New Zealand evaluation found four of six people whose cases involved sexual offences 'felt better' after the process and 'more positive' about the criminal justice system generally.<sup>21</sup>
- 9.23 In all these evaluations, restorative justice was only beneficial for people who had experienced sexual violence if their needs were catered for and they felt safe. In addition, when restorative justice was positively evaluated, the person responsible for the violence was usually receiving independent support or therapeutic treatment.<sup>22</sup>

### Restorative justice can benefit the person responsible and reduce reoffending

- 9.24 The benefits of restorative justice are not limited to the person who was harmed. Evaluations indicate it can help people responsible for violence to better understand the impact of what they did. It gives them a meaningful chance to take responsibility and make amends.<sup>23</sup>

15 Kathleen Daly, Brigitte Bouhours, and Australian Centre for the Study of Sexual Assault, *Conventional and Innovative Justice Responses to Sexual Violence* (Report, Australian Institute of Family Studies (Cth), 2011) 10, 18–9; Shelby Sewak et al, *Youth Restorative Justice: Lessons from Australia* (Report, HAQ Centre for Child Rights, June 2019) 58 <<https://haqcrc.org/wp-content/uploads/2019/07/restorative-justice-in-australia.pdf>>.

16 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) 17–18 <[https://cij.org.au/cms/wp-content/uploads/2018/08/rmit\\_8691-rjcpp-report-web.pdf](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) 26 <<https://cij.org.au/research-projects/sexual-offences/>>; United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes* (Criminal Justice Handbook Series, 2nd ed, 2020) 8–10.

17 This view is shared by people responsible for crime: Meredith Rossner, 'Restorative Justice and Victims of Crime: Developments and Directions' in Sandra Walklate (ed), *Handbook of Victims and Victimology* (Routledge, 2017) ch 12, 238.

18 Jane Bolitho and Karen Freeman, *The Use and Effectiveness of Restorative Justice in Criminal Justice Systems Following Child Sexual Abuse or Comparable Harms* (Report, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016) <<http://www.childabuseroyalcommission.gov.au/getattachment/gf328928-a343-4c65-b98e-94e3185894c7/Restorative-justice-following-child-sexual-abuse-o>>; *Royal Commission into Institutional Responses to Child Sexual Abuse: Final Report* (Report, December 2017) 185 <<https://www.childabuseroyalcommission.gov.au/final-report>>.

19 Bebe Loff, Liz Bishop and Bronwyn Naylor, *Community-Based, Victim-Centred Restorative Justice for Sexual Violence—A Pilot* (Report No CRG 33/14–15, Australian Institute of Criminology, July 2019) <<https://www.aic.gov.au/crg/reports>>.

20 Ibid 31.

21 Gravitas Research and Strategy Ltd, *Ministry of Justice—Restorative Justice Survey* (Victim Satisfaction Survey 2018, Ministry of Justice (NZ), September 2018) 26, 40 <<https://www.justice.govt.nz/assets/Documents/Publications/Restorative-Justice-Victim-Satisfaction-Survey-Report-Final-TK-206840.pdf>>.

22 *Royal Commission into Institutional Responses to Child Sexual Abuse: Final Report* (Report, December 2017) 184–5 <<https://www.childabuseroyalcommission.gov.au/final-report>>.

23 Marie Keenan, 'Training for Restorative Justice Work in Sexual Violence Cases' (2018) 1(2) *The International Journal of Restorative Justice* 291, 291; Vince Mercer and Karin Sten Madsen, *Doing Restorative Justice in Cases of Sexual Violence: A Practice Guide* (Report, 2015) 12–13.

- 9.25 Another benefit of restorative justice is that it appears to reduce the likelihood of reoffending. Reoffending is higher among people who committed violent crimes that were dealt with solely through the criminal justice system.<sup>24</sup>
- 9.26 By reducing repeat offending, restorative justice may help reduce the burden that sexual offending puts on the criminal justice system.<sup>25</sup>

## What have recent inquiries said about restorative justice?

### We endorsed restorative justice in our Victims of Crime report

- 9.27 In our report on *The Role of Victims of Crime in the Criminal Trial Process* (the Victims of Crime report), we recommended making restorative justice available for all indictable (serious) offences. For these offences, we said it should be available alongside criminal processes and should not be used to divert people from criminal prosecution.<sup>26</sup>
- 9.28 Our recommendations reflected support from people we consulted with and submissions we received, and research showing high levels of satisfaction with restorative justice conferencing among victims of crime. We found restorative justice gave victims 'a more supportive and flexible forum for active participation' than the criminal justice process.<sup>27</sup>

### The Royal Commission into Family Violence endorsed restorative justice

- 9.29 The Royal Commission into Family Violence also endorsed restorative justice. It was told that restorative justice can provide a forum for women to be heard on their own terms and acknowledged, and where the perpetrator can be held accountable. It concluded that restorative justice processes could 'meet a broad range of victims' needs that might not always be met through the courts'.<sup>28</sup>
- 9.30 The Royal Commission recommended setting up a pilot program and restorative justice framework for family violence.<sup>29</sup> The Victorian Government did this. After being successfully piloted, the Family Violence Restorative Justice Service is now ongoing.<sup>30</sup>

### Restorative justice for sexual harassment has support

- 9.31 The Australian Human Rights Commission (AHRC) recently suggested using restorative engagement in a truth-telling process for people with past experience of workplace sexual harassment. It said that 'there is a healing power in having one's experience heard'.<sup>31</sup>
- 9.32 In its submission to the AHRC's review of sexual harassment, the Victorian Equal Opportunity and Human Rights Commission supported making restorative justice available for sexual harassment complaints. It is developing restorative engagement pathways for sexual harassment cases.<sup>32</sup>

24 See, eg, Jacqueline Joudo Larsen, *Restorative Justice in the Australian Criminal Justice System* (Research and Public Policy Series No 127, Australian Institute of Criminology (Cth), 2014) 23–5 <<https://www.aic.gov.au/publications/rpp/rpp127>>; Marie Keenan, 'Training for Restorative Justice Work in Sexual Violence Cases' (2018) 1(2) *The International Journal of Restorative Justice* 291, 292; United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes* (Criminal Justice Handbook Series, 2nd ed, 2020) 8.

25 Queensland Sentencing Advisory Council, *Penalties for Assaults on Public Officers* (Final Report, August 2020) 294, 296 <[https://www.sentencingcouncil.qld.gov.au/\\_data/assets/pdf\\_file/0003/657732/chapter-11-institutional-responses.pdf](https://www.sentencingcouncil.qld.gov.au/_data/assets/pdf_file/0003/657732/chapter-11-institutional-responses.pdf)>.

26 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016), 177 [7.250]–[7.251] Recommendation 32.

27 Ibid xix [55]–[56].

28 *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016) vol IV, 135 <<http://rcfv.archive.royalcommission.vic.gov.au/Report-Recommendations.html>>.

29 Ibid Recommendation 122.

30 Consultation 3 (Family Violence Restorative Justice Service); Department of Justice and Regulation (Vic), *Restorative Justice for Victim Survivors of Family Violence* (Framework, Family Violence Restorative Justice Project, August 2017) <<http://www.justice.vic.gov.au/restorative-justice-for-victim-survivors-of-family-violence-framework>>; Justice and Community Safety (Vic), 'Restorative Justice for Victim Survivors of Family Violence', *The Family Violence Restorative Justice Service* (Web Page) <<https://www.justice.vic.gov.au/fvrjservice>>.

31 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020) 511, Recommendation 27 <<https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>>.

32 Victorian Equal Opportunity and Human Rights Commission, Submission to the Australian Human Rights Commission, *National Inquiry into Sexual Harassment in Australian Workplaces* (February 2019) 3, 42–3 <[https://www.humanrights.vic.gov.au/static/f72f3b7bf8c99ca4911c6f76ba5abcc1/Submission-National\\_inquiry\\_sexual\\_harassment-Feb\\_2019.pdf](https://www.humanrights.vic.gov.au/static/f72f3b7bf8c99ca4911c6f76ba5abcc1/Submission-National_inquiry_sexual_harassment-Feb_2019.pdf)>.



## What did people tell us about restorative justice?

For me restorative justice would have been beneficial ... I had and still have, many questions I would like answered and would gladly agree to meet the offender if it was offered to me today.

Not all victims will want to or benefit from meeting with the offender but I think it should be discussed and available.<sup>33</sup>

- 9.33 Many people we heard from in our inquiry supported making restorative justice an option for sexual offences. They stressed that it must be done well and governed by best practice principles.<sup>34</sup>
- 9.34 Support came from people who have experienced sexual violence, and from sexual assault and family violence services and representative organisations. It came from people working in the criminal justice system. Victoria Legal Aid, for example, said that restorative justice has some of 'the greatest potential to effect positive change in the [justice system's] response to sexual offending'.<sup>35</sup> We also spoke with restorative justice practitioners who described its transformative power.<sup>36</sup>

### Restorative justice can meet needs that the criminal justice system cannot

- 9.35 We were told that restorative justice should be an option because the criminal justice system was not designed for victims of crime and could not meet all their needs.<sup>37</sup>

The flow-on effects are huge and I don't think people who offend realise what those flow-on effects are. My children have had to change their surnames, I'm now financially ruined, my children have lost educational opportunities, and they will always be marginalised as a result of the offending. My children have lost their friends, and I have lost friends.

There should be a space to have a dialogue with the offender around what those broader implications have been.—'Marie'<sup>38</sup>

- 9.36 The Victims of Crime Commissioner said:
- Alternative forms of participation or alternative justice responses—such as restorative justice—can meet more of victims' most commonly articulated needs, including participation, voice, validation, vindication and offender accountability.<sup>39</sup>
- 9.37 Domestic Violence Victoria told us that restorative justice can provide 'an opportunity to be heard'. They said that restorative justice 'should be available as victim survivors do not often get the opportunity to be heard during the criminal justice process'.<sup>40</sup>

33 Submission 32 (A victim survivor of sexual assault (name withheld)).

34 Submissions 7 (Dr Bianca Fileborn, Dr Rachel Loney-Howes, Dr Tully O'Neill and Sophie Hindes), 10 (Carolyn Worth AM and Mary Lancaster), 12 (Women's Legal Service Victoria), 14 (Gatehouse Centre, Royal Children's Hospital), 17 (Sexual Assault Services Victoria), 18 (In Good Faith Foundation), 21 (Victorian Aboriginal Child Care Agency), 22 (knowmore legal service), 24 (Jesuit Social Services), 25 (Dr Steven Tudor), 27 (Victoria Legal Aid), 40 (Law Institute of Victoria), 44 (Dr Patrick Tidmarsh and Dr Gemma Hamilton), 50 (Project Respect), 52 (Centre for Innovative Justice), 53 (Liberty Victoria), 54 (Victorian Multicultural Commission), 56 (Domestic Violence Victoria), 58 (Law and Advocacy Centre for Women Ltd); Consultations 32 (Anonymous member, Victim Survivors' Advisory Council), 56 (Cecilia, a victim survivor of sexual assault), 64 (Marie (a pseudonym)), 69 (Deborah, a victim survivor of sexual assault), 71 (Magistrates' Court of Victoria (No 1)); Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021).

35 Submission 27 (Victoria Legal Aid).

36 Consultations 1 (ACT Restorative Justice Unit and academics), 2 (Centre for Innovative Justice), 3 (Family Violence Restorative Justice Service), 12 (Project Restore), 38 (Australian Association for Restorative Justice).

37 Submissions 7 (Dr Bianca Fileborn, Dr Rachel Loney-Howes, Dr Tully O'Neill and Sophie Hindes), 12 (Women's Legal Service Victoria), 25 (Dr Steven Tudor), 52 (Centre for Innovative Justice), 53 (Liberty Victoria).

38 Consultation 64 (Marie (a pseudonym)).

39 Submission 45 (Victims of Crime Commissioner).

40 Submission 56 (Domestic Violence Victoria).

- 9.38 A victim survivor who had been to court felt that if she had used restorative justice, she 'would have at least been able to tell the truth of what happened', even if the accused denied the assault.<sup>41</sup>

### Restorative justice gives people more choices

Restorative justice 'is a great idea—as many opportunities for victims to heal as possible should be offered to them to allow choice, and control over the choices ... It's very important that victim survivors have control over what happens, because as victims they haven't had control.'—Cecilia<sup>42</sup>

- 9.39 Deborah, another victim survivor of sexual assault, thought restorative justice sounded risky but said, 'It is good for people to have options.'<sup>43</sup> Another person said restorative justice might be a 'more supportive, less scary' option than running into the people who had sexually assaulted her and having to speak to them on her own.<sup>44</sup>

### Restorative justice provides another form of accountability

I would like to see access to restorative justice for those who want this pathway and ways to safely do that, and for people to have choice if that is additional to prison time ... or for victims who don't want their perpetrator to go to prison for them to also have that choice.<sup>45</sup>

- 9.40 As Sexual Assault Services Victoria pointed out, 'justice looks different to different people'. They explained:
- Often a [victim survivor] may just want the perpetrator to understand the impacts of their behaviour, acknowledge the crime and/or offer an apology. They may not necessarily want the offender to serve jail time.<sup>46</sup>
- 9.41 The Victorian Aboriginal Legal Service (VALS) noted the desire in some Aboriginal communities for a process:
- where the offender is held to account, not with the result being a prison sentence, but rather ... an acknowledgement of the harm that the offender has caused the victim.<sup>47</sup>
- 9.42 Several victim survivors who responded to our online form said that they would have liked to use restorative justice. One person did not want the person responsible to go to prison but wanted them to 'realize the gravity of their actions'. She felt that restorative justice processes might be more likely to achieve this. Another person, a parent, said she supported it because even with a conviction 'the person won't necessarily change for the better'.<sup>48</sup>

41 Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021).

42 Consultation 56 (Cecilia, a victim survivor of sexual assault).

43 Consultation 69 (Deborah, a victim survivor of sexual assault).

44 Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021).

45 Consultation 32 (Anonymous member, Victim Survivors' Advisory Council).

46 Submission 17 (Sexual Assault Services Victoria).

47 Submission 67 (Victorian Aboriginal Legal Service).

48 Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021).

## Restorative justice can be healing

- 9.43 In the experience of Sexual Assault Services Victoria, restorative justice can help:  
in shifting the common negative core beliefs ... that [victim survivors] bear:  
responsibility, shame, guilt, feeling that they are bad.<sup>49</sup>
- 9.44 The Magistrates' Court of Victoria supported making restorative justice available for sexual offences, with clear rules and guidelines. In its view, restorative justice can be a way for someone to find 'healing, repair and acknowledgement'.<sup>50</sup>

## Some people had concerns, and some said restorative justice would be out of the question for them

Some people ... are manipulative. In a restorative justice process, he would have manipulated the process. He would have presented himself as the picture of remorse.—Nicole Lee<sup>51</sup>

- 9.45 Some victim survivors we heard from opposed restorative justice. They were worried people responsible for sexual violence would manipulate the process. Others doubted that the person who had assaulted them would be prepared to admit the assault or take responsibility for it.

In my experience of being the victim of a crime, the offender just doesn't care and doesn't want to change.<sup>52</sup>

- 9.46 Some said that they would never want to see the person who had assaulted them again.<sup>53</sup> One said that meeting her attacker in person, even with a trained facilitator, would be 'out of the question, far too distressing and traumatising'.<sup>54</sup>
- 9.47 One person thought providing restorative justice could imply that sexual violence is trivial or unimportant. She said it could support the view that:  
what has happened is just going to be accepted by the police and society. It suggests that rapes can continue to go under-reported, under-charged and under-convicted.<sup>55</sup>
- 9.48 Other people who had experienced sexual violence said restorative justice should be an option, even though they would never use it. One thought it could be 'very powerful', even though she would not be 'brave enough to confront my assaulter'.<sup>56</sup>

## Restorative justice carries risks

- 9.49 Even advocates of restorative justice recognise it carries serious risks.
- 9.50 The two main concerns about using restorative justice for sexual offences are:
- It implies sexual violence is unimportant, and a private rather than public concern.
  - Restorative justice could repeat the dynamics of the original violence and retraumatise the person harmed.

49 Submission 17 (Sexual Assault Services Victoria).

50 Consultation 71 (Magistrates' Court of Victoria (No 1)).

51 Consultation 59 (Ashleigh Rae, Nicole Lee, Penny).

52 Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021).

53 Ibid.

54 Submission 15 (Danielle).

55 Consultation 63 (A victim survivor of sexual assault, name withheld).

56 Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021).

## Restorative justice risks hiding sexual violence from public view

- 9.51 In the past, many forms of sexual violence were treated 'as private matters, not deserving of public condemnation'. The trauma and suffering sexual violence caused was ignored or minimised.<sup>57</sup>
- 9.52 Sexual violence continues to be an isolating experience. It is often hidden behind 'veils of secrecy and shame'. For many people, even their close family and friends are unaware of the offending and its impact.<sup>58</sup>
- 9.53 There is a risk that crimes which were once minimised and treated as 'private matters' may be hidden away again if restorative justice is used instead of public prosecutions and trials.<sup>59</sup> Apart from the content of outcome agreements, what happens during restorative justice is private and confidential, as we discuss below.

## Restorative justice risks retraumatising the person harmed

- 9.54 In restorative justice, the person responsible for the harm can speak, so there is a risk they will repeat the dynamics of the original harm. They may denigrate the person they harmed and challenge their account of what happened. The person harmed may feel silenced and violated, as they were during the sexual violence.
- 9.55 If other participants in restorative justice believe an alternative version of events given by the person responsible, it will be retraumatising. This is especially so, because:  
a considerable element of the trauma that victims of sexual assault experience is the denial and disbelief ... many encounter.<sup>60</sup>
- 9.56 Even if the person harmed is believed, they may be intimidated or traumatised by the presence of the person responsible. This may cause them to freeze or be unable to speak freely, echoing their experience of the violence.<sup>61</sup>
- 9.57 Intimidation or control in abusive relationships is often subtle. This may be difficult for restorative justice facilitators to recognise and counter.<sup>62</sup> For example, inviting the person responsible to apologise may be inappropriate, because 'apology and forgiveness ... are characteristics of the cycle of abuse'.<sup>63</sup>
- 9.58 The more unequal the relationship, the greater the risk. Partly for this reason, the Royal Commission into Institutional Responses to Child Sexual Abuse concluded that restorative justice processes are unlikely to assist many victim survivors of institutional child sexual abuse.<sup>64</sup>

57 Submission 52 (Centre for Innovative Justice).

58 Ministry of Justice (NZ), *Restorative Justice Standards for Sexual Offending Cases* (Report, 2013) 19 <<https://www.justice.govt.nz/assets/Documents/Publications/Restorative-justice-standards-for-sexual-offending-cases.pdf>>.

59 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) [7.249].

60 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 <<https://cij.org.au/research-projects/sexual-offences/>>.

61 Vince Mercer and Karin Sten Madsen, *Doing Restorative Justice in Cases of Sexual Violence: A Practice Guide* (Report, 2015) 14.

62 Tristan Russell, William R Wood and Samantha Jeffries, 'Adult Restorative Justice and Gendered Violence: Practitioner and Service Provider Viewpoints from Queensland, Australia' (2021) 10(13) *Laws* 1, 3; Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 177 [7.249].

63 Royal Commission into Family Violence: *Report and Recommendations* (Final Report, March 2016) vol IV, 138 <<http://rcfv.archive.royalcommission.vic.gov.au/Report-Recommendations.html>>.

64 Royal Commission into Institutional Responses to Child Sexual Abuse: *Criminal Justice Report* (Executive Summary and Parts I-II, 2017) 190. While it did not recommend making restorative justice available, the Royal Commission included restorative elements as a central component of its redress scheme. The scheme provides for a direct personal response from a senior representative of the institution where the abuse occurred, including an apology and acknowledgment of the abuse and its impact: Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation* (Report, Royal Commission into Institutional Responses to Child Sexual Abuse, September 2015) ch 5 <<https://www.childabuseroyalcommission.gov.au/redress-and-civil-litigation>>.

## Guiding principles can minimise the risks

- 9.59 Sexual violence is a public wrong that the state must redress. Dealing with sexual violence in the criminal justice system is an important way of signalling how serious it is. This is part of how society condemns the violence and holds the people responsible for it to account. The justice system should be a focus of reform, and it is in this report.
- 9.60 But in too many cases, criminal justice does not redress the wrong at all. In others, it deals with it in a way that does not meet the needs of victim survivors. Clearly, more justice options should be available. Restorative justice has powerful potential to provide choice, voice, acknowledgment and healing for some survivors of sexual violence.
- 9.61 The risks of restorative justice are real and need to be managed. We are not recommending that restorative justice replaces criminal justice. Neither are we saying that sexual violence should be treated as unimportant or as a private wrong. Instead, restorative justice should be an option that supplements criminal justice.
- 9.62 The risks of restorative justice can be managed through careful design and implementation of a principle-based scheme. The principles we recommend are listed in Table 11 and expanded on in the following sections. They are drawn from Australian and international expertise and regulatory frameworks. Many were developed for sexual or other serious offences involving violence.<sup>65</sup>
- 9.63 For example, the Framework for the Family Violence Restorative Justice Service was informed by extensive research and consultation. It includes each of the principles we recommend, although some are expressed differently.<sup>66</sup> In New Zealand, restorative justice for sexual offences is based on similar principles.<sup>67</sup>
- 9.64 We tested these principles through our issues paper.<sup>68</sup> They received widespread support.<sup>69</sup>

65 See, eg, Department of Justice and Regulation (Vic), *Restorative Justice for Victim Survivors of Family Violence* (Framework, Family Violence Restorative Justice Project, August 2017) <<http://www.justice.vic.gov.au/restorative-justice-for-victim-survivors-of-family-violence-framework>>; Ministry of Justice (NZ), *Restorative Justice—Best Practice Framework* (Report, 2017) <<https://www.justice.govt.nz/assets/Documents/Publications/restorative-justice-best-practice-framework-2017.pdf>>; Ministry of Justice (NZ), *Restorative Justice Standards for Sexual Offending Cases* (Report, 2013) <<https://www.justice.govt.nz/assets/Documents/Publications/Restorative-justice-standards-for-sexual-offending-cases.pdf>>; *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, ESC Res 2002/12, 37th plen mtg (24 July 2002) <[https://www.unodc.org/pdf/criminal\\_justice/Basic\\_Principles\\_on\\_the\\_use\\_of\\_Restorative\\_Justice\\_Programs\\_in\\_Criminal\\_Matters.pdf](https://www.unodc.org/pdf/criminal_justice/Basic_Principles_on_the_use_of_Restorative_Justice_Programs_in_Criminal_Matters.pdf)>; United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes* (Handbook, United Nations, 2006) 33–44.

66 Department of Justice and Regulation (Vic), *Restorative Justice for Victim Survivors of Family Violence* (Framework, Family Violence Restorative Justice Project, August 2017) 6–9 <<http://www.justice.vic.gov.au/restorative-justice-for-victim-survivors-of-family-violence-framework>>.

67 Ministry of Justice (NZ), *Restorative Justice—Best Practice Framework* (Report, 2017) <<https://www.justice.govt.nz/assets/Documents/Publications/restorative-justice-best-practice-framework-2017.pdf>>; Ministry of Justice (NZ), *Restorative Justice Standards for Sexual Offending Cases* (Report, 2013) <<https://www.justice.govt.nz/assets/Documents/Publications/Restorative-justice-standards-for-sexual-offending-cases.pdf>>. But note also that in New Zealand, it is a principle that ‘full participation of the victim and offender should be encouraged’: *ibid* 10 [2]. This is not a principle we have adopted because it may create tension with the principle that the process should be centred around the needs of the person harmed.

68 Victorian Law Reform Commission, *Sexual Offences: Restorative and Alternative Justice Models* (Issues Paper G, October 2020). In our issues paper, we listed 12 best practice principles. Here, we have amalgamated some principles to arrive at the list of eight guiding principles. ‘Safety and respect’ now incorporates the following components, which were listed separately in the issues paper: protection from harm; power imbalances redressed and dignity and equality of participants recognised; appropriate resourcing and expert personnel; flexibility and responsiveness to diverse needs. ‘Accountability’ now incorporates two components that were listed separately in the issues paper: the person responsible accepts responsibility; outcome agreements are fair and reasonable.

69 Some submissions focused on particular principles, or expressed the principles in slightly different form, but there was strong overall support. See, eg, Submissions 7 (Dr Bianca Fileborn, Dr Rachel Loney-Howes, Dr Tully O’Neill and Sophie Hinds), 10 (Carolyn Worth AM and Mary Lancaster), 22 (knowmore legal service), 27 (Victoria Legal Aid), 52 (Centre for Innovative Justice), 53 (Liberty Victoria), 55 (Springvale Monash Legal Service), 68 (Victoria Police).

**Table 11: Guiding principles for restorative justice in cases involving sexual offences**

<b>Voluntary participation</b>
Consent is informed and participants are free to withdraw at any time.
<b>Accountability</b>
The person responsible accepts responsibility. Outcome agreements are fair and reasonable.
<b>The needs of the person harmed take priority</b>
The process centres on the needs and interests of the person harmed.
<b>Safety and respect</b>
Safety measures are provided. The process is flexible and responsive to diverse needs, including the needs of children and young people, and of Aboriginal communities. Power imbalances are redressed, and the dignity and equality of participants is respected. The process is supported by skilled personnel with specialist expertise in sexual violence, and it is well resourced.
<b>Confidentiality</b>
What is said and done during restorative justice is confidential, with some exceptions.
<b>Transparency</b>
De-identified results are publicised to contribute to continuous program improvement. Programs are regularly evaluated.
<b>An integrated justice response</b>
The process is part of 'an integrated justice response'. Other criminal and civil justice options are available, as well as therapeutic treatment programs.
<b>Clear governance</b>
Legislation sets out the guiding principles, provides for implementation and oversight, and explains how restorative justice interacts with the criminal justice system.

## Participation is voluntary

### Consent is informed and participants are free to withdraw

- 9.65 Participants must be fully informed about restorative justice. They should understand what the process will require of them, what they can expect from it and what their rights are. They are entitled to legal advice about the implications of participation. They should not feel pressured to participate and may withdraw at any time.<sup>70</sup> In Chapter 12 we discuss legal advice for people who have experienced sexual violence.
- 9.66 The principle of voluntary participation reduces the risk of re-traumatisation for victim survivors and protects the rights of the person responsible. It reflects that restorative justice is about giving participants control over the decisions that will affect their lives.<sup>71</sup> If participation is forced, a restorative engagement will not empower, heal or rehabilitate.

<sup>70</sup> Submissions 22 (knowmore legal service), 27 (Victoria Legal Aid), 52 (Centre for Innovative Justice), 53 (Liberty Victoria), 68 (Victoria Police). See also *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, ESC Res 2002/12, 37th plen mtg (24 July 2002) [7], [13] <[https://www.unodc.org/pdf/criminal\\_justice/Basic\\_Principles\\_on\\_the\\_use\\_of\\_Restorative\\_Justice\\_Programs\\_in\\_Criminal\\_Matters.pdf](https://www.unodc.org/pdf/criminal_justice/Basic_Principles_on_the_use_of_Restorative_Justice_Programs_in_Criminal_Matters.pdf)>.

<sup>71</sup> Marie Keenan, 'Training for Restorative Justice Work in Sexual Violence Cases' (2018) 1(2) *The International Journal of Restorative Justice* 291, 292.



- 9.67 Facilitators and support workers, as part of their preparation, should scrutinise whether participants are able to make free decisions to participate. There is a risk that people who have experienced sexual violence at the hands of a family or community member will be under communal pressure to participate. This was a particular concern for some Aboriginal groups and community members.<sup>72</sup>
- 9.68 The person responsible for the violence could also be pressured to participate. Again, this risk should be managed through careful preparation, and by making sure they have independent support and counselling. They should not be penalised for choosing not to participate. (We discuss this below.)
- 9.69 Restorative justice should not continue if a facilitator decides a participant is being pressured to participate.

## There is accountability for the harm

### The person responsible accepts responsibility

- 9.70 If a person responsible for sexual violence wishes to participate in restorative justice, they must accept some responsibility for the harm they have caused. This starting point is important to support the healing potential of restorative justice, and to avoid retraumatising the person harmed.<sup>73</sup>
- 9.71 Guidelines in New Zealand suggest restorative justice should not occur in sexual offence cases unless the person responsible has acknowledged responsibility for the offence. A guilty plea is viewed as the clearest way of acknowledging responsibility.<sup>74</sup> District (mid-tier) Courts may refer people to restorative justice after a conviction, but they will not be accepted for restorative justice if they still deny responsibility for the offending.<sup>75</sup>
- 9.72 The Family Violence Restorative Justice Service says that a person responsible for violence can gain insight into their behaviour through a restorative justice process, so the 'threshold for a perpetrator to commence engagement' can be 'quite low'.<sup>76</sup> A person who moves from some acceptance of responsibility to greater acceptance while preparing for a restorative justice conference will be able to participate:
- if the conference can happen safely, and
  - it is what the person harmed wants.
- If the person responsible fails to accept an appropriate level of responsibility, the restorative justice process will be stopped.<sup>77</sup>
- 9.73 We consider this a sensible approach. As a restorative justice practitioner in the Australian Capital Territory told us, a person might accept some responsibility for the harm they have caused while disputing criminal liability. Also, their attitude to their own responsibility may shift over time.<sup>78</sup> In the Australian Capital Territory, a person who commits an offence is eligible for restorative justice if they accept responsibility for committing the offence. However, they can still plead not guilty to the offence in court.<sup>79</sup>

<sup>72</sup> Submissions 9 (Djirra), 20 (Anonymous member of Aboriginal community), 67 (Victorian Aboriginal Legal Service).  
<sup>73</sup> Submission 53 (Liberty Victoria). See also United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes* (Criminal Justice Handbook Series, 2nd ed, 2020) 6–7.  
<sup>74</sup> However, a person who first pleaded not guilty and later admitted guilt may still be accepted for restorative justice: Ministry of Justice (NZ), *Restorative Justice Standards for Sexual Offending Cases* (Report, 2013) 12 [4] <<https://www.justice.govt.nz/assets/Documents/Publications/Restorative-justice-standards-for-sexual-offending-cases.pdf>>.  
<sup>75</sup> Ibid 8, 12 [4]; *Sentencing Act 2002* (NZ) ss 24A, 25(1)(b).  
<sup>76</sup> Department of Justice and Regulation (Vic), *Restorative Justice for Victim Survivors of Family Violence* (Framework, Family Violence Restorative Justice Project, August 2017) 7 <<http://www.justice.vic.gov.au/restorative-justice-for-victim-survivors-of-family-violence-framework>>.  
<sup>77</sup> Ibid. See also Justice and Community Safety (Vic), 'Restorative Justice for Victim Survivors of Family Violence', *The Family Violence Restorative Justice Service* (Web Page) <<https://www.justice.vic.gov.au/fvrjservice>>.  
<sup>78</sup> Consultation 1 (ACT Restorative Justice Unit and academics).  
<sup>79</sup> *Crimes (Restorative Justice) Act 2004* (ACT) ss 19(1)(b), 20(1). Young people need not actively accept responsibility—they are able to participate in restorative justice for less serious offences (punishable by 10 years imprisonment or less) if they do not deny responsibility: s 19(1)(b).



## Outcome agreements are fair and reasonable

- 9.74 In line with the focus of restorative justice on healing and respect, outcome agreements must be fair and reasonable. The person responsible must be able to carry them out. They are not meant to unfairly punish, nor to humiliate the person responsible for the violence.<sup>80</sup> Restorative justice should help people responsible for violence to feel and express shame in a way that is 'rehabilitative and non-stigmatising'.<sup>81</sup>
- 9.75 The content of outcome agreements should be considered carefully before any restorative justice conference. In New Zealand, Project Restore's preparation for conferences involves identifying 'clearly defined action plans that reflect what participants think will put offending right', including 'consequences if the action plan is not complied with'.<sup>82</sup>
- 9.76 In New Zealand and the Australian Capital Territory, outcome agreements are given to sentencing courts if they referred the matter for restorative justice.<sup>83</sup> We discuss adopting this practice in Victoria below.

## The needs of the person harmed take priority

### The process centres on the needs and interests of the person harmed

- 9.77 In this inquiry we heard about how important it is to place the needs of the person harmed at the centre of the restorative justice process.<sup>84</sup>
- 9.78 In the past, a focus of restorative justice was on repairing relationships and communal bonds. This made giving all participants an equal voice important. When dealing with sexual violence, aiming to repair relationships and treating all voices as equal cannot be the starting point. This is because sexual violence uses and increases power imbalances between the person harmed and the person responsible.<sup>85</sup>
- 9.79 Making the needs of the person harmed a priority helps ensure that the dynamics of the original violence are not repeated. To achieve this, facilitators and counsellors are guided by the wishes of the person harmed. They work closely with them to assess their safety needs, how they want the restorative justice process to run, and what they hope to achieve from it.<sup>86</sup>

## The process is safe and respectful

### Safety measures are provided

- 9.80 Restorative justice should only go ahead if it is safe for all participants. It is important not to risk further trauma. Safety measures should cover physical and psychological safety and be trauma-informed.<sup>87</sup>

80 See, eg, *Crimes (Restorative Justice) Act 2004* (ACT) s 51(3)–(4).

81 Vince Mercer and Karin Sten Madsen, *Doing Restorative Justice in Cases of Sexual Violence: A Practice Guide* (Report, 2015) 13.

82 Shirley Jülich et al, *An Exploratory Study of Restorative Justice and Sexual Violence* (Report, AUT University, Project Restore—NZ, May 2010) 37.

83 *Crimes (Restorative Justice) Act 2004* (ACT) ss 48, 53(e), 54; *Sentencing Act 2002* (NZ) s 8(j).

84 See, eg, Submissions 10 (Carolyn Worth AM and Mary Lancaster), 14 (Gatehouse Centre, Royal Children's Hospital), 18 (In Good Faith Foundation), 27 (Victoria Legal Aid), 52 (Centre for Innovative Justice).

85 Bebe Loff, Liz Bishop and Bronwyn Naylor, Community-Based, Victim-Centred Restorative Justice for Sexual Violence—A Pilot (Report No CRG 33/14–15, Australian Institute of Criminology, July 2019) <https://www.aic.gov.au/crg/reports>; Tristan Russell,

William R Wood and Samantha Jeffries, 'Adult Restorative Justice and Gendered Violence: Practitioner and Service Provider Viewpoints from Queensland, Australia' (2021) 10(13) *Laws* 1, 3; Marie Keenan, 'Training for Restorative Justice Work in Sexual Violence Cases' (2018) 1(2) *The International Journal of Restorative Justice* 291, 297–9; Vince Mercer and Karin Sten Madsen, *Doing Restorative Justice in Cases of Sexual Violence: A Practice Guide* (Report, 2015) 14–5.

87 Submission 52 (Centre for Innovative Justice); *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, ESC Res 2002/12, 37th plen mtg (24 July 2002) 41 <[https://www.unodc.org/pdf/criminal\\_justice/Basic\\_Principles\\_on\\_the\\_use\\_of\\_Restorative\\_Justice\\_Programs\\_in\\_Criminal\\_Matters.pdf](https://www.unodc.org/pdf/criminal_justice/Basic_Principles_on_the_use_of_Restorative_Justice_Programs_in_Criminal_Matters.pdf)>.

- 9.81 The process involves careful screening of participants and preparation. This will usually take several months. It will involve input from allied service providers and support personnel, working separately with the person harmed and the person responsible.<sup>88</sup>
- 9.82 In cases of intimate partner violence or ongoing relationships, additional risk assessment tools and management plans are used. The Australian Capital Territory's Restorative Justice Unit and the Family Violence Restorative Justice Service use standardised risk assessment tools.<sup>89</sup>
- 9.83 Safety measures should cover practical steps, like making sure participants can enter and exit any conference rooms safely and without running into each other, and having security staff on site if needed.<sup>90</sup>
- 9.84 Safety assessments should be ongoing and restorative processes should stop at any time if the facilitator decides it is unsafe to continue.<sup>91</sup>
- 9.85 Part of ensuring safety is responding to the diverse needs of participants. In the next sections, we discuss how restorative justice can meet diverse needs, including by protecting the safety of children and young people, and involving Victoria's Aboriginal communities in its design and delivery.

### **The process is flexible and responsive to diverse needs**

- 9.86 Restorative justice is flexible and can be responsive to the diverse needs of participants. As the Centre for Innovative Justice told us, these are 'key' benefits.<sup>92</sup> However, it is important that robust safety protocols and good governance balance flexibility and responsiveness.<sup>93</sup>
- 9.87 Tailoring restorative justice to the diverse needs of participants could include changing the format for participants who have cognitive disabilities or who prefer non-verbal communication. Instead of a conference, there might be an exchange of video recordings, or some other form of engagement. Restorative justice might also include using accessible language, interpreters or other specialist supports.<sup>94</sup>
- 9.88 A flexible process might include varying where restorative justice takes place. The Family Violence Restorative Justice Service meets participants wherever they feel most comfortable and secure, if possible.<sup>95</sup>

88 The Family Violence Restorative Justice Service told us that screening and preparation for family violence restorative justice conferences typically takes at least six months: Consultation 3 (Family Violence Restorative Justice Service). See also Submission 53 (Liberty Victoria); Consultation 1 (ACT Restorative Justice Unit and academics); Clare McGlynn, Nicole Westmarland and Nikki Godden, 'I Just Wanted Him to Hear Me': Sexual Violence and the Possibilities of Restorative Justice' (2012) 39(2) *Journal of Law and Society* 213, 226.

89 In the case of the ACT's Restorative Justice Unit, the Family Violence Risk Assessment Tool or 'FVRAT' is used, which has a scoring system for analysing dynamics of power and control: Consultation 1 (ACT Restorative Justice Unit and academics). See also Consultation 3 (Family Violence Restorative Justice Service); Ministry of Justice (NZ), *Restorative Justice Practice Standards for Family Violence Cases* (Report, 2 August 2019) 19–20 <<https://www.justice.govt.nz/assets/Documents/Publications/Restorative-Justice-Family-Violence-Practice-Standards-August-2019.pdf>>.

90 Bebe Loff, Liz Bishop and Bronwyn Naylor, Community-Based, Victim-Centred Restorative Justice for Sexual Violence—A Pilot (Report No CRG 33/14–15, Australian Institute of Criminology, July 2019) <https://www.aic.gov.au/crg/reports>

91 Ministry of Justice (NZ), *Restorative Justice Standards for Sexual Offending Cases* (Report, 2013) 15 [6] <<https://www.justice.govt.nz/assets/Documents/Publications/Restorative-justice-standards-for-sexual-offending-cases.pdf>>.

92 Submission 52 (Centre for Innovative Justice). See also Submission 53 (Liberty Victoria); Tristan Russell, William R Wood and Samantha Jeffries, 'Adult Restorative Justice and Gendered Violence: Practitioner and Service Provider Viewpoints from Queensland, Australia' (2021) 10(13) *Laws* 1, 11.

93 Marie Keenan, 'Training for Restorative Justice Work in Sexual Violence Cases' (2018) 1(2) *The International Journal of Restorative Justice* 291, 292–3; United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes* (Criminal Justice Handbook Series, 2nd ed, 2020) 60–1.

94 Submission 52 (Centre for Innovative Justice); 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) 7, 24, 39 <<https://cij.org.au/research-projects/sexual-offences/>>.

95 Consultation 3 (Family Violence Restorative Justice Service).

## The process responds to the needs of children and young people

- 9.89 Victoria Police suggests it may not be appropriate for children who have been sexually abused to participate in restorative justice.<sup>96</sup> Differences in power may be more extreme and easier for the person responsible for the abuse to exploit. Children may not have the cognitive or emotional maturity, or the agency, to make an informed decision to participate.<sup>97</sup>
- 9.90 One response is to require additional safeguards for cases involving children. In New Zealand:
- Specialist input from child specialists is required.
  - The Department for Children, Youth and Family must be informed and invited to contribute.
  - The person responsible for sexual abuse must be assessed for therapeutic treatment if they are going to be involved.<sup>98</sup>
- 9.91 In the Australian Capital Territory children under 10 years old are excluded from participation. They can be represented in restorative justice processes by a related adult.<sup>99</sup>
- 9.92 Ten is the age when children can be held criminally responsible in the Australian Capital Territory and Victoria.<sup>100</sup> Excluding children under 10 from restorative justice fixes a point in time for when they are able to make their own choices. In reality, this will vary between children. There are also problems with tying any age minimum to the age of criminal responsibility, given debate about how appropriate this age is.<sup>101</sup>
- 9.93 We prefer to deal with these concerns in a similar way to New Zealand and include more safeguards for children, including adolescents under the age of 18.
- 9.94 We agree that restorative justice will not be appropriate for most children and young people who have been sexually abused. But rather than excluding some completely, we recommend that these decisions be made on a case-by-case basis. As well as the standard restorative justice screening procedures, there should be an independent assessment of any child or young person who wishes to take part.
- 9.95 The assessment should consider the child or young person's ability to freely consent, given the specific context of the violence. If their participation is appropriate, they should have independent support throughout the restorative justice process by someone specialised in working with children.

## What role can restorative justice have when children and young people use harmful sexual behaviour?

- 9.96 Additional issues arise in relation to children or adolescents who have been abused by other children or adolescents.

<sup>96</sup> Submission 68 (Victoria Police).

<sup>97</sup> The Centre for Innovative Justice discusses these concerns. It supports making restorative justice available for children and young people, and other potentially vulnerable participants, with appropriate safeguards and assessed on a case-by-case basis: Submission 52 (Centre for Innovative Justice).

<sup>98</sup> Ministry of Justice (NZ), *Restorative Justice Standards for Sexual Offending Cases* (Report, 2013) 26 <<https://www.justice.govt.nz/assets/Documents/Publications/Restorative-justice-standards-for-sexual-offending-cases.pdf>>.

<sup>99</sup> *Crimes (Restorative Justice) Act 2004* (ACT) ss 17(1)(b)–(2).

<sup>100</sup> *Children, Youth and Families Act 2005* (Vic) s 344; *Criminal Code 2002* (ACT) s 25. However, children in the Australian Capital Territory aged between 10 and 13 years can only be held criminally responsible if they know their conduct is wrong: *Criminal Code 2002* (ACT) s 26.

<sup>101</sup> Oliver Gordon, 'Australia Urged by 31 Countries at UN Meeting to Raise Age of Criminal Responsibility', *ABC News* (online, 21 January 2021) <<https://www.abc.net.au/news/2021-01-21/un-australia-raise-the-age-of-criminal-responsibility/13078380>>.

### **Responding to harmful sexual behaviour among children and young people**

Children and young people (up to 18) using harmful sexual behaviour can be diverted from the criminal justice system through a Therapeutic Treatment Order made by the Children's Court. They can also be voluntarily referred to therapeutic treatment (called a Sexually Abusive Behaviour Treatment Service) before contact with the justice system.

We discuss the response to harmful sexual behaviours in Chapter 8.

Some therapeutic treatment programs use elements of restorative justice. They may invite the participation of a child who has been harmed, usually where the child responsible for the harm is a sibling.<sup>102</sup>

- 9.97 The Gatehouse Centre strongly supports restorative processes for children and young people displaying harmful sexual behaviours.<sup>103</sup> A senior sexual assault worker at SECASA was also supportive. She explained the benefits:

Restorative justice is incredibly powerful in cases involving families who have young people that have caused harm, for example, to a sibling. It can involve an acknowledgement of the behaviour by the person responsible which is witnessed by the parents and person harmed.

This can be very important for the person harmed, especially when the young person responsible whole heartedly acknowledges the harm.<sup>104</sup>

- 9.98 Jesuit Social Services told us that restorative justice plays an important role in responding to harmful sexual behaviours but pointed out that 'processes like group conferencing involve highly verbal social exchanges that require higher order cognitive skills'.<sup>105</sup> While they do not think children should be excluded, they stressed the need for careful screening procedures.<sup>106</sup>
- 9.99 The Children's Court can refer children (up to the age of 18) who have been convicted of certain offences to group conferencing, but sexual offences are excluded.<sup>107</sup> These cases should not be excluded automatically from restorative justice. Restorative justice should be available and fully integrated with the Therapeutic Treatment Order system and with Sexually Abusive Behaviour Treatment Services.<sup>108</sup>
- 9.100 It is important that independent assessments are conducted of the child/young person who was harmed and the child/young person responsible for the harm, in addition to standard restorative justice screening procedures. This will ensure restorative justice only occurs if it is a safe and appropriate response for all participants.

### **How can restorative justice involve Aboriginal communities?**

- 9.101 Victoria's Aboriginal communities should be central in the design of any restorative justice scheme. Many told us they could see the benefits of restorative justice but stressed that it should not be imposed on them.<sup>109</sup>

<sup>102</sup> *Children, Youth and Families Act 2005* (Vic) pt 4.8, dv 3; Submission 14 (Gatehouse Centre, Royal Children's Hospital).

<sup>103</sup> Submission 14 (Gatehouse Centre, Royal Children's Hospital).

<sup>104</sup> Consultation 16 (Senior sexual assault worker, South Eastern Centre Against Sexual Assault).

<sup>105</sup> Submission 24 (Jesuit Social Services).

<sup>106</sup> When making these points, Jesuit Social Services referred to people with cognitive impairments as well as children: *ibid.*

<sup>107</sup> Children's Court of Victoria, 'Group Conferencing', *Children's Court of Victoria* (Web Page, 2021) <<https://www.childrenscourt.vic.gov.au/criminal-division/group-conferencing>>; *Children, Youth and Families Act 2005* (Vic) s 415. Currently, the conferencing process focuses on supporting the rehabilitation of the child responsible for harm. The consent or participation of the person harmed are not preconditions: s 415(4).

<sup>108</sup> Submission 14 (Gatehouse Centre, Royal Children's Hospital).

<sup>109</sup> Submissions 9 (Djirra), 65 (Aboriginal Justice Caucus), 67 (Victorian Aboriginal Legal Service).

- 9.102 The Aboriginal Justice Caucus, supported by the Victorian Aboriginal Legal Service, said:
- There is evidence to support Restorative Justice processes can be effective in responding to sexual offending. However, design, development and implementation of these justice responses will take time, and must be community led. Responses must be aligned with Aboriginal Community values, victim-centred and responsive to the community.<sup>110</sup>
- 9.103 Djirra called for Aboriginal women to co-design any restorative justice model offered to Aboriginal communities. It added that tailored models were needed for each of Victoria's 38 original clans.<sup>111</sup>
- 9.104 Djirra said victim survivors should have an appropriate person to sit with them through any restorative justice process, to support and advise them where needed.<sup>112</sup> The Victorian Aboriginal Legal Service also highlighted the importance of appropriate support.<sup>113</sup>
- 9.105 The Australian Capital Territory's Restorative Justice Unit has an Indigenous guidance partner who:
- supports Aboriginal and Torres Strait Islander victims and those responsible for an offence and their supporters to understand the restorative justice process. This is to help them decide whether they will participate and also to support compliance with any agreements made as part of participating in the process.<sup>114</sup>
- 9.106 The Indigenous guidance partner attends restorative justice conferences and can assist people responsible for harm to fulfil outcome agreements. For example, they help with transport to placements or appointments.<sup>115</sup>
- 9.107 We hear the strong message from Victoria's Aboriginal communities that they wish to be listened to and involved in the design of restorative justice for their communities.
- 9.108 The governance framework we recommend below can incorporate input from Aboriginal communities. It is based on several restorative justice providers running restorative justice. These could include Aboriginal-led or designed providers. While the Department of Justice and Community Safety would have responsibility for restorative justice, and the new Commission for Sexual Safety that we recommend in Chapter 22 would provide specialised oversight, the governance team could include Aboriginal community representatives.

### **Power imbalances are redressed and there is respect for dignity and equality**

- 9.109 Respecting the dignity and equality of all participants is critical to restorative justice processes.<sup>116</sup> A dialogue with healing potential needs participants who listen respectfully to each other and can see each other's humanity.
- 9.110 Respect for equality does not mean equal input. As discussed earlier, equality requires that problematic power dynamics are redressed.<sup>117</sup> But restorative justice is not about demeaning the person responsible for sexual violence. The process must not be punitive or de-humanising.<sup>118</sup>
- 9.111 Instead, a focus is on helping the person responsible take responsibility for the violence and providing them with professional support so they do not reoffend.

110 Submission 65 (Aboriginal Justice Caucus).

111 Submission 9 (Djirra).

112 Ibid.

113 Submission 67 (Victorian Aboriginal Legal Service).

114 Justice and Community Safety (ACT), 'Indigenous Support', *Justice and Community Safety Directorate* (Web Page) <<https://justice.act.gov.au/standard-page/indigenous-support>>.

115 Ibid.

116 *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, ESC Res 2002/12, 37th plen mtg (24 July 2002) preamble <[https://www.unodc.org/pdf/criminal\\_justice/Basic\\_Principles\\_on\\_the\\_use\\_of\\_Restorative\\_Justice\\_Programs\\_in\\_Criminal\\_Matters.pdf](https://www.unodc.org/pdf/criminal_justice/Basic_Principles_on_the_use_of_Restorative_Justice_Programs_in_Criminal_Matters.pdf)>.

117 Submission 52 (Centre for Innovative Justice).

118 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) 8 <[https://cij.org.au/cms/wp-content/uploads/2018/08/rmit\\_8691-rjcpp-report-web.pdf](https://cij.org.au/cms/wp-content/uploads/2018/08/rmit_8691-rjcpp-report-web.pdf)>.

## Expert personnel and adequate resourcing are critical

- 9.112 Restorative justice needs to be well resourced and supported by skilled personnel.<sup>119</sup>
- 9.113 Facilitators may come from a range of backgrounds, including psychology, psychotherapy and social work.<sup>120</sup> All should have a combination of theoretical and practical training in restorative justice. Separate from their training in restorative justice, it is crucial that they have specialist expertise in sexual violence.<sup>121</sup> This is because:
- People responsible for sexual violence may use sophisticated forms of manipulation.
  - The dynamics of sexual violence are complex.
  - Victim survivors often blame themselves and feel shame.<sup>122</sup>
- 9.114 As well as being experts in sexual violence, restorative justice practitioners should:
- understand the effects of trauma, recognize the symptoms and signs of trauma ... and be familiar with trauma-informed communication and interventions.<sup>123</sup>
- 9.115 Training that includes mentoring or apprenticeship models is especially effective. The Australian Association for Restorative Justice recommends building skills by starting with more straightforward cases and developing them for use in more complex cases. It stressed that 'ongoing coaching and skill development are essential'.<sup>124</sup>
- 9.116 The person harmed and the person responsible should be provided with independent support, in line with the model used by Project Restore.<sup>125</sup> For the person harmed, this role could be filled by a victim advocate (see Chapter 12).

## What is said and done is confidential

- 9.117 It is widely accepted that restorative discussions and information exchanged should be confidential but that there must be some limits on this. For example, statements or information may need to be disclosed in court (admissible) for some purposes.
- 9.118 Confidentiality allows genuine engagement between participants and helps them feel safe. It allows the person responsible for sexual violence to freely acknowledge their responsibility.<sup>126</sup> Through open communication, participants can gain insight into the causes and consequences of the offending. This can be a deeply transformative and healing process for all participants.<sup>127</sup>

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119 Council of Europe, *Recommendation Concerning Restorative Justice in Criminal Matters* (Doc No CM/Rec 2018) 8 [54] <[http://giustiziariparativa.comune.tempiopausania.ot.it/attachments/article/3972/CM%20Rec%20\(2018\)%208%20concerning%20restorative%20justice%20in%20criminal%20matters%2003.10.18.pdf](http://giustiziariparativa.comune.tempiopausania.ot.it/attachments/article/3972/CM%20Rec%20(2018)%208%20concerning%20restorative%20justice%20in%20criminal%20matters%2003.10.18.pdf)>.

120 Marie Keenan, 'Training for Restorative Justice Work in Sexual Violence Cases' (2018) 1(2) *The International Journal of Restorative Justice* 291, 296.

121 Submission 53 (Liberty Victoria); Consultations 3 (Family Violence Restorative Justice Service), 12 (Project Restore); Bebe Loff, Liz Bishop and Bronwyn Naylor, Community-Based, Victim-Centred Restorative Justice for Sexual Violence—A Pilot (Report No CRG 33/14–15, Australian Institute of Criminology, July 2019) <https://www.aic.gov.au/crg/reports>; Clare McGlynn, Nicole Westmarland and Nikki Godden, 'I Just Wanted Him to Hear Me': Sexual Violence and the Possibilities of Restorative Justice' (2012) 39(2) *Journal of Law and Society* 213, 236–7.

122 Marie Keenan, 'Training for Restorative Justice Work in Sexual Violence Cases' (2018) 1(2) *The International Journal of Restorative Justice* 291, 297–8.

123 United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes* (Criminal Justice Handbook Series, 2nd ed, 2020) 72.

124 Consultation 38 (Australian Association for Restorative Justice).

125 Submission 52 (Centre for Innovative Justice); Consultation 12 (Project Restore); Clare McGlynn, Nicole Westmarland and Nikki Godden, 'I Just Wanted Him to Hear Me': Sexual Violence and the Possibilities of Restorative Justice' (2012) 39(2) *Journal of Law and Society* 213, 230, 237.

126 Submissions 27 (Victoria Legal Aid), 52 (Centre for Innovative Justice), 53 (Liberty Victoria). See also *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) 41 [14] <<https://www.undocs.org/E/2000/INF/2/Add.2>>; 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) 9 <[https://cij.org.au/cms/wp-content/uploads/2018/08/rmit\\_86g1-rjcpp-report-web.pdf](https://cij.org.au/cms/wp-content/uploads/2018/08/rmit_86g1-rjcpp-report-web.pdf)>.

127 Vince Mercer and Karin Sten Madsen, *Doing Restorative Justice in Cases of Sexual Violence: A Practice Guide* (Report, 2015) 12–13.



- 9.119 In the Australian Capital Territory, statements made by the person responsible during restorative justice are not admissible in court if they relate to less serious offences, which can be punished by imprisonment for 10 years or less. Details can still be provided as part of an outcome agreement for a sentencing court to consider. Statements relating to serious offences may sometimes be admissible in legal proceedings for the offences. If something is said during restorative justice about a proposed offence—whether it is a serious offence or not—this may be admissible in future legal proceedings related to the offence.<sup>128</sup>
- 9.120 In the Victims of Crime report, we said that a privilege—preventing disclosure in court—should apply to discussions during restorative justice conferences unless:
- the participants agree to disclosure or
  - there is an immediate risk of harm to a person.<sup>129</sup>
- 9.121 This is a straightforward way to protect the safety of participants while encouraging genuine and open communication.
- 9.122 It would not prevent later criminal or civil proceedings for an alleged offence that was discussed during restorative justice. But discussions about the offence that occurred during restorative justice should not be admissible.<sup>130</sup> Also, the fact that a person participated in restorative justice should not be admissible as evidence of guilt.<sup>131</sup> However, the law that sexual offences committed by adults against children must be reported would still apply.<sup>132</sup>

## The process is transparent

- 9.123 It is important that restorative justice processes are transparent. A transparent process avoids the risk of privatising sexual violence. The public is entitled to know how restorative justice processes work. People thinking about restorative justice as an option should be clear about what to expect.
- 9.124 The public should have access to de-identified data about the use of restorative justice. The new Commission for Sexual Safety (see Chapter 22) should collect data about restorative justice for sexual violence. This data should be published in an annual report (see Chapter 6).
- 9.125 Restorative justice should be carefully evaluated. The results of evaluations should inform ongoing program improvements.<sup>133</sup>

## Restorative justice is part of an integrated justice response

### There should be other criminal and civil options

- 9.126 We agree with submissions which stressed that restorative justice should be part of an integrated justice response. It should supplement but not replace other criminal or civil justice options.<sup>134</sup> This will ensure sexual violence is taken seriously and is not treated as private. If restorative justice is part of an integrated justice response, people who have experienced sexual violence will have more justice options available to them.

128 *Crimes (Restorative Justice) Act 2004* (ACT) ss 59, 60. See also s 12 (definition of less serious offence). Note as well that it is an offence for people working under the Territory's restorative justice legislation to disclose information they learn during restorative justice: s 64.

129 We noted that 'Details about the application of the privilege and its relationship with the conference facilitator's report and any agreement reached by the parties, and whether any other exceptions should apply, are matters that require additional consideration': Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) [7.288] and see generally [7.286]–[7.289].

130 Various legislative provisions protect the confidentiality of discussions or (more narrowly) provide that they are not admissible in subsequent legal proceedings: see, eg, *Criminal Procedure Act 2009* (Vic) s 127(3) (evidence of things said or done during a committal case conference is not admissible except with the consent of the parties); *Children, Youth and Families Act 2005* (Vic) s 415(9), (10) (the proceedings of a group conference are confidential and must not be disclosed without leave of the court or the consent of the parties).

131 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) [7.286].

132 *Crimes Act 1958* (Vic) s 327.

133 Submission 52 (Centre for Innovative Justice); Department of Justice and Regulation (Vic), *Restorative Justice for Victim Survivors of Family Violence* (Framework, Family Violence Restorative Justice Project, August 2017) 9 <<http://www.justice.vic.gov.au/restorative-justice-for-victim-survivors-of-family-violence-framework>>.

134 Submissions 17 (Sexual Assault Services Victoria), 52 (Centre for Innovative Justice), 53 (Liberty Victoria).



## Therapeutic treatment services should be available

- 9.127 Another aspect of an integrated justice response is providing support services. As discussed earlier, people who have experienced sexual violence should be supported during their participation in restorative justice.<sup>135</sup> The person responsible for violence should also be supported. They should have access to therapeutic treatment throughout the process and be able to commit to further treatment in an outcome agreement.<sup>136</sup>
- 9.128 In Chapter 13, we discuss the need to increase the availability of treatment programs as part of a coordinated approach to preventing sex offending. Making treatment programs available for people responsible for sexual violence who participate in restorative justice should be part of this coordinated response. Integrated supports reduce the risks and improve the safety of restorative justice. With them in place, it can be done well and contribute to healing.

## There is clear governance

- 9.129 To manage the risks of restorative justice, there must be clear governance. As we discuss in more detail below, a new scheme for restorative justice should:
- set out the guiding principles listed here
  - be implemented through legislation
  - explain who can refer matters for restorative justice and when they can do this
  - explain how restorative justice interacts with the criminal justice system and how to monitor restorative justice agreements
  - establish who will provide restorative justice
  - establish who will have oversight.<sup>137</sup>
- 9.130 Without clear governance, restorative justice may be unsafe. Sexual violence could be treated as private or not taken seriously. It could retraumatise people who have experienced it. Some restorative justice practitioners and people working in criminal justice say that the way restorative justice is used for sexual offences in Queensland is unsafe. In part, this is because it does not have a formal governance framework.<sup>138</sup>

## We should establish a restorative justice scheme

### The scheme should apply to all offences—not just sexual offences

- 9.131 We continue to support our previous recommendation in the Victims of Crime report that restorative justice should be available for all indictable offences.<sup>139</sup> Introducing restorative justice for sexual offences alone could give the wrong impression that sexual offending is less serious than other crimes.
- 9.132 In the Victims of Crime report we recommended a staged approach, with sexual and family violence brought into the restorative justice scheme at a later stage.<sup>140</sup> This was 'to allow time to develop appropriate processes and procedures'.<sup>141</sup> However, a staged approach is no longer necessary.

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135 Submissions 17 (Sexual Assault Services Victoria), 52 (Centre for Innovative Justice); Consultation 12 (Project Restore).

136 Submissions 27 (Victoria Legal Aid), 52 (Centre for Innovative Justice), 53 (Liberty Victoria).

137 Submissions 52 (Centre for Innovative Justice), 53 (Liberty Victoria); Consultation 12 (Project Restore); 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](https://cij.org.au/cms/wp-content/uploads/2018/08/rmit_8691-rjcpp-report-web.pdf)>.

138 Tristan Russell, William R Wood and Samantha Jeffries, 'Adult Restorative Justice and Gendered Violence: Practitioner and Service Provider Viewpoints from Queensland, Australia' (2021) 10(13) *Laws* 1, 24.

139 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) Recommendation 32. Our recommendation was restricted to indictable crime in line with our limited terms of reference, but there is no reason in principle why restorative justice should not be available for summary offences as well.

140 Ibid Recommendation 34.

141 Ibid [7.328].

- 9.133 The Family Violence Restorative Justice Service is already running. Around the same time as it was being piloted, the Centre for Innovative Justice at RMIT University piloted a restorative justice program for serious motor vehicle accidents. The Centre has now made restorative justice available for a range of offences, including sexual offences, through a program called 'Open Circle'.<sup>142</sup>
- 9.134 These developments, plus strong support for restorative justice in this inquiry, mean that a staged approach is no longer needed.

### The scheme should be set out in legislation

- 9.135 The Victorian Government should pass legislation that creates a clear and comprehensive framework for delivering restorative justice. It should support best practice and address the risks of restorative justice. For sexual offences, the legislation should include the guiding principles listed earlier.
- 9.136 A legislative framework will give restorative justice visibility. It will make restorative justice accessible and transparent. It will ensure there is authority and accountability in its practice (for example, to make sure outcome agreements are followed). Together, these features will ensure that restorative justice is not a 'second-tier' or hidden form of justice.<sup>143</sup> Instead, it will be viewed as a legitimate option that supplements criminal justice.<sup>144</sup>

### Referrals should be available to all

- 9.137 For restorative justice to be a meaningful justice option, people who have been harmed need to know about it and be able to request it. Information about and connections to restorative justice should be widely available.
- 9.138 In the Australian Capital Territory, a range of people and bodies in the criminal justice system including police, prosecution, the courts and the Victims of Crime Commissioner may refer matters for restorative justice. Their power to refer matters depends on the stage in criminal proceedings. For example, police and the Victims of Crime Commissioner can refer matters before charges are filed.
- 9.139 We see the value of a similarly broad approach in Victoria. In Chapter 4, we recommend amending the *Victims' Charter Act 2006* (Vic) to give victims of sexual offences the right to be referred to restorative justice, where appropriate. As we discuss in Chapter 18, people working in criminal justice will need training about what restorative justice is and the kinds of cases that may be suitable for it. Sexual assault and family violence services should also be able to refer people who have experienced sexual violence to restorative justice. People who have experienced sexual violence should be able to self-refer.
- 9.140 Everyone who reports a sexual offence should be told about restorative justice as part of an 'options talk'. We discuss the options talk in Chapter 17. They would be free to reject the offer or take it up at a later stage. Requiring people working in criminal justice to tell victim survivors of sexual violence about restorative justice will ensure equal access to it. It will prevent personal views that people working in justice might have about the process from affecting what victim survivors are told. This requirement should be part of the legislative scheme.

142 Submission 52 (Centre for Innovative Justice); 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) 26–7 <[https://cij.org.au/cms/wp-content/uploads/2018/08/rmit\\_8691-rjcpp-report-web.pdf](https://cij.org.au/cms/wp-content/uploads/2018/08/rmit_8691-rjcpp-report-web.pdf)>.

143 Sexual Assault Services Victoria emphasised that restorative justice for sexual offences should not become a 'second-tier' alternative to criminal prosecutions: Submission 17 (Sexual Assault Services Victoria).

144 Submission 52 (Centre for Innovative Justice); *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016) vol IV, 144 <<http://rcfv.archive.royalcommission.vic.gov.au/Report-Recommendations.html>>.

## The relationship between restorative and criminal justice should be clear

- 9.141 In our Victims of Crime report we recommended that any restorative justice scheme should supplement the criminal justice system, and be available:
- where a decision is made by the Director of Public Prosecutions (DPP) to discontinue a prosecution
  - after a guilty plea and before sentencing
  - after a guilty plea and in connection with an application for restitution or compensation orders by a victim.<sup>145</sup>
- 9.142 Restorative justice should be available in the above situations. In addition, restorative justice should be available:
- where there has been no police report or charges filed
  - where a decision is made by the police to discontinue a prosecution
  - after a conviction and before sentencing
  - following sentencing.
- 9.143 It was outside the scope of the Victims of Crime report to consider if restorative justice should be available without a police report or charges or when the police file but later withdraw charges. In the current inquiry, there was strong support for making restorative justice available without a police report, or after a report, if the investigating or prosecuting agency decides that a criminal prosecution will not proceed.<sup>146</sup> This is consistent with the approach in the Australian Capital Territory and New Zealand.<sup>147</sup> It is especially important for sexual offences, where most offences are not reported and many do not proceed to charge. We discuss this in Chapter 1.
- 9.144 However, the availability of restorative justice should not be considered by the police or DPP when deciding to file charges or continue a prosecution. Their decision should be guided by the prospects of conviction and the public interest.<sup>148</sup> To ensure that sexual offending is not privatised, the legislative framework should include a section providing that a referral to restorative justice does not affect any other action in relation to the offence. For example, in the Australian Capital Territory, the legislation governing restorative justice says:
- referral [to restorative justice] is to have no effect on any other action or proposed action in relation to the offence or the offender.<sup>149</sup>
- 9.145 The DPP's 'Policy' includes a section listing 'improper considerations' in decisions to prosecute. This should also be amended to provide that the availability of restorative justice must not influence prosecution decisions.<sup>150</sup>
- 9.146 In the Victims of Crime report we noted concerns that participation by the person responsible in restorative justice might be insincere. For this reason, we recommended limiting its availability to after a guilty plea. We said it should not be available after a conviction at trial, given the person convicted had pleaded not guilty.<sup>151</sup>
- 9.147 We now think this approach is too restrictive. As we discussed earlier, a person responsible for violence may accept some responsibility for the harm while denying criminal responsibility. Their attitude towards responsibility may shift with time. If the person harmed would like to engage in restorative justice even with the 'not guilty'

145 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) Recommendation 32.

146 Submissions 17 (Sexual Assault Services Victoria), 27 (Victoria Legal Aid), 52 (Centre for Innovative Justice), 53 (Liberty Victoria). In New Zealand: Consultation 12 (Project Restore). In the Australian Capital Territory, a person can be referred for restorative justice before other options for dealing with an alleged offence are considered. However, the legislation provides that 'the

147 referral is to have no effect on any other action or proposed action in relation to the offence or the offender'. As a result, charges may still be filed or a prosecution continued regardless of a restorative justice process or outcome: *Crimes (Restorative Justice) Act 2004* (ACT) s 7(1)–(2).

148 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) [7.292].

149 *Crimes (Restorative Justice) Act 2004* (ACT) s 7(1). References to 'offender' or 'offence' include references to 'alleged offender' and 'alleged offence': s 12 (definition of 'offence' and 'offender').

150 *Policy of the Director of Public Prosecutions for Victoria* (Report, 17 September 2020) 4 [6] <<https://www.opp.vic.gov.au/getattachment/a26fab55-0c8a-48a9-b4e5-71f3a898e6cb/DPP-Policy.aspx>>.

151 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) [7.297].

plea, this option should be available. This gives victim survivors control and a wider range of justice options.

- 9.148 In the Victims of Crime report we also said that restorative justice should not be available during a criminal prosecution.<sup>152</sup> We noted that restorative justice 'presents unique challenges' in this context.<sup>153</sup> These include that participants may experience conflict between their roles in the criminal prosecution and their ability to engage fully in restorative justice.<sup>154</sup> In this inquiry, a representative from the Restorative Justice Unit in the Australian Capital Territory told us:
- it can be tricky if restorative justice is going on at the same time as the criminal justice process – the person responsible then has a leg in both the adversarial and restorative areas.<sup>155</sup>
- 9.149 Some people we heard from supported making restorative justice available at any time during a criminal prosecution.<sup>156</sup> However, the Centre for Innovative Justice at RMIT University disagreed, saying 'a restorative process should not proceed at a point in time where this may compromise criminal proceedings'.<sup>157</sup>
- 9.150 We have concluded that restorative justice should not be available during a criminal prosecution. The position is similar in the Australian Capital Territory for cases involving sexual offences.<sup>158</sup> In our view, this strikes the right balance between providing a range of justice options for people who have experienced sexual violence and preventing the use of restorative justice as an alternative to criminal justice.

## Restorative justice outcomes should be considered in sentencing

- 9.151 Sentencing courts should consider restorative justice outcomes, but restorative justice participation should not automatically result in a lighter sentence. This is consistent with the law in the Australian Capital Territory and New Zealand.<sup>159</sup> It gives an incentive for the person responsible to engage in restorative justice but helps ensure that only genuine engagement leads to a reduced sentence.<sup>160</sup>
- 9.152 The County Court of Victoria told us that allowing sentencing courts to take restorative justice outcomes into account in sentencing could result in unfairness. This is because not everyone found guilty of a crime will be able to participate in restorative justice—it can only occur if the person who was harmed wants it. But courts are already required to take a range of factors into account in their sentencing decisions, including the impact an offence had on the victim.<sup>161</sup> Some of these factors are outside the control of the person responsible and will vary between cases. This need not create unfairness because there are other ways that an offender can show their commitment to rehabilitation.<sup>162</sup>
- 9.153 The principle that restorative justice participation must be voluntary means that sentencing courts should not increase a sentence because an offender chose not to take part in restorative justice or stopped taking part. This is the position in the Australian Capital Territory.<sup>163</sup>

<sup>152</sup> Ibid [7.283].

<sup>153</sup> Ibid [7.280].

<sup>154</sup> Ibid [7.281]–[7.282].

<sup>155</sup> Consultation 1 (ACT Restorative Justice Unit and academics).

<sup>156</sup> Submissions 7 (Dr Bianca Fileborn, Dr Rachel Loney-Howes, Dr Tully O'Neill and Sophie Hindes), 27 (Victoria Legal Aid).

<sup>157</sup> Submission 52 (Centre for Innovative Justice).

<sup>158</sup> *Crimes (Restorative Justice) Act 2004* (ACT) s 16(3). In the Australian Capital Territory, less serious offences can be referred for restorative justice during criminal prosecutions, but less serious sexual offences should only be referred and accepted for restorative justice, where a criminal prosecution is underway, in exceptional circumstances: *ibid* ss 27(5), 33(2) (exceptional circumstances). Less serious offences are punishable by a term of imprisonment of 10 years or less: s 12 (definition of 'less serious sexual offences').

<sup>159</sup> *Sentencing Act 2002* (NZ) ss 8(j), 10; *Crimes (Sentencing) Act 2005* (ACT) s 33(1)(y); *Crimes (Restorative Justice) Act 2004* (ACT) s 53(e).

<sup>160</sup> Submission 53 (Liberty Victoria); Consultation 1 (ACT Restorative Justice Unit and academics).

<sup>161</sup> *Sentencing Act 1991* (Vic) ss 5(2)(daa), 5(2)(e).

<sup>162</sup> To implement our recommendation, section 5 of the *Sentencing Act 1991* (Vic) could be amended to provide that a court must have regard to participation in restorative justice in sentencing an offender (but not for the purposes of imposing a more severe sentence if the offender chose not to participate or to withdraw from restorative justice). A sentencing court may in any event consider participation in restorative justice under section 5(2C), which provides that the court may have regard to the conduct of an offender on or in connection with the trial or hearing as an indication of remorse, or lack of remorse.

<sup>163</sup> *Crimes (Restorative Justice) Act 2004* (ACT) ss 25(f)(iii), 53(e)(iii); *Crimes (Sentencing) Act 2005* (ACT) s 34(1)(h).

## Restorative justice outcome agreements should be monitored

- 9.154 Courts could have a role monitoring outcome agreements. If restorative justice occurs after a guilty plea or verdict and before sentencing, and the person harmed wishes it, the sentencing court could use its powers to defer sentencing for up to twelve months.<sup>164</sup> This would be enough time to see if the terms of an outcome agreement were met. If the offender fails to do what they said they would, the court could consider this in its sentencing decision.<sup>165</sup>
- 9.155 Other referring bodies, such as the police, could also monitor outcome agreements, as happens in the Australian Capital Territory.<sup>166</sup> Where restorative justice occurs without a police report or criminal charges, after a criminal prosecution has been discontinued, or after sentencing, the restorative justice service provider should monitor the outcome agreements. If a person responsible for sexual violence does not do what they said they would, this should be reported to the body that has oversight of restorative justice.<sup>167</sup>

## A range of providers should run restorative justice

- 9.156 We recommend that a range of providers be eligible for accreditation to provide restorative justice for sexual offences. Several organisations and agencies, including the Family Violence Restorative Justice Service, Open Circle, and—in the area of youth justice—Jesuit Social Services, have built up expertise providing restorative justice. If they meet the accreditation criteria, their expertise should not be wasted. We also see the benefits of organisations working within diverse communities to provide restorative justice programs that are responsive to those communities. They should have the opportunity to provide restorative justice.<sup>168</sup>

## The Department of Justice and Community Safety should have responsibility for restorative justice

- 9.157 The Department of Justice and Community Safety should have responsibility for the restorative justice scheme. Specialised oversight of restorative justice for sexual violence should be provided. This is important so that the guiding principles discussed here are implemented consistently and there is quality control. The oversight body should:
- establish training programs
  - establish accreditation processes
  - make sure that restorative justice outcome agreements are monitored and that there are processes to manage failures to comply with outcome agreements
  - establish and manage a complaints process
  - evaluate programs regularly and collect data.
- To support quality control, restorative justice accreditation should be renewed annually.
- 9.158 The new Commission for Sexual Safety (Chapter 22) should provide this oversight of restorative justice for sexual violence. The specifics could be set out in a Memorandum of Agreement with the Department of Justice and Community Safety.

164 In Victoria, courts are empowered to defer sentencing for up to 12 months to allow an adult offender 'to participate in a program or programs aimed at addressing the impact of the offending on the victim'. A court must only defer a matter if the offender agrees: *Sentencing Act 1991* (Vic) s 83A. This provision could enable the County Court to order the deferral of a sentence for the purposes of a restorative justice conference: Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) [7.248].

165 The person harmed by the offence could choose to defer providing a Victim Impact Statement until after restorative justice. Their Victim Impact Statement could be provided in the usual way before the sentencing hearing, and they would have the opportunity to read it at the sentencing hearing: *Sentencing Act 1991* (Vic) pt 3, div 1C.

166 *Crimes (Restorative Justice) Act 2004* (ACT) s 58.

167 See generally *ibid* div 8.5.

168 The availability of restorative justice through the Family Violence Restorative Justice Service would not prevent civil organisations with appropriate expertise applying for accreditation to provide restorative justice for family violence.

## Recommendations

- 28 The Victorian Government should establish a restorative justice scheme in legislation ('the restorative justice scheme') that applies to all offences. The following principles should guide restorative justice for sexual violence in the restorative justice scheme:
  - a. voluntary participation
  - b. accountability
  - c. the needs of the person harmed take priority
  - d. safety and respect
  - e. confidentiality
  - f. transparency
  - g. the process is part of an 'integrated justice response'
  - h. clear governance.
- 29 The restorative justice scheme should be adequately resourced to ensure:
  - a. victim survivors and people responsible for harm have independent, professional support throughout the process
  - b. participants have access to independent legal advice
  - c. independent assessments for children who wish to participate are conducted, in addition to the standard screening procedures
  - d. children who participate are provided with independent and specialised support.
- 30 Victoria's Aboriginal communities should be supported to design accredited restorative justice programs for Aboriginal people.
- 31 The restorative justice scheme should supplement criminal justice and be available in the following situations:
  - a. where a person harmed does not wish to report the harm or to pursue a criminal prosecution
  - b. where a harm is reported but there are insufficient grounds to file charges
  - c. where charges were filed but the prosecution discontinues the prosecution
  - d. after a guilty plea or conviction and before sentencing
  - e. after a guilty plea or conviction and in connection with an application for restitution or compensation orders
  - f. at any time after sentencing.
- 32 The Director of Public Prosecutions should amend the *Policy of the Director of Public Prosecutions for Victoria* to ensure that the availability of restorative justice does not influence prosecution decisions.

## Recommendations

- 33 Therapeutic treatment programs should be available to support people responsible for sexual violence who are participating in restorative justice and/or commit to participating in a program as part of an outcome agreement. These supports should be developed as part of the coordinated approach to preventing sexual offending in Recommendation 47.
- 34 The restorative justice scheme should require justice agencies to inform victim survivors they are entitled to request a restorative justice process.
- 35 Restorative justice for sexual violence should be available through several providers.
- 36 The Department of Justice and Community Safety should be responsible for the restorative justice scheme. The Commission for Sexual Safety (Recommendation 90) should work with the Department to provide oversight in relation to restorative justice for sexual violence. Oversight should include:
  - a. establishing training standards
  - b. establishing accreditation criteria
  - c. ensuring restorative justice outcome agreements are monitored
  - d. establishing and managing a complaints process
  - e. evaluating programs and collecting data.



# Improving financial assistance and truth telling for victim survivors of sexual violence

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# 10. Improving financial assistance and truth telling for victim survivors of sexual violence

## Overview

- A strong message the Commission heard in our inquiry is that people who have experienced sexual violence have a range of justice needs. These include financial assistance and a need to tell their story in their own way.
- We considered the role of financial assistance and truth telling for all victims of crime in our *Review of the Victims of Crime Assistance Act 1996*. We recommended that the Victorian Government replace the Victims of Crime Assistance Tribunal (VOCAT) with a new scheme. The government has begun work on this.
- The new scheme will change how financial assistance is provided to victims. It will create a forum where victims of crime can tell their story and have it officially acknowledged.
- The scheme will benefit people who have experienced sexual violence.
- In this chapter, we make recommendations to strengthen financial assistance and truth telling under the new scheme as justice options for people who have experienced sexual violence:
  - The time limit for making an application should be removed.
  - There should be a specialist stream run by respected decision makers with sexual violence expertise.
  - The sexual violence decision makers should ensure 'recovery payments' are enough to recognise the impacts of sexual violence.

## Financial assistance and truth telling have powerful benefits

There was a time I attempted suicide. I just couldn't get to tomorrow. If a parliamentarian heard that, they'd be like, 'well, she's just got mental issues'. Up until my assault, I was ambitious, I'd been through hard family stuff, but I was resilient, I was sporty, ambitious, I was really clear who I was ...—Danielle<sup>1</sup>

- 10.1 The impacts of sexual violence can be profound. Emotional and psychological distress, physical harm, and disruptions to work life are just some of the impacts sexual violence can have. We discuss these negative impacts in Chapter 2.
- 10.2 Some victim survivors require practical support to recover. Government-funded financial assistance is an important way to provide this support. The money can be used to pay for medical, counselling and other costs, and to make up for lost income.

- 10.3 If people can make their own decisions about how to use financial assistance, this can restore a sense of agency and control.<sup>2</sup> Financial assistance can have symbolic benefits as well—most victims of crime view it as an acknowledgment of their experience and suffering.<sup>3</sup>
- 10.4 Other potential sources of money for people who have experienced sexual violence include:
- payments under redress schemes<sup>4</sup>
  - damages awards made by a court where the person harmed sues the person or institution responsible (civil litigation)
  - compensation orders made by a criminal court following a guilty plea or conviction.
- 10.5 These are all important justice options. In Chapter 1, we explain why victim survivors should have access to a range of justice options. In Chapter 11 we make recommendations to improve access to civil litigation and compensation orders. However, these will not be suitable options in all cases. Civil litigation can be time-consuming. Compensation orders are only available if a crime is reported and the person responsible is convicted. Both keep the person responsible for the violence in the picture.
- 10.6 The limits of other justice options make it especially important that government-funded financial assistance is available to help people who have experienced sexual violence to recover. The importance of financial assistance was highlighted by people we heard from in our inquiry. One person we spoke with had to wait for the criminal justice process to finish before she could apply for financial assistance. This left her feeling powerless and at a loss:
- I don't know what people are supposed to do during this time [without access to financial assistance].—Cecilia<sup>5</sup>
- 10.7 Telling one's story and being listened to respectfully can also be healing. People who have experienced sexual violence say they want to tell their story in their own way.<sup>6</sup> Too often, they feel that they are not able to do this during a trial because of the adversarial system.<sup>7</sup> We discuss problems with the adversarial system in Chapter 19.
- 10.8 Many want their story to be heard but do not want to engage with the criminal justice system at all.<sup>8</sup> A 'truth-telling' process allows people who have experienced sexual violence to tell their story in a safe and supported environment. The person responsible for the violence does not need to be involved. The process can formally acknowledge the harm done and validate their experience.<sup>9</sup> Insights they provide can be used to reform the justice response and other services.

2 Consultation 56 (Cecilia, a victim survivor of sexual assault); Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996* (Report No 36, July 2018) [13.259].

3 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996* (Report No 36, July 2018) 316 [10.15].

4 Redress schemes are set up in an institution or sector to compensate people who have experienced sexual violence. Some are run by a single institution; others are run by government, with institutions covering some of the costs.

5 Consultation 56 (Cecilia, a victim survivor of sexual assault).

6 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) 12, 86–91 <<https://cij.org.au/research-projects/sexual-offences/>>.

7 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) [3.78], [5.36], [7.5], [7.237].

8 Submissions 9 (Djirra), 17 (Sexual Assault Services Victoria), 39 (Rape & Domestic Violence Services Australia).

9 Submission 7 (Dr Bianca Fileborn, Dr Rachel Loney-Howes, Dr Tully O'Neill and Sophie Hindes); 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 <<https://cij.org.au/research-projects/sexual-offences/>>.

- 10.9 Truth telling has been described by victims of crime as 'powerful', 'empowering' and 'therapeutic'.<sup>10</sup>

Processes that allow victim survivors to tell their story and contribute to future reforms represent 'a really good outcome; the best outcome really ... it can be cathartic to tell your story'.—Deborah, a victim survivor of sexual assault<sup>11</sup>

- 10.10 We heard about the 'therapeutic effect' of 'well-measured and kind words' from Springvale Monash Legal Service:

In many cases, this is the only recognition our clients may have received and it can be extremely powerful.<sup>12</sup>

- 10.11 A survey of Australian women who had been sexually assaulted reached a similar conclusion. It found that for some women, comments by judicial officers in hearings for financial assistance were 'the only form of belief and validation [they] received throughout their involvement with the [justice] system'.<sup>13</sup>

- 10.12 Together, financial assistance and truth telling can be powerful justice options for people who have experienced sexual violence. In this chapter, we make recommendations to make these justice options more accessible, and more effective for acknowledgment and healing.

## How does the current victims of crime assistance scheme work?

### A note on the language we use

While the term 'victims' compensation' is common, in this chapter we use the expression 'financial assistance'. This is the language used by VOCAT and in the future scheme. It makes it clear that government-funded assistance is different from payments made by a person who has committed a crime to compensate the person harmed.

- 10.13 In Victoria, victims of any violent crime can apply to VOCAT for payments to help their recovery and to cover expenses resulting from the crime.<sup>14</sup> The crime must have:
- happened in Victoria
  - been reported to police within a reasonable time
  - directly resulted in injury or death.<sup>15</sup>
- 10.14 VOCAT is located within the Magistrates' Court of Victoria, with magistrates and judicial registrars sitting as tribunal members.<sup>16</sup>

10 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996* (Report No 36, July 2018) [7.37].

11 Consultation 69 (Deborah, a victim survivor of sexual assault).

12 Submission 55 (Springvale Monash Legal Service).

13 Denise Lievore, *No Longer Silent: A Study of Women's Help-Seeking Decisions and Service Responses to Sexual Assault* (Report, Australian Institute of Criminology (Cth), June 2005) vi <<https://aic.gov.au/publications/archive/no-longer-silent>>.

14 *Victims of Crime Assistance Act 1996* (Vic) ss 1(2), 25(1).

15 Victorian Government, 'Applying for Financial Assistance from VOCAT', *Victims of Crime* (Web Page, 19 August 2020) <<https://www.victimsofcrime.vic.gov.au/going-to-court/applying-for-financial-assistance-from-vocat>>.

16 Although located within the Magistrates' Court of Victoria, VOCAT is a separate entity with its own jurisdiction. It is a tribunal, not a court, exercising administrative rather than judicial power. But its functions are performed by judicial officers. See Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996* (Report No 36, July 2018) [4.18], [4.22]; Victims of Crime Assistance Tribunal, *Annual Report 2019–2020* (Report, 2020) 6 <[https://www.vocat.vic.gov.au/sites/default/files/publication/2020-12/13166%20VOCAT%20Annual%20Report%202019-2020\\_WEB%20V2.pdf](https://www.vocat.vic.gov.au/sites/default/files/publication/2020-12/13166%20VOCAT%20Annual%20Report%202019-2020_WEB%20V2.pdf)>.

- 10.15 The Tribunal can order payments if it is satisfied that it is more likely than not that the crime happened (on the 'balance of probabilities').<sup>17</sup> This is easier to establish than the standard of proof used in the criminal justice system ('beyond reasonable doubt').
- 10.16 The Tribunal can order payments up to a total of \$60,000 to cover:
- counselling (up to five hours of counselling to start, with additional sessions available but based on an application being made for each treatment plan)
  - medical expenses
  - loss of earnings (capped at \$20,000)
  - loss or damage to clothing
  - safety-related expenses.<sup>18</sup>
- 10.17 The Tribunal can order an additional 'special financial assistance' payment of up to \$10,000. This covers physical injury or emotional distress that had a significant adverse effect.<sup>19</sup>
- 10.18 As well as meeting practical needs, the payments may help communicate 'the community's sympathy and condolence for, and recognition of' the effects of the violence, although this is not a formal aim.<sup>20</sup>
- 10.19 When people apply for assistance, they may be required or choose to appear before the Tribunal.<sup>21</sup> The Tribunal states that appearing before it can provide:
- an opportunity for victims to give voice to the impact of the crime and to receive acknowledgement and validation of their trauma through a hearing process.<sup>22</sup>

## A new assistance scheme is due to start in 2023

- 10.20 In our 2018 review of the *Victims of Crime Assistance Act 1996* (Vic), (VOCAA report) we recognised the benefits of VOCAT but recommended replacing it with an administrative scheme, removed from Victoria's court system. We said this would have additional benefits, including that it would improve accessibility and fix existing issues such as long delays.
- 10.21 The Victorian Government accepted all our recommendations in principle and is working on the new scheme. It is due to start in March 2023.<sup>23</sup> We do not have information about whether the scheme will work in exactly the way we recommended. In this chapter, we assume its main features will be the same.
- 10.22 The scheme was designed to provide a 'victim-centred, trauma-informed model' of financial assistance.<sup>24</sup> Its purpose is to help victims of crime recover from the effects of the crime.<sup>25</sup>

<sup>17</sup> *Victims of Crime Assistance Act 1996* (Vic) s 31.

<sup>18</sup> Ibid s 8. These amounts, and the 'special financial assistance' amount of \$10,000, are available for 'primary' victims only, who are people who were injured or died as a direct result of an act of violence committed against them: s 7(1).

<sup>19</sup> *Victims of Crime Assistance Act 1996* (Vic) ss 3(1) (definition of 'significant adverse effect'), 8A.

<sup>20</sup> Ibid s 1(2)(b). However, as we pointed out in the VOCAA report, 'Hearings under the VOCAA are not legislatively established for the purpose of victim recognition': Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996* (Report No 36, July 2018) [10.10].

<sup>21</sup> *Victims of Crime Assistance Act 1996* (Vic) ss 33, 34. Generally, applicants will be asked to attend if the crime was not reported to police, or if the offender contests the application.

<sup>22</sup> 'Frequently Asked Questions', *Victims of Crime Assistance Tribunal* (Web Page, 2016) <<https://www.vocat.vic.gov.au/how-apply/frequently-asked-questions>>. See also the objectives of the Victims of Crime Assistance Act, which include payment of financial assistance 'as a symbolic expression by the state of the community's sympathy and condolence for, and recognition of' the effects of the crime: *Victims of Crime Assistance Act 1996* (Vic) s 1(2)(b).

<sup>23</sup> Magistrates' Court of Victoria, *Magistrates' Court of Victoria: Annual Report 2019–2020* (Annual Report, 2020) 25 <[https://www.mcv.vic.gov.au/sites/default/files/2021-02/Annual%20Report\\_19-20.pdf](https://www.mcv.vic.gov.au/sites/default/files/2021-02/Annual%20Report_19-20.pdf)>. See also Submission 45 (Victims of Crime Commissioner).

<sup>24</sup> Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996* (Report No 36, July 2018) [8.124].

<sup>25</sup> Ibid xxiii [30].

## The new scheme has benefits for people who have experienced sexual violence

- 10.23 The scheme will meet more of the needs of people who have experienced sexual violence than the current victims of crime assistance scheme. Here we discuss the most relevant changes.<sup>26</sup>

### The new scheme will be faster, more accessible and less threatening

- 10.24 The scheme will be administrative. Its decision makers will not be judicial officers and the process will not be adversarial. This should make the application process fast and easy to access.<sup>27</sup> It also responds to concerns that:

judicial decision making establishes an adversarial process for victims and ... can make some ... 'feel like a criminal' and that they must 'prove themselves'.<sup>28</sup>

- 10.25 Another concern has been that victims of sexual and other violence do not apply to VOCAT because the person responsible for the crime may be notified of an application and appear at the hearing.<sup>29</sup> In the VOCAA report we said that notifying an offender is unnecessary because they 'do not have a legal interest' in the application, so issues of fairness do not arise.<sup>30</sup> They should not have a role in a process that is 'designed to meet victims' legitimate needs'.<sup>31</sup>
- 10.26 In this inquiry, we heard a range of similar concerns. One victim survivor told us that her experience at VOCAT was 'retraumatising'.<sup>32</sup> Another person who had experienced sexual violence said that going to VOCAT was 'like going through another entire rape investigation'.<sup>33</sup> Another said she did not go to VOCAT because the person responsible could be notified.<sup>34</sup>
- 10.27 The Law and Advocacy Centre for Women said that some magistrates:
- approach matters as they would an adversarial process, with a degree of scepticism that undermines the role of the court as a mechanism for redress, further retraumatises victims and undermines their trust in institutions to assist them.<sup>35</sup>
- 10.28 The Centre also observed that 'the mere possibility of [offender involvement] can operate as a huge deterrent to victims pursuing claims'.<sup>36</sup>
- 10.29 Other submissions we received, including from InTouch Multicultural Centre Against Family Violence and the Law Institute of Victoria, highlighted that delay is a problem at VOCAT.<sup>37</sup>

26 Other relevant recommendations that we do not discuss include that assistance should be available for all sexual offences (summary as well as indictable), including non-contact offences such as image-based offences: see *ibid* [12.148]. See also *ibid* Recommendation 27(b) and the discussion at [12.168]–[12.172]. In Recommendation 29 we also said that the 'Government should conduct a review to determine whether the offences contained in the *Sex Work Act 1994* (Vic) and any other offences that may have a significant physical and/or psychological impact on the victim should be recognised by the proposed Act.'

27 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996* (Report No 36, July 2018) [8.122].

28 *Ibid* [8.16].

29 *Ibid* [6.7]–[6.14]. We were told that this happens rarely: *ibid* [6.14].

30 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996* (Report No 36, July 2018) xxi [18].

31 *Ibid* [8.120].

32 Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021).

33 Consultation 63 (A victim survivor of sexual assault, name withheld).

34 Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021).

35 Submission 58 (Law and Advocacy Centre for Women Ltd).

36 *Ibid*.

37 Submissions 40 (Law Institute of Victoria), 49 (InTouch Multicultural Centre Against Family Violence).

## The new scheme breaks the link with criminal proceedings

- 10.30 In the VOCAA report, we said it is not necessary to put applications for financial assistance on hold while waiting for an outcome in criminal proceedings.<sup>38</sup> Putting applications on hold is a common practice.<sup>39</sup> In this inquiry, Springvale Monash Legal Service said that this:
- can be distressing and frustrating. [People who have been harmed] can perceive this as ... VOCAT doubting their story. Protracted delays may prolong [the wait for] access to funded counselling and so hinder ... recovery.<sup>40</sup>
- 10.31 The current scheme requires victims to report the crime to the police and, where relevant, assist the prosecution. If they have not reported the crime to police, they can still apply but they must explain why they did not report. In the VOCAA report, we recommended removing the reporting requirement.<sup>41</sup>
- 10.32 This is especially important for people who experience sexual violence, because not reporting is very common (see Chapter 2). The reporting requirement can be an additional barrier to justice for some people or groups. Djirra pointed out, for example, that 'because Aboriginal women are ... less likely to proceed with pursuing charges through the police, their VOCAT claims can be, and often are, reduced'.<sup>42</sup>
- 10.33 We recommended as well that the new scheme's decision maker should be able to decide that a crime happened regardless of the status or outcome of other legal proceedings, even if a criminal trial ended in a 'not guilty' verdict.<sup>43</sup> Once again, this is important for people who have experienced sexual violence, given low rates of reporting and conviction for sexual offences (see Chapters 1 and 2).

## The new scheme extends the time to make an application

- 10.34 In the VOCAA report, we recommended removing the time limit for applications to cover counselling costs,<sup>44</sup> and extending the time limit for other forms of assistance to 10 years after a sexual or family violence offence.<sup>45</sup> The time limit has already been removed for people sexually abused as children.<sup>46</sup>
- 10.35 In this inquiry, we heard from a woman who was sexually assaulted by a stranger at knife point about how important it is to be able to access counselling expenses at any time. She was asked to support a criminal prosecution more than 20 years after the assault, after police matched DNA evidence following an arrest for a different violent crime. She agreed because she 'felt a responsibility to do what [she] could so he could not harm others'.<sup>47</sup> The court proceedings were distressing and traumatising. Afterwards, she applied for financial assistance to cover the costs of counselling. She was told she was eligible for only three funded sessions, because she had received compensation following the assault and it was too long ago for the original award to be varied.<sup>48</sup>

38 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996* (Report No 36, July 2018) Recommendation 59(b).

39 Ibid [5.157], [5.167]–[5.168], [15.164].

40 Submission 55 (Springvale Monash Legal Service).

41 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996* (Report No 36, July 2018) Recommendations 59(b), 60, xxvi [48], ch 15.

42 Submission 9 (Djirra).

43 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996* (Report No 36, July 2018) Recommendation 59. See also the discussion at [14.44]–[14.48].

44 Ibid Recommendation 71(b).

45 Ibid Recommendation 71(a)(iii). In Recommendation 73 we also said that the scheme decision maker should have a discretion to accept applications made out of time and that in considering such late applications, should have regard—among other things—to whether the alleged offender was in a position of power, influence or trust in relation to the applicant; the physical or psychological effect of the criminal act on the applicant; and the nature, dynamics and circumstances of the criminal act, including whether it occurred in the context of a pattern of abuse, including family violence.

46 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996* (Report No 36, July 2018) Recommendation 71(a)(iii); *Victims of Crime Assistance Act 1996* (Vic) s 29(1A).

47 Submission 32 (A victim survivor of sexual assault (name withheld)).

48 Ibid.



It may seem like a small thing not to be eligible for counselling, but my life had turned upside down. I was happy and content with my life before being asked to be part of this process. I had agreed to testify and as a result relived the assault; been through a criminal process where I felt powerless; my life was discussed in public; it had been picked up by general media and was ... even on the nightly news; I felt justice had not been done and I just needed to talk about it and start to heal. I felt the least the government could do was fund counselling.<sup>49</sup>

### The new scheme removes other conditions restricting access

10.36 In the VOCAA report we recommended that victims of sexual offences should not need to prove they were injured.<sup>50</sup> In part, this is because people who have experienced sexual violence often have difficulty obtaining documentary evidence to prove they were injured.<sup>51</sup>

10.37 We also recommended that a person's criminal record should not affect their ability to apply for financial assistance, unless this record is connected to the crime they are seeking financial assistance for.<sup>52</sup> As we were told in this inquiry:

The requirement that victims satisfy the court that they are of 'good character' in circumstances where they have had previous involvement in the justice system is degrading and demeaning to criminalised women who have suffered harm as a result of sexual assault and family violence.

It perpetrates a false dichotomy between 'deserving' and 'undeserving' victims ...<sup>53</sup>

10.38 Djirra told us that Aboriginal women with a history of criminal justice contact often have their VOCAT claims reduced.<sup>54</sup>

### The new scheme creates new categories of assistance and increases the maximum limit

It's not good enough that I'm so out of pocket because I was raped ... I haven't had enough money to move house even though my rapist lives nearby and I have felt desperate to move.<sup>55</sup>

10.39 We recommended introducing new and simpler categories of assistance, and an increase in the total maximum award that can be paid.<sup>56</sup> We said the increased maximum is justified because the maximums have not increased in many years or been adjusted for inflation.<sup>57</sup> We also noted that the Royal Commission into Institutional Responses to Child Sexual Abuse recommended a total maximum of \$200,000 be available for any one victim under its proposed Redress scheme, with an average payment of \$65,000.<sup>58</sup>

49 Ibid.

50 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996* (Report No 36, July 2018) Recommendation 31. See also the discussion in [12.230]–[12.249].

51 Ibid [12.230]–[12.249].

52 Ibid [15.121]–[15.129]. See also Recommendations 76, 77, 78.

53 Submission 58 (Law and Advocacy Centre for Women Ltd). The Law and Advocacy Centre also noted that 'Sexual assault can often be the trigger for or exacerbate underlying mental health or substance abuse issues, which in turn place women on a pathway towards criminalisation and imprisonment. Given the high instance of victimisation amongst women in the criminal justice system, this character test operates as a significant barrier to VOCAT assisting the victims that would most benefit from its assistance.' See also Submission 27 (Victoria Legal Aid) recommending that the requirement to consider an applicant's past criminal history should be removed.

54 Submission 9 (Djirra).

55 Consultation 63 (A victim survivor of sexual assault, name withheld).

56 As well as the streams of assistance listed here, funeral expenses can also be covered if the primary victim was killed.

57 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996* (Report No 36, July 2018) [13.337].

58 Ibid [13.338].

- 10.40 The new categories and maximum awards we recommended include:
- for immediate needs—up to \$5000 (this amount may be deducted from later awards for other forms of assistance)
  - counselling costs—up to 20 counselling sessions, and more sessions as required, but only in exceptional circumstances
  - practical assistance—up to \$80,000 to cover such things as reasonable health, housing and safety-related expenses, and 'financial support' (covering loss of earnings, dependency payments and financial counselling; with no change to the cap of \$20,000 for loss of earnings)
  - recovery payments (lump sums to assist in recovery)—\$20,000, or \$25,000 for applicants who were the victim of two or more related criminal acts.<sup>59</sup>
- 10.41 This would increase the maximum possible award of \$70,000 to about \$100,000 in total, for victims of one crime.
- 10.42 The new provisions for counselling costs will make more initial counselling sessions available. It will also reduce the burden of applying. For up to 20 sessions, there will be no need to provide treatment plans or to reapply with each new plan. If a person needs more than 20 sessions, they can authorise the scheme decision maker to get information from their counsellor to help them decide if there are 'exceptional circumstances'.<sup>60</sup>
- 10.43 In the current inquiry, a respondent to our online form told us she felt deterred from applying to VOCAT by the 'need to quantify the effects of the crime', such as how much psychological therapy might be required and how much that might cost. She said it was:
- impossible to quantify the impacts ... and even more difficult to predict how much support a victim needs to recover.<sup>61</sup>
- 10.44 She supported the New South Wales approach.<sup>62</sup> In New South Wales, victims can access up to 22 counselling sessions, and in exceptional circumstances, an unlimited number. The approach under the new scheme is very similar.<sup>63</sup>

### The new scheme would enhance truth telling and recognition

- 10.45 We also recommended a new category of non-financial recognition. This was designed to separate out the financial and 'symbolic' functions of the scheme.<sup>64</sup> The new category would provide for recognition, acknowledgment and validation of a person's experience. It would include provision for:
- recognition statements
  - victim conferences
  - restorative justice referrals.
- 10.46 Victims of crime would have a right to a written 'recognition statement'. This would acknowledge in a personalised way the effects of the crime and express the state's condolences.<sup>65</sup>

<sup>59</sup> Ibid ch 13.

<sup>60</sup> Ibid [13.208].

<sup>61</sup> Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021).

<sup>62</sup> Ibid.

<sup>63</sup> Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996* (Report No 36, July 2018) [13.203].

<sup>64</sup> We concluded that 'recognition can and should be provided in non-pecuniary ways', whereas 'financial assistance under the proposed Act should be reserved for expenses to assist in the victim's recovery': ibid [13.258]. See also [13.257].

<sup>65</sup> Ibid [10.99]–[10.104] Recommendation 11.

- 10.47 Victims of crime would also be able to request a private conference with the scheme decision maker or a deputy decision maker.<sup>66</sup> This would 'ensure victims are given a voice'.<sup>67</sup>
- 10.48 Our recommendations for victim conferences were informed by the private sessions run by the Royal Commission into Institutional Responses to Child Sexual Abuse. In these sessions, people who had been sexually abused could share their story with a Commissioner in a safe and supported environment.
- 10.49 The sessions had a flexible structure. People could share their experiences and their ideas for helping to protect children in the future in their own way. The Commissioner's role was to 'listen, [and] to bear witness' on behalf of the nation.<sup>68</sup>
- 10.50 We recommended that conferences should be conducted in a trauma-informed way and in a safe space. They should be able to cater to different cultural needs. People requesting a conference could have a support person and be legally represented. Scheme staff with responsibility for case management would assist them.<sup>69</sup> Anything said in these private sessions could not be used as evidence in civil or criminal proceedings.<sup>70</sup>
- 10.51 Finally, we recommended that victims of crime should be able to request referral to a restorative justice program.<sup>71</sup> Our current recommendations in relation to restorative justice are set out in Chapter 9.

### The new scheme would include specialisation

- 10.52 Our VOCAA report also discussed how important it is to develop a 'culture of specialisation' within the new scheme.<sup>72</sup>
- 10.53 We said the new scheme should:
- have a dedicated decision maker who is supported by suitably qualified deputies, and subject matter specialists of appropriate standing<sup>73</sup>
  - require all staff to be specially trained
  - include specialised case management teams.<sup>74</sup>
- 10.54 Specialisation is especially important in sexual violence cases. We discuss the value of specialisation in Chapter 18.

### The reforms in the new scheme should be taken further

- 10.55 These changes to the financial assistance scheme will improve the justice system's response to sexual offences.<sup>75</sup> As we heard in this inquiry, many of the concerns raised in our VOCAA report still exist today. Some are a greater problem for people who have experienced sexual violence than for other victims of crime. Based on these concerns, we have identified three ways to strengthen the new scheme.

66 Ibid [10.105]–[10.121] Recommendations 13, 14.

67 Ibid [10.106].

68 Ibid [10.35]. See also [10.31]–[10.36]; 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) 87 <<https://cij.org.au/research-projects/sexual-offences/>>.

69 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996* (Report No 36, July 2018) 195–205, Recommendations 14, 16, 17.

70 Ibid Recommendation 15.

71 Ibid [10.168]–[10.186] Recommendation 18.

72 Ibid [10.219] Recommendation 19.

73 Ibid Recommendation 9(a).

74 Ibid [10.213]–[10.234].

75 Submission 45 (Victims of Crime Commissioner).

## Time limits should be removed

I was raped as a 17-year-old girl more than 25 years ago. It was brutal and it was painful. I did not tell a soul for decades and still only a handful of people in my life now know. That was the only way I could regain control over the scenario. The thing that has kept me together is the fact I kept it secret, because that's the only thing that let me maintain control. I felt that if I let the story out, then I would be out on my own, totally exposed. I felt like this even if it was only one person who I told.<sup>76</sup>

- 10.56 Among victim survivors who spoke to the Royal Commission into Institutional Responses to Child Sexual Abuse, the average time for disclosing child sexual abuse in institutions was 23.9 years.<sup>77</sup> People had a range of reasons for not speaking about their abuse. Many said their delay in reporting was because they blamed themselves for the abuse or felt too embarrassed or ashamed to disclose it. Other said they had no confidence they would be believed, or they feared their friends and family would find out and think less of them.<sup>78</sup>
- 10.57 Time limits for VOCAT applications for child sexual abuse have been removed to recognise the barriers to reporting faced by people who were abused as children.
- 10.58 The time limit for applications relating to other forms of sexual violence should also be removed. Some people sexually assaulted as adults take time to report. Many others do not disclose the violence at all. They may blame themselves or feel shame, or not trust how other people will react. A nationwide survey found that one in four women who had not contacted the police after they were sexually assaulted said it was because they felt ashamed or embarrassed.<sup>79</sup> In our VOCAA report, we noted that people who have been sexually assaulted—along with 'child victims' and people who have experienced family violence—'may take much longer to recognise the violence and/or its effects on them, and/or to disclose or report it' than victim survivors of other crimes.<sup>80</sup>
- 10.59 Removing the time limits for sexual violence applications would reflect the reality of reporting sexual violence, and the barriers to reporting. It would preserve financial assistance as a justice option for victim survivors, regardless of when they report. It would send a strong signal that people who have experienced sexual violence should not have to cope on their own, without support.

<sup>76</sup> Submission 69 (Victim survivor of sexual assault (name withheld)).

<sup>77</sup> *Royal Commission into Institutional Responses to Child Sexual Abuse: Final Report* (Report, December 2017) vol 4, 30 <<https://www.childabuseroyalcommission.gov.au/final-report>>. Note that the figure of 22 years is often cited. This comes from an earlier report of the Royal Commission, based on the private sessions it had conducted to that point: *Royal Commission into Institutional Responses to Child Sexual Abuse, Redress and Civil Litigation* (Report, September 2015) 444 <<https://www.childabuseroyalcommission.gov.au/redress-and-civil-litigation>>.

<sup>78</sup> *Royal Commission into Institutional Responses to Child Sexual Abuse, Redress and Civil Litigation* (Report, September 2015) 444 <<https://www.childabuseroyalcommission.gov.au/redress-and-civil-litigation>>; *Royal Commission into Institutional Responses to Child Sexual Abuse: Final Report* (Report, December 2017) vol 4, 78–82, 84–5 <<https://www.childabuseroyalcommission.gov.au/final-report>>.

<sup>79</sup> Australian Institute of Health and Welfare (Cth), *Sexual Assault in Australia* (In Focus Report, 28 August 2020) 5 <<https://www.aihw.gov.au/reports/domestic-violence/sexual-assault-in-australia/contents/summary>>.

<sup>80</sup> Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996* (Report No 36, July 2018) [14.222].

## Recommendation

- 37 The time limit for applications in sexual offence cases should be removed from the new financial assistance scheme that was recommended in the Victorian Law Reform Commission's *Review of the Victims of Crime Assistance Act 1996* report.

### There should be a specialised response to sexual violence

- 10.60 In the VOCAA report, we recommended that the Victims of Crime Commissioner should be the decision maker under the new scheme, supported by deputy decision makers with specialist expertise.<sup>81</sup> They would administer financial assistance and run the recognition stream under the new scheme.
- 10.61 It is crucial that the new scheme includes dedicated decision makers with specialist expertise in sexual violence.<sup>82</sup> As we discuss below and explain in Chapter 18, sexual violence is different from other crimes and the people who work with victim survivors need to be specialists. People who have experienced sexual violence must be able to explain what happened to them to someone who understands the context of the offending and the impacts it can have. Additional specialisation within the pool of sexual violence decision makers should also be supported, to facilitate meaningful engagement with people from diverse communities.<sup>83</sup>
- 10.62 The dedicated decision makers for sexual violence cases should be people with strong standing in the community. They should have positions of authority within the new Commission for Sexual Safety (see Chapter 22).
- 10.63 As we discuss in Chapter 2, for some victim survivors, it is important to have a 'voice' and to explain what happened and how it affected them in a 'significant setting', such as in a justice process, where it is publicly and officially acknowledged. Even if they choose not to report sexual violence to the police, they do not want it simply hidden from view.
- 10.64 As well as being told about the benefits of being heard and believed by someone in a position of authority,<sup>84</sup> we heard that truth telling must be done well, in a way that does not trivialise the process:
- Story and truth-telling options must be meaningful and ensure that what survivors have to say is heard and has impact. Tokenistic approaches to story and truth-telling will be counterproductive if not harmful to survivors.<sup>85</sup>

<sup>81</sup> Ibid Recommendations 3, 9(a).

<sup>82</sup> The submission from the Law and Advocacy Centre for Women raises concerns that will be addressed through the VOCAA reforms, and also suggests that 'in the immediate term, a specialist family violence and sexual assault list should be established within VOCAT': Submission 58 (Law and Advocacy Centre for Women Ltd). The Law Institute of Victoria also recommends the creation of a VOCAT specialised family violence and sexual assault list: Submission 40 (Law Institute of Victoria).

<sup>83</sup> See Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996* (Report No 36, July 2018) [10.223]–[10.229].

<sup>84</sup> Submissions 7 (Dr Bianca Fileborn, Dr Rachel Loney-Howes, Dr Tully O'Neill and Sophie Hindes), 52 (Centre for Innovative Justice), 55 (Springvale Monash Legal Service), 56 (Domestic Violence Victoria). See also Consultation 74 (Magistrate David Fanning, Neighbourhood Justice Centre).

<sup>85</sup> Submission 7 (Dr Bianca Fileborn, Dr Rachel Loney-Howes, Dr Tully O'Neill and Sophie Hindes).

- 10.65 The insights provided by people who have experienced sexual violence in victim conferences should be used to improve how society responds to sexual violence. The specialised decision makers could report to the government annually, via the new Commission for Sexual Safety (see Chapter 22) on the themes they see in victim conferences (where consent is provided). As we discuss in Chapter 2, victim survivors often have social aims in seeking justice, including preventing further harm to others and a sense of social responsibility.<sup>86</sup> Their voices should shape our response to sexual violence.
- 10.66 In Chapter 6 we recommend that a working group should publish a report or analysis annually on sexual offending. We note in that chapter that the report should include data on justice options such as victim conferences.

## Recommendations

- 38 The new financial assistance scheme that was recommended in the Victorian Law Reform Commission's *Review of the Victims of Crime Assistance Act 1996* report should include a specialised stream for sexual offences.
- Decision makers in this stream should have expertise in sexual violence, strong standing in the community and positions of authority in the new Commission for Sexual Safety (Recommendation 90).
- 39 The new Commission for Sexual Safety (Recommendation 90), or the body that has oversight of the new financial assistance scheme that was recommended in the Victorian Law Reform Commission's *Review of the Victims of Crime Assistance Act 1996* report, should report annually on themes from sexual offence victim conferences, to improve the system's response to sexual violence. These reports should be publicly available.

## Recovery payments should reflect the serious impacts of sexual violence

- 10.67 The amounts of financial assistance available currently and under the new scheme are not meant to reflect what a victim of crime would receive if they successfully sued the person responsible.<sup>87</sup> This should continue to be the case. It would not be appropriate for the state to pay financial assistance equal to the awards that people can receive in civil litigation from the person or institution who was responsible for the harm or for failing to protect against it. The new scheme is designed to be a simple, non-adversarial process that contributes towards recovery. The scheme is publicly funded and must be sustainable.
- 10.68 The increased maximum payments that will be available under the new scheme balance the need to make the scheme affordable for government to run and the need to provide meaningful assistance so people can recover from the effects of crime. The increases were supported by many people we heard from during our VOCAA inquiry.<sup>88</sup> They will keep Victoria broadly in step with other jurisdictions and reduce the gap between our financial assistance scheme and other schemes, such as the Commonwealth Redress scheme (Table 12).<sup>89</sup>

86 See, eg, S Caroline Taylor and Caroline Norma, 'The "Symbolic Protest" Behind Women's Reporting of Sexual Assault Crime to Police' (2012) 7(1) *Feminist Criminology* 24, 25; Haley Clark, 'What Is the Justice System Willing to Offer?' Understanding Sexual Assault Victim/Survivors' Criminal Justice Needs' (2010) 85 *Family Matters* 28, 30.

87 *Victims of Crime Assistance Act 1996* (Vic) s 1(3). We recommended that an objective of the new Act should be to 'enable victims to have recourse to financial assistance under the Act, noting such assistance is not intended to reflect the level of compensation that may be available at common law or otherwise': Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996* (Report No 36, July 2018) Recommendation 21(d).

88 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996* (Report No 36, July 2018) [13.301]–[13.307].

89 Ibid [13.334].

**Table 12: Comparative maximum awards—financial assistance for victims of crime**

	ACT <sup>90</sup>	NSW <sup>91</sup>	NT <sup>92</sup>	Qld <sup>93</sup>	SA <sup>94</sup>	Tas <sup>95</sup>	Vic— VOCAT <sup>96</sup>	Vic— new FAS <sup>97</sup>	WA <sup>98</sup>
<b>Max award— all forms of financial assistance, including lump sum awards, if any</b>	\$55,041	\$45K	\$40K	\$75K	\$100K	\$30K	\$70K	\$100K	\$75K
<b>Max 'lump sum' award</b>	\$28,896	\$10K	\$10K	\$10K	NA	NA	\$10K	\$20K	NA
<b>Max award for victims of institutional child sexual abuse—Cth Redress Scheme<sup>99</sup></b>	\$150K	\$150K	\$150K	\$150K	\$150K	\$150K	\$150K	\$150K	\$150K

10.69 In our VOCAA report, we said that amounts of financial assistance should be based on 'a victim's specific circumstances' and the impact of the crime, rather than on the type of offence.<sup>100</sup> This is still correct as a general statement. However, the focus in our VOCAA report was not on sexual offences.

VOCAT needs to look at the life circumstances of every survivor. For those who are not in poverty therapy is fine. But some of us, like me, live in poverty and need more.—Ashleigh<sup>101</sup>

10.70 We now consider it important to recognise that sexual offences are distinctive. This makes the specialised expertise of sexual violence decision makers under the new scheme essential. The decision makers should take current research and evidence about sexual violence and its negative impacts into account in their decision making. This should especially be the case when they assess applications for 'recovery payments'.

90 *Victims of Crime (Financial Assistance) Regulation 2016* (ACT) regs 5, 8. The highest recognition payment available in the Australian Capital Territory is for a sexual offence punishable by imprisonment of 14 years or more, or attempt or conspiracy to commit homicide, where the victim survivor has suffered, as a result of the offence, a very serious injury that is likely to be permanent.

91 *Victims Rights and Support Regulation 2019* (NSW) regs 10, 14; *Victims Rights and Support Act* (NSW) ss 26, 35(2), 36(1)(c).

92 *Victims of Crime Assistance Act 2006* (NT) s 38.

93 *Victims of Crime Assistance Act 2009* (Qld) ss 38(1), 39, 219, sch 2, s 2. In addition, a victim may be awarded up to \$500 for the legal costs of submitting an application for assistance under the Act: s 38(2).

94 *Victims of Crime Act 2001* (SA) s 20(3).

95 *Victims of Crime Assistance Regulations 2010* (Tas) reg 4. A maximum award of \$50,000 is available for victims of two or more related acts. In Victoria, VOCAT may treat related criminal acts as part of the same offence for the purposes of making an award: *Victims of Crime Assistance Act 1996* (Vic) s 4(4). See also Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996* (Report No 36, July 2018) [13.297]–[13.299].

96 *Victims of Crime Assistance Act 1996* (Vic) ss 8, 8A.

97 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996* (Report No 36, July 2018) Recommendation 43.

98 *Criminal Injuries Compensation Act 2003* (WA) s 31(1).

99 Australian Government, *National Redress Guide* (Guides to Social Policy Law, 1 July 2021) [5.1] <<https://guides.dss.gov.au/national-redress-guide/5/1>>. Note that this maximum is less than the Royal Commission's recommended maximum redress payment of \$200,000: Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation* (Report, September 2015) Recommendation 19 <<https://www.childabuseroyalcommission.gov.au/redress-and-civil-litigation>>.

100 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996* (Report No 36, July 2018) [13.271], [13.272].

101 Consultation 59 (Ashleigh Rae, Nicole Lee, Penny).



- 10.71 Recovery payments will replace 'special financial assistance' lump sum payments. They are designed to give people choice and freedom, allowing them to 'determine their own recovery pathway'.<sup>102</sup> Unlike the other streams of assistance, they are not tied to the payment of expenses (such as health costs) or to covering lost income. They will be important for many people who have experienced sexual violence because the effects of the violence may not be obvious to other people.
- 10.72 The new decision makers should be conscious that:
- Misconceptions influence how people who have experienced sexual violence are treated—both in the community and within the justice system (see Chapter 3).
  - The negative impacts of sexual violence can be profound but are often underestimated (see Chapter 2).
- 10.73 A study of financial assistance awards in Queensland found myths about 'real rape' influenced payments in sexual violence cases. People whose circumstances fitted 'real rape' stereotypes, such as that rape occurs between strangers and there is evidence of physical force, were more likely to receive the maximum award than others.<sup>103</sup> Maximum payments were more often awarded to those who did not delay reporting the sexual violence; had not been using alcohol or drugs; were not at a bar or party at the time of the offence; and did not accept the company of the person responsible.<sup>104</sup>
- 10.74 The study was conducted using data from 2012–2014 and its authors suggest the misconceptions discussed may be less influential today.<sup>105</sup> However, we have learnt during our inquiry that these misconceptions still feature in the justice system.<sup>106</sup>
- 10.75 We have also been told about the damaging but often hidden effects of sexual violence. Many people who experience sexual violence take years to recover and feel permanently scarred. Some feel as if they will never recover.<sup>107</sup> Sexual offending that occurs over a long period and involves an abuse of trust is particularly damaging.<sup>108</sup> These effects have been poorly understood until recently. We need to do more to support people to recover, and to make sure that misunderstandings about sexual violence do not prevent them getting the help they need.

## Recommendation

- 40 The new financial assistance scheme that was recommended in the Victorian Law Reform Commission's *Review of the Victims of Crime Assistance Act 1996* report should require decision makers in the sexual violence stream (see Recommendation 38) to ensure that recovery payments for sexual offences reflect current research and evidence about the impacts of sexual violence.

<sup>102</sup> Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996* (Report No 36, July 2018) [13.259].

<sup>103</sup> Kathleen Daly, Robyn Holder and Victoria Meyer, *Technical Report No 6: Contexts, Data, and Decisions by Victim Assist Queensland for Sexual Offences* (Technical Report, Griffith University, February 2019) 39, 53, 63.

<sup>104</sup> Ibid 54, 63.

<sup>105</sup> Ibid 35.

<sup>106</sup> Julia Quilter and Luke McNamara, *Qualitative Analysis of County Court of Victoria Rape Trial Transcripts* (Report to the Victorian Law Reform Commission) (forthcoming). See also Lori Haskell and Melanie Randall, *The Impact of Trauma on Adult Sexual Assault Victims* (Report submitted to Research and Statistics Division, Justice Canada, 2019) 5, <<https://www.justice.gc.ca/eng/rp-pr/jr/trauma/index.html>> and ch 3 of this report.

<sup>107</sup> See, eg, Consultations 56 (Cecilia, a victim survivor of sexual assault), 81 (Danielle, a victim survivor); Submission 38 (Bravehearts); Lori Haskell and Melanie Randall, *The Impact of Trauma on Adult Sexual Assault Victims* (Report submitted to Research and Statistics Division, Justice Canada, 2019) 8–11 <<https://www.justice.gc.ca/eng/rp-pr/jr/trauma/index.html>>.

<sup>108</sup> Tamara Blakemore et al, 'The Impacts of Institutional Child Sexual Abuse: A Rapid Review of the Evidence' (2017) 74 *Child Abuse & Neglect* 35, 43.



# Improving civil litigation for victim survivors of sexual violence

230 Overview

230 Civil litigation is an important justice option

234 Civil litigation should be accessible

# 11. Improving civil litigation for victim survivors of sexual violence

## Overview

- Civil litigation is a justice option that is available in addition to or as an alternative to criminal justice.
- For some people who have experienced sexual violence, civil litigation meets important justice needs.
- Substantial compensation can be paid for pain and suffering, and loss of enjoyment of life. It can cover medical expenses and loss of income or capacity to earn a living.
- Civil litigation can provide acknowledgment and a sense of control.
- If a person who has experienced sexual violence successfully sues an institution, like a school or church, or settles the case, the institution will usually pay compensation. Accessing legal representation for institutional abuse claims is not generally a problem.
- Claims against individuals are different. Even if a person who has experienced sexual violence sues successfully or settles the case, getting payment can be difficult. Because of this, it can be hard to get legal representation to sue an individual for sexual violence.
- It can also be difficult to get payment of compensation orders, which are civil orders made by criminal courts to pay a victim compensation.
- To improve access to justice for people who have experienced sexual violence, the Victorian Government should:
  - fund civil cases against individual (non-institutional) defendants that raise important legal or systemic issues, or where the person who experienced sexual violence faces many barriers to justice and has a strong case
  - enforce, on request, civil orders and settlements in sexual violence cases involving individual (non-institutional) defendants.

## Civil litigation is an important justice option

- 11.1 A person who has experienced sexual violence can sue the person who harmed them or a related institution, such as a school or church ('the defendant'). The person bringing the case ('the plaintiff') must prove that the defendant committed a wrong ('tort'). This kind of proceeding is a form of 'civil litigation'.
- 11.2 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, which includes child sexual abuse, is a form of battery.<sup>1</sup>

<sup>1</sup> 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>>; Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation* (Report, September 2015) 460 <<https://www.childabuseroyalcommission.gov.au/redress-and-civil-litigation>>.

- 11.3 If the defendant is an institution, the tort is 'negligence'. This involves an institution breaching its duty to take reasonable precautions to protect the plaintiff from harm caused by people associated with it, such as employees or representatives.<sup>2</sup> An institution may also have legal responsibility ('vicarious liability') for the actions of its employees.<sup>3</sup> Since reforms were introduced in response to Victoria's *Betrayal of Trust* report and the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse, it has been easier to sue institutions for sexual offending committed by people associated with them.<sup>4</sup>
- 11.4 Civil litigation is a justice option that can be used along with, or instead of, criminal justice.<sup>5</sup> It provides an alternative to criminal justice:
- for people who do not want to report sexual violence to the police
  - where the police or the Director of Public Prosecutions decide not to prosecute
  - where a criminal trial occurs but the accused is found not guilty.
- 11.5 We know that these three scenarios are common. Most women who have been sexually assaulted by a man do not report the assault to the police.<sup>6</sup> Among reported cases, only about a third progress to the next stage of the criminal justice system.<sup>7</sup> The difficulty of getting criminal justice makes having other justice options like civil litigation more important.
- 11.6 People who have experienced sexual violence have a range of justice needs (see Chapter 2). For example, not everyone wants the person responsible for the violence to go to prison, but many want them to acknowledge that what they did was wrong. Some may seek compensation for treatment or other expenses, or for the negative impact that the violence has had on their lives. Justice options like civil litigation can work better than criminal justice to meet some of these needs.
- 11.7 For civil litigation to be a real justice option for people who have experienced sexual violence, it needs to be accessible and effective. Our recommendations in this chapter are designed to make it easier to access civil litigation and get payment when suing an individual (non-institutional) defendant.

## Civil litigation has benefits

- 11.8 When compared to the criminal justice system, civil litigation has certain benefits. In a criminal case, a conviction is possible only if the court finds it is 'beyond reasonable doubt' that the accused committed the offence. Proving that a sexual offence occurred 'beyond reasonable doubt' is often difficult, as we discuss in Chapter 19.

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2 See Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation* (Report, September 2015) 460–1 <<https://www.childabuseroyalcommission.gov.au/redress-and-civil-litigation>>; Department of Justice and Regulation (Vic), *Betrayal of Trust Fact Sheet: The New Organisational Duty of Care to Prevent Child Abuse* (Fact Sheet, May 2017) <<https://www.justice.vic.gov.au/safer-communities/protecting-children-and-families/betrayal-of-trust-fact-sheet-the-new>>.

3 Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation* (Report, September 2015) 53–54 <<https://www.childabuseroyalcommission.gov.au/redress-and-civil-litigation>>.

4 Victorian Law Reform Commission, *Sexual Offences: Civil Law and Other Non-Criminal Responses* (Issues Paper H, October 2020) [7], nn 4–8; 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>>; 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>>.

5 Other options include compensation orders under section 85B of the *Sentencing Act 1991* (Vic), which we discuss below, awards made by the Victims of Crime Assistance Tribunal (VOCAT), or awards made under a redress scheme. Redress schemes are set up in an institution or sector to compensate people who have experienced sexual violence. Some are run by a single institution. Others are run by government, with institutions covering some of the costs. If a person receives an award in one context (such as a compensation order), a subsequent award made in a different context (such as in civil litigation) will be reduced by the amount of the earlier award if it relates to the same subject matter (such as medical expenses). Sometimes a condition of accepting an award under a redress scheme is that the person who has experienced sexual violence agrees not to commence subsequent civil litigation.

6 The 2016 'Personal Safety Survey' found that '87 per cent of [adult] women who experienced their most recent aggravated sexual assault by a male in the last 10 years did not contact the police': Australian Institute of Health and Welfare (Cth), *Sexual Assault in Australia* (In Focus Report, 28 August 2020) 5 <<https://www.aihw.gov.au/reports/domestic-violence/sexual-assault-in-australia/contents/summary>>.

7 Inga Ting, Nathanael Scott and Alex Palmer, 'Rough Justice: How Police Are Failing Survivors of Sexual Assault', *ABC News* (online, 3 February 2020) <<https://www.abc.net.au/news/2020-01-28/how-police-are-failing-survivors-of-sexual-assault/11871364>>.

- 11.9 In a civil case, the case is proved if the court finds it is more likely than not that the defendant sexually assaulted the plaintiff ('on the balance of probabilities').<sup>8</sup> The lower standard of proof means that a person who has experienced sexual violence has 'a greater chance of vindication'.<sup>9</sup>
- 11.10 Civil litigation also provides different outcomes from the criminal justice system. The main outcome of successful litigation is a court order for the defendant to pay the plaintiff money ('damages') to compensate them for their injuries. Damages cover medical and other expenses, loss of earnings, pain and suffering, and loss of enjoyment of life.<sup>10</sup>
- 11.11 Damages awards in civil cases are higher than the amounts criminal courts sometimes award following a guilty plea or conviction ('compensation orders', which we discuss below). They are also higher than financial assistance awards made by the Victims of Crime Assistance Tribunal (VOCAT) (see Chapter 10).<sup>11</sup>
- 11.12 If the parties agree to settle a civil case, the settlement agreement might include an apology from the defendant as well as damages. If the defendant is an institution, it may agree to change its policies and practices to prevent future sexual violence. A settlement agreement can be a positive outcome for someone who has experienced sexual violence because it provides compensation without the need to go through a civil trial.
- 11.13 Aside from damages, civil litigation can provide a person who has experienced sexual violence with:
- formal acknowledgment of the violence and its impacts
  - a sense of control because they are a party to the proceedings
  - a sense of closure
  - a sense that they helped to deter future offending and held the person responsible to account.<sup>12</sup>
- 11.14 The benefits of civil litigation may extend beyond the person who experienced sexual violence and have wider, social value. For example, a large 'general' damages award (providing compensation for things like pain and suffering) is a public signal that sexual violence has serious and lasting effects.
- 11.15 Until quite recently, general damages for sexual harassment and assault were much lower than for other personal injuries.<sup>13</sup> This suggests there remains a need to educate judges (see Chapter 18), and the public (see Chapter 3) about the serious impacts of sexual violence.

8 *Evidence Act 2008* (Vic) s 140. The court is, however, expected to give weight to the presumption of innocence in civil litigation where it is alleged that a crime was committed, and 'exactness of proof' is expected: *Briginshaw v Briginshaw* (High Court of Australia, Latham CJ, Rich, Starke, Dixon and McTiernan JJ, 30 June 1938) 34, (1938) 60 CLR 336, per Dixon J.

9 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) 92 <<https://cij.org.au/research-projects/sexual-offences/>>.

10 'Damages are intended to compensate the successful claimant for loss or injury by placing the claimant, as nearly as possible, in the position that he or she would have been in had the breach of duty not occurred.' Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation* (Report, September 2015) 219 <<https://www.childabuseroyalcommission.gov.au/redress-and-civil-litigation>>.

11 Damages awards for sexual assault and child sexual abuse vary, but awards of over \$150,000 are not unusual and sometimes are much higher: *ibid* 230. The maximum award for victims at VOCAT is \$70,000, and the average amount of financial assistance paid to victims (regardless of the crime) is around \$7,900: Victims of Crime Assistance Tribunal, *Annual Report 2019–2020* (Report, 2020) 2 <[https://www.vocat.vic.gov.au/sites/default/files/publication/2020-12/13166%20VOCAT%20Annual%20Report%202019-2020\\_WEB%20V2.pdf](https://www.vocat.vic.gov.au/sites/default/files/publication/2020-12/13166%20VOCAT%20Annual%20Report%202019-2020_WEB%20V2.pdf)>.

12 Bruce Feldthusen, Olina Hankivsky and Lorraine Greaves, 'Therapeutic Consequences of Civil Actions for Damages and Compensation Claims by Victims of Sexual Abuse' (2000) 12 *Canadian Journal of Women & Law* 66, 69; knowmore, Submission to Royal Commission into Institutional Responses to Child Sexual Abuse, *Issues Paper 5—Civil Litigation* (17 March 2014) 2 <<https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/Issues%20Paper%205%20-%20Submission%20-%202017%20Knowmore.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) 92 <<https://cij.org.au/research-projects/sexual-offences/>>.

13 *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82, 223 FCR 334 [109] (Kennedy J). The 2018 national 'Respect @ Work' inquiry was told that damages awarded by courts in sexual harassment matters are still comparatively low. It called for research to assess if 'current damages reflect contemporary understandings of the nature, drivers, harms and impacts of sexual harassment': Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020) 29 <<https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>>.

## Civil litigation has drawbacks

- 11.16 While civil litigation has benefits, it also has serious drawbacks. The specialist legal service, knowmore, describes civil litigation as 'adversarial, costly, lengthy and ... extremely re-traumatising' for people who have been sexually abused.<sup>14</sup> The Centre for Innovative Justice observes that it is 'an adversarial, protracted, expensive and often damaging process' for people who have experienced sexual violence.<sup>15</sup>
- 11.17 In this inquiry, we received limited feedback about these concerns and how to respond to them. We have therefore focused on two problems where there is scope to make a difference:
- Without substantial financial means, it is difficult to get legal representation to sue an individual defendant for sexual assault.
  - It is difficult to enforce settlement agreements and damages awards.
- 11.18 Suing an individual defendant is expensive and risky.<sup>16</sup> Plaintiff lawyers will act on a 'no win, no charge' basis in cases with an institutional defendant and a strong chance of success.<sup>17</sup> In other cases, they will act only if a plaintiff can pay their costs, whatever the outcome.<sup>18</sup> If the plaintiff loses the case, they will have to pay their own lawyers and often the defendant's legal costs.<sup>19</sup>
- 11.19 If a plaintiff brings a case and is successful, or obtains a settlement agreement, enforcing the outcome can be expensive and complex. There are different enforcement options to choose between, and all involve bringing new legal proceedings. Another problem is that an individual defendant may not have the money to pay damages,<sup>20</sup> or may transfer their assets to others, such as family members, trusts and companies, to avoid having to pay.<sup>21</sup>
- 11.20 These issues would not prevent people who have experienced sexual violence from suing the person responsible if assistance was provided by the state. However, 'No publicly funded body acts on behalf of the victim' and 'no equivalent of legal aid is available for civil claimants'.<sup>22</sup>

14 knowmore legal service, Submission to Royal Commission into Institutional Responses to Child Sexual Abuse, *Issues Paper 5—Civil Litigation* (17 March 2014) 3 <<https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/Issues%20Paper%205%20-%20Submission%20-%2017%20Knowmore.pdf>>.

15 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) 92 <<https://cij.org.au/research-projects/sexual-offences/>>.

16 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) 5 <<https://www.cfecfw.asn.au/wp-content/uploads/2015/05/Royal%20Commission%20-%20Issues%20Paper%205%20-%20Civil%20Litigation.pdf>>; knowmore legal service, Submission to Royal Commission into Institutional Responses to Child Sexual Abuse, *Issues Paper 5—Civil Litigation* (17 March 2014) 3, 22–3 <<https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/Issues%20Paper%205%20-%20Submission%20-%2017%20Knowmore.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) 92 <<https://cij.org.au/research-projects/sexual-offences/>>.

17 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>>.

18 While it is quite common for individuals to be named as co-defendants in sexual harm litigation commenced against institutions, it is rare for civil claims to proceed against individuals alone. Unlike negligence claims against institutions, there can be no insurance for intentional torts like sexual assault, or for criminal acts.

19 South Eastern Centre against Sexual Assault & Family Violence, *Sexual Assault, the Law, Your Rights* (Guide, December 2016) 80 <<https://www.secasa.com.au/pages/sexual-assault-the-law-your-rights/>>.

20 knowmore legal service, Submission to Royal Commission into Institutional Responses to Child Sexual Abuse, *Issues Paper 5—Civil Litigation* (17 March 2014) 3 <<https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/Issues%20Paper%205%20-%20Submission%20-%2017%20Knowmore.pdf>>; Submission 9 (Djirra).

21 Submission 14 (Gatehouse Centre, Royal Children's Hospital). The plaintiff can seek an order preventing transfer (an injunction), but they must demonstrate that the transfer is about to happen, and this can be complicated. In relation to the cost and complexity of enforcing judgment debts generally: see Sentencing Advisory Council (Vic) et al, *Restitution and Compensation Orders* (Issues and Options Paper, 2018) xvii–xviii.

22 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) 92 <<https://cij.org.au/research-projects/sexual-offences/>>.



## Civil litigation should be accessible

### Public funding should be available for legal representation in some cases

- 11.21 People cannot access justice if they cannot afford legal advice or representation in civil cases.<sup>23</sup> Victoria Legal Aid provides limited funding for applicants in some civil jurisdictions, like family violence and child protection cases.<sup>24</sup> It does not fund civil litigation for sexual assault.
- 11.22 If supported by public funding, civil litigation would be another way for people who have experienced sexual violence to get justice, and a way to hold people accountable for the violence. It would bring benefits such as financial compensation, control and acknowledgment within reach of more victim survivors.
- 11.23 The Centre for Excellence in Child and Family Welfare describes the ability to sue for sexual violence as a 'civil right':
- There is no way of knowing how many people may have wished to pursue civil litigation but did not have the stamina to pursue their claim to resolution, or were advised by lawyers that their chances of winning a payout were too limited to pursue a 'no win no pay' case.
- The civil rights of such people remain a concern ... litigation is a civil right.<sup>25</sup>
- 11.24 The importance of providing access to civil litigation as a justice option was emphasised by several people we spoke to or heard from during our inquiry.
- 11.25 One person who had experienced sexual violence told us she felt powerless when the police decided not to charge the person who assaulted her. She said she was left without options:

I wish there was a financially viable option for me to actively decide to take my case to court or a tribunal where I would have an opportunity to be heard and fight my case.—Danielle<sup>26</sup>

- 11.26 A mother whose daughter was sexually assaulted told us about her experience seeking legal representation for civil proceedings after police refused to file charges. She explained the difficulties she faced and why she wanted to sue.

I've re-mortgaged the house, trying to look at a civil action, but I can't find a lawyer to pick it up. We just want to say that this is wrong and seek some damages. But there [won't be any] big payout, so no lawyer will pick it up. Lawyers have just said, 'No, try someone else.'

It's not the money, there's a greater cost [of this crime] ...

We don't want compensation, we want to know that this person knows that what he did wasn't right.—Alison<sup>27</sup>

<sup>23</sup> Victorian Law Reform Commission, *Civil Justice Review* (Report No 14, March 2008) 607.

<sup>24</sup> Submission 27 (Victoria Legal Aid).

<sup>25</sup> 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>>.

<sup>26</sup> Submission 15 (Danielle).

<sup>27</sup> Consultation 99 (Alison, the mother of a rape survivor).

- 11.27 Another person, who was sexually assaulted at work, was able to get legal representation because she could sue the company that employed her. She told us how important this was for her.

It was empowering to know that I'm fighting for justice for all people that were involved. It's not about winning or losing the civil claim. Regardless of the outcome I feel like I would have done everything I could have in my power to say that what happened was wrong and that no one can go around doing what had happened to me without consequences.—Lucille<sup>28</sup>

- 11.28 The scale of sexual violence and the failure of our justice system to provide meaningful options for people who have experienced it (see Chapters 1–3) is so serious that it requires a bold response. The Victorian Government should provide funding to improve access to civil litigation for people who have experienced sexual violence and who wish to sue an individual defendant or defendants.
- 11.29 Funding should be directed to cases:
- that raise important legal or systemic issues, or
  - where the person harmed faces multiple barriers to justice and their case has reasonable prospects of success.
- 11.30 Focusing public support for civil litigation on these cases will ensure the state's funding commitment is sustainable. It will mean that support is used for cases with the potential to improve the law for everyone, and where it is needed most and can bring the most benefit.

Sexual violence often affects the most vulnerable members of the community including children, the elderly and people living with disabilities. These victims often find it difficult to articulate the abuse in fear of retribution by the offender or other family members. The justice system can sometimes fail to acknowledge the unique vulnerability of these victims in society.—Shine Lawyers<sup>29</sup>

- 11.31 For some people, sexual violence reflects existing injustice. In Chapter 2, we discuss how Aboriginal people, people with disabilities, and LGBTIQ+ communities are all more likely than other people to experience sexual violence. In Chapters 2 and 3, we note that sexual violence is gendered. Children, older people and people who live in institutional contexts also experience high rates of sexual violence.<sup>30</sup> We also heard in our inquiry about the greater barriers that people in these groups face when trying to get justice.<sup>31</sup> Djirra explained that for Aboriginal women, the difficulty of bringing civil litigation is 'a significant gap' and is part of 'ongoing inequities'.<sup>32</sup>

<sup>28</sup> Consultation 54 (Lucille Kent, a victim survivor of sexual assault).

<sup>29</sup> Submission 62 (Shine Lawyers (on behalf of Ms Kim Elzaibak)). See also Lori Haskell and Melanie Randall, *The Impact of Trauma on Adult Sexual Assault Victims* (Report, 2019) 5 <<http://www.deslibris.ca/ID/10103348>>: 'Indigenous women ... experience disproportionately high rates of sexual victimization and ... have also experienced the most tragic gaps in police and criminal justice system responses. Other groups of racialized women, disabled women, young women, women who have used alcohol or drugs, are impoverished or homeless, or have other circumstances of marginality, are particularly vulnerable to sexual assault as well as decreased access to justice.' The quote here is referring to Indigenous women in Canada, but as we discuss in Chapter 2, it also applies to Aboriginal women in Australia.

<sup>30</sup> Submissions 1 (Dr Catherine Barrett), 58 (Law and Advocacy Centre for Women Ltd). See, eg, Australian Institute of Health and Welfare (Cth), *Sexual Assault in Australia* (In Focus Report, 28 August 2020) 1 <<https://www.aihw.gov.au/reports/domestic-violence/sexual-assault-in-australia/contents/summary>>.

<sup>31</sup> See chs 2, 8.

<sup>32</sup> Submission 9 (Djirra).

- 11.32 In its recent report, the Royal Commission into Victoria's Mental Health System argued that people who confront discrimination because of their mental health need better social, legal and institutional supports than they have now. It said they should not be forced to stand up to discrimination on their own. The Royal Commission recommended that the Victorian Government should fund some legal services to help people with mental illness sue for discrimination.<sup>33</sup>
- 11.33 We think a similar approach is justified for sexual violence. People who have experienced sexual violence, especially those who face multiple barriers to justice, should not have to stand up to it on their own.
- 11.34 To implement our recommendation, legal representation could be provided through a legal aid scheme or another suitable body, which could be responsible for the day-to-day administration of the scheme. The new Commission for Sexual Safety (see Chapter 22) should provide guidelines or criteria for making civil litigation funding decisions. It could provide advice, where appropriate, on the conduct of particular cases.
- 11.35 To ensure procedural fairness, where plaintiffs receive publicly funded legal representation to sue for sexual assault, defendants should be eligible for legal aid, subject to the usual means (income) test.

## Recommendation

- 41 The Victorian Government should provide funding for people who wish to bring civil proceedings against a non-institutional defendant (or defendants) for sexual assault where:
- their case raises important systemic or legal issues, or
  - they face multiple barriers to justice and their case has reasonable prospects of success.

## Civil justice orders and settlements should be enforced against individual defendants

- 11.36 Helping people who have received a civil award or settlement to enforce that outcome is another way of responding to the urgent need for more sexual violence justice options. Without this help, civil litigation will not be a real justice option for many people. With it, there is public recognition that the state takes the violence seriously, and the practical assistance that comes with enforcement. It is a way of ensuring that people responsible for sexual violence are held financially accountable if they have the means to pay.
- 11.37 The Victorian Government, or an agency authorised by it, should bring enforcement proceedings in sexual violence cases. This should occur where the person who experienced sexual violence requests it,<sup>34</sup> and an individual defendant or defendants does not pay after:
- the court makes an order in a civil case, or
  - the case is settled.

33 *Royal Commission into Victoria's Mental Health System* (Final Report, 3 February 2021) Recommendation 41(4)(c) and see generally ch 25.10, 562–7 <<https://finalreport.rcvmhs.vic.gov.au/>>.

34 Enforcement should not occur automatically or by default, given the reprisal risks this could create if the person harmed is in a relationship, or has close connections to, the person responsible for the violence: Sentencing Advisory Council (Vic), *Restitution and Compensation Orders* (Report, 25 October 2018) xvii <<https://www.sentencingcouncil.vic.gov.au/publications/restitution-and-compensation-orders-report>>; Sentencing Advisory Council (Vic) et al, *Restitution and Compensation Orders* (Issues and Options Paper, 2018) xxii.

- 11.38 The Victorian Government should also enforce compensation orders made under the *Sentencing Act 1991* (Vic), at the request of a person who has experienced sexual violence.
- 11.39 When a person is convicted of a criminal offence, anyone who has suffered an injury as a result of the crime can apply for a compensation order.<sup>35</sup> The sentencing court can order the person responsible to pay financial compensation. This is a civil remedy attached to the end of a criminal trial to benefit people injured by the crime.<sup>36</sup>
- 11.40 Compensation orders can avoid the need for victims of crime to sue the person responsible for damages. The orders are designed to provide compensation more quickly and efficiently than civil litigation.<sup>37</sup> They are therefore another form of justice. However, failure to pay seems to be common,<sup>38</sup> and victims 'often struggle to enforce' compensation orders.<sup>39</sup>
- 11.41 In 2018, the Sentencing Advisory Council made a similar recommendation that the Victorian Government should consider empowering an appropriate agency to enforce compensation orders on behalf of victims of crime.<sup>40</sup> The Sentencing Advisory Council cautioned that offenders who cannot pay should not be imprisoned for their failure to pay.<sup>41</sup> Imprisonment would be inappropriate because compensation orders are civil outcomes that aim to provide compensation for injury, not to punish the person responsible.<sup>42</sup>
- 11.42 We agree with the Sentencing Advisory Council's comments in relation to compensation orders. These comments apply equally to the enforcement of civil litigation outcomes. The same limits should apply.
- 11.43 The new Commission for Sexual Safety should provide guidance on bringing enforcement proceedings and work with the Victorian Government, or the enforcement agency or authority authorised by it, to provide oversight (see Chapter 22).

## Recommendation

- 42 The Victorian Government, or an agency or authority it authorises, should bring enforcement proceedings on behalf of a person who has experienced sexual violence, if they request it.
- This should be available if the individual responsible for sexual violence does not fulfil the terms of a civil settlement or court order to pay damages or compensation for injuries resulting from sexual violence.

35 *Sentencing Act 1991* (Vic) s 85B(1).

36 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Consultation Paper, July 2015) 130 [10.3].

37 Sentencing Advisory Council (Vic), *Restitution and Compensation Orders* (Report, 25 October 2018) xiii <<https://www.sentencingcouncil.vic.gov.au/publications/restitution-and-compensation-orders-report>>; Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) [9.21] 232.

38 Sentencing Advisory Council (Vic) et al, *Restitution and Compensation Orders* (Issues and Options Paper, 2018) xviii, 27–9.

39 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) [63].

40 Sentencing Advisory Council (Vic), *Restitution and Compensation Orders* (Report, 25 October 2018) xvii, Recommendation 7 <<https://www.sentencingcouncil.vic.gov.au/publications/restitution-and-compensation-orders-report>>.

41 Ibid xvii.

42 The Sentencing Advisory Council suggested that, if state enforcement is introduced, the enforcement agency should only have powers to use civil mechanisms of enforcement, such as the powers of a judgment creditor to enforce a debt: Ibid.



# CHAPTER 12

## Supporting people who have experienced sexual violence

240 Overview

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249 Victim survivors need immediate practical support

250 There is a need for continuous support: 'a little bit of light'

263 Victim survivors need legal advice and representation

## 12. Supporting people who have experienced sexual violence

### Overview

- Too often, people who have experienced sexual violence are left alone to navigate a complex and frightening system.
- Victim survivors told us they need strong and continuous support to get justice.
- While Victoria has the foundation of a strong support system, we need to increase our investment to strengthen the services we have now.
- We need to make sure people can get the right support, at the right place and time, in the way they need it.
- We should move towards a model where someone 'walks with' those who have experienced sexual violence before, during and beyond their time in the criminal justice system.
- We should build this model by:
  - identifying first the people who most need support, because their needs are not being met by existing services
  - strengthening the role and resourcing of Victoria's counsellor advocates, so they can support clients throughout the whole journey
  - extending this model to other places where people go for support, such as Aboriginal community-controlled organisations.
- People who have experienced sexual violence also need legal advice and representation so they can exercise their rights and protect their interests where these differ from those of the prosecution.
- The new Victims Legal Service should provide this and it should extend, where needed, to legal representation up to the point of trial.



## Victim survivors should no longer feel alone

I needed a support team, an advocate, a lawyer. The offender had all of this, a whole team of people looking after him. I felt stripped of everything, like I had no-one. I felt so alone.<sup>1</sup>

- 12.1 Taking the step to reach out for support is far from easy. For most people, the first step is to reach out to their families and friends, or to their teachers and doctors. They might reach out through helplines or services that focus on their community (see Chapters 3 and 8).
- 12.2 Once they do reach out, they are often connected to Victoria's formal support services for people who have experienced sexual violence. This is the focus of this chapter.
- 12.3 Victoria has the foundation of a strong support system. There are counsellor advocates in centres against sexual assault (CASAs) with decades of experience, a helpline and a service for child witnesses. There are volunteers who sit with people during police interviews and explain the layout of courts, and social workers who attend court to support those giving evidence.
- 12.4 Yet all too often a victim survivor still faces the justice system alone. She takes a taxi ride to the hospital, alone. She tries to tell her deeply personal story across the police counter, alone. She answers the police's questions for hours, alone. She calls repeatedly to find out about the progress of her case, alone. She sits all day alone in the remote witness facility, too afraid to get lunch in case she runs into him. When the prosecution decides not to go ahead, or the trial ends, she is left alone with her regrets, grief and anger.<sup>2</sup>
- 12.5 If we want to make the experience of the justice system less traumatic, then we must make sure victim survivors get the support they need. That is one of the strongest themes we heard in this inquiry, and it is supported by research.
- 12.6 For many people 'justice' is not about what happens at the end, but about how they experience the process. They may have different justice needs, including the need for counselling and emotional support (see Chapter 2). For many, getting justice means that they can move forward with their life.<sup>3</sup>
- 12.7 Support can help people to engage with the criminal justice system. Many people only report to police because they received the support they needed first. For example, Deborah told us that she came to report after the person who had supported her rang the police. When the police contacted her to follow up, their supportive approach made her feel that reporting was something she wanted to do.<sup>4</sup>
- 12.8 Practical and emotional support can make people feel confident to take part in the criminal justice system.<sup>5</sup> The County Court of Victoria told us that reforms to increase support for complainants had improved the quality of their evidence.<sup>6</sup>

1 Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021).

2 Ibid; Consultations 54 (Lucille Kent, a victim survivor of sexual assault), 56 (Cecilia, a victim survivor of sexual assault).

3 Nicole Bluett-Boyd and Bianca Fileborn, *Victim/Survivor-Focused Justice Responses and Reforms to Criminal Court Practice* (Research Report No 27, Australian Institute of Family Studies (Cth), April 2014) 27 <<https://aifs.gov.au/publications/victim-survivor-focused-justice-responses-and-reforms-criminal-court-practice>>.

4 Consultation 69 (Deborah, a victim survivor of sexual assault).

5 Oona Brooks-Hay et al, *Evaluation of the Rape Crisis Scotland National Advocacy Project* (Briefing No 01/2018, Scottish Centre for Crime and Justice Research, January 2018) 3–4 <<https://www.sccjr.ac.uk/publications/evaluation-of-the-rape-crisis-scotland-national-advocacy-project-summary-report-jan-2018/>>; Victims' Commissioner for England and Wales, *Victim Advocates: A Rapid Evidence Assessment* (Report, February 2019) 12 <<https://victimscommissioner.org.uk/published-reviews/victim-advocates-a-rapid-evidence-assessment/>>.

6 Submission 59 (County Court of Victoria).

- 12.9 However, in this inquiry we heard that people are still not getting the support they need. For example, people told us:
- **It is still too hard to access specialist services.** There can be long waiting lists for centres against sexual assault (CASAs), even for their priority clients.<sup>7</sup> The after-hours helpline needs much more funding.<sup>8</sup>
  - **Support is not always there when you need it.** People need support before deciding to report to police, and when they report to police. There is often no court support for people involved in summary cases before the Magistrates' Court of Victoria.<sup>9</sup> More support is also needed when any justice process ends.
  - **Supports need to be flexible and holistic.** There are gaps in meeting immediate practical or legal needs, such as getting a taxi to the hospital. Support services or programs also focus on the individual, rather than the family.
- 12.10 Not everyone wants to use mainstream services or feels comfortable with them. People need options so they can get the support they need from places they trust (see Chapter 8).
- 12.11 This chapter discusses what we need to do so that people no longer feel alone.

## There is a strong base to build from

- 12.12 In Victoria, CASAs provide the main form of specialist support for people who have experienced sexual assault. They are an example of best practice support internationally.<sup>10</sup> In this inquiry, we heard overwhelming support for the 'brilliant' work of CASA counsellor advocates.<sup>11</sup>
- 12.13 CASA counsellor advocates provide counselling and therapy and also advocate for their clients. They provide them with independent information about their justice options, rights and access to services. They advocate for them with other services, such as health and social services. Counsellor advocates often provide counselling or support during the criminal justice process, if the client engages with that process. They consult with, educate and train other services in responding to sexual violence.
- 12.14 Some CASAs are co-located in multi-disciplinary centres across Victoria and do outreach to other community-specific organisations and women's prisons (see Chapter 8).

7 Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021).

8 Submissions 10 (Carolyn Worth AM and Mary Lancaster), 44 (Dr Patrick Tidmarsh and Dr Gemma Hamilton).

9 Consultation 71 (Magistrates' Court of Victoria (No 1)).

10 See, eg, Natalie Slade, *Literature Review on International Best Court Support Models for Victim-Survivors of Sexual Violence* (Report, Ministry of Social Development (NZ), January 2020) 20–2 <<https://msd.govt.nz/documents/about-msd-and-our-work/publications-resources/literature-reviews/literature-review-on-international-best-court-support-models-for-victim-survivors-of-sexual-violence.pdf>>.

11 Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021).

- 12.15 Victoria has a range of programs to support all victims of crime. Some give priority to victims of sexual offences (see Figure 16). Programs include:
- The Victims Support Agency within the Department of Justice and Community Safety runs the Victims of Crime Helpline and funds the Victims Assistance Program through providers across the state. This Program includes needs and risk assessments, referrals and limited funds for practical counselling and referrals to other services.<sup>12</sup>
  - The Child Witness Service prepares complainants and witnesses who are under 18 to give evidence, including by familiarising them with the court process and staff, supporting them and their families, and referring them to community agencies.<sup>13</sup>
  - The Victims and Witness Assistance Service, co-located and funded by the Office of Public Prosecutions, supports adult victims through the process of giving evidence, including by giving them information about how courts work and providing practical support.<sup>14</sup>
  - The Court Network, a service for everyone using courts in Victoria, has trained volunteers who inform people about going to court and court processes, support a person in court, and inform and refer people to legal support and other community services.<sup>15</sup>
- 12.16 In Chapter 15 we discuss the intermediary program, independent third persons, as well as interpreters and translators. While these people also work directly with complainants, their function is not to provide emotional or practical support, but rather enhance participation in the justice process.

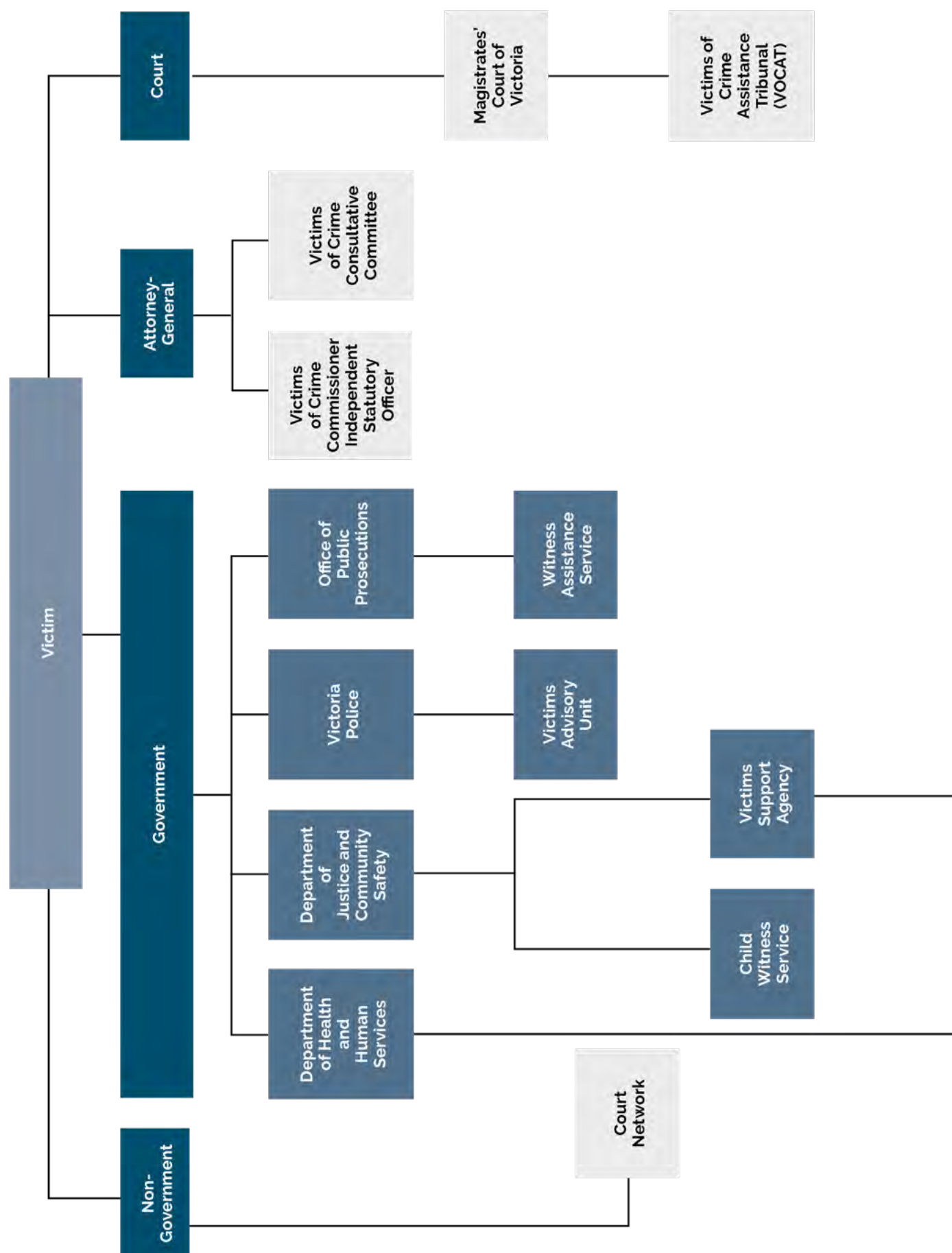
12 Centre for Innovative Justice, RMIT University, *Strengthening Victoria's Victim Support System: Victim Services Review* (Final Report, November 2020) 110–12 <<https://cij.org.au/cms/wp-content/uploads/2020/11/strengthening-victorias-victim-support-system-victim-services-review-centre-for-innovative-justice-november-2020.pdf>>.

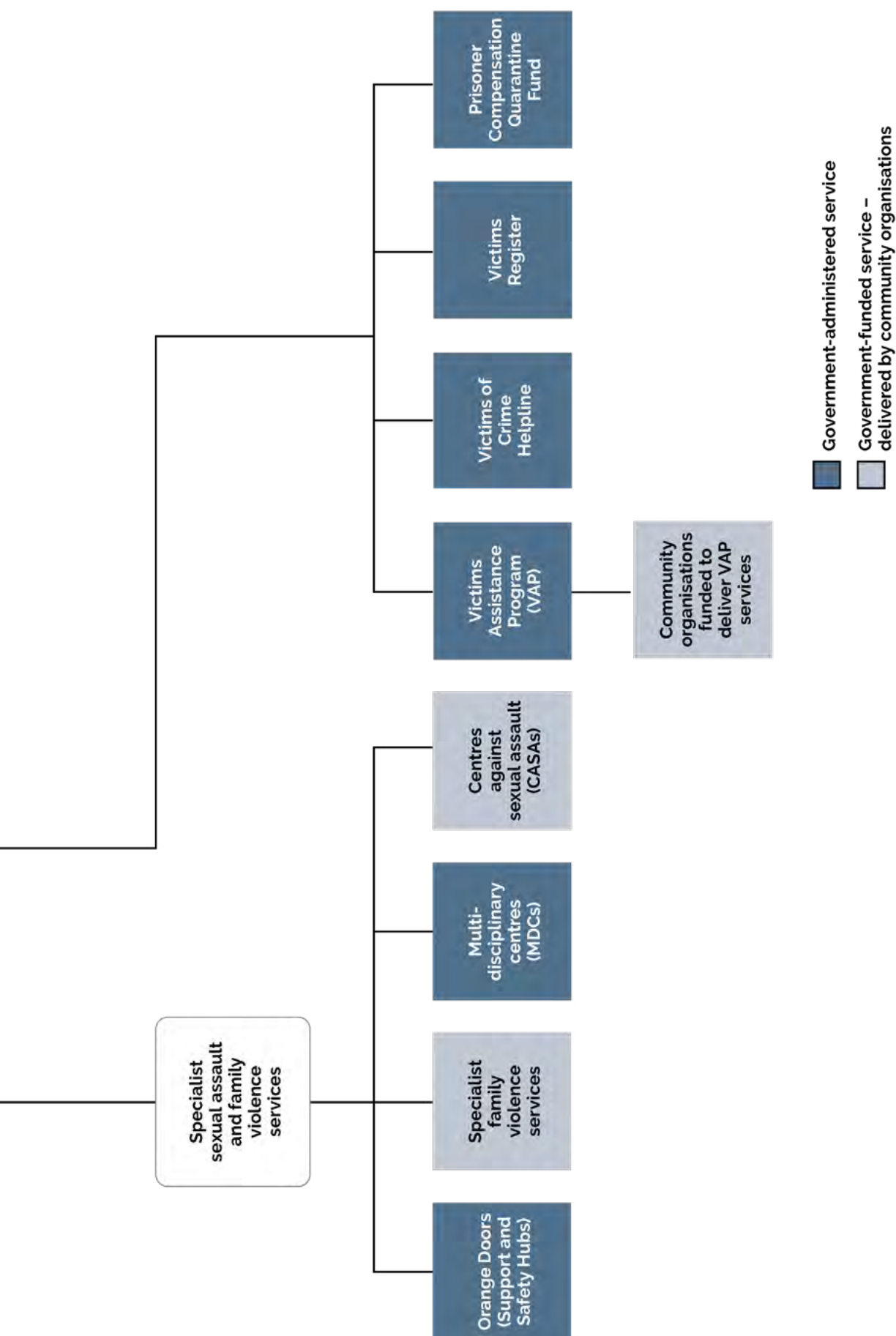
13 'Child Witness Service', *Victims of Crime* (Web Page, 10 June 2021) <<http://www.victimsofcrime.vic.gov.au/going-to-court/child-witness-service>>.

14 Office of Public Prosecutions (Vic), *Witness Assistance Service* (Brochure) <<http://www.opp.vic.gov.au/getdoc/4a8ca3d9-2e86-46d5-ae1b-6479c6156e37/WAS-brochure.aspx>>.

15 'How We Can Help', *Court Network* (Web Page, 2021) <<https://courtnetwork.com.au/get-support/how-we-can-help/>>.

Figure 16: Programs to support victims of crime in Victoria





## Changes to Victoria's victim services are underway

- 12.17 In November 2020, a major review of Victoria's victim services (the Victim Services Review) was published.<sup>16</sup> It recommended a new model of victim services which would double the Victorian Government's investment in victim support services. Its recommendations are being considered by the Victorian Government.
- 12.18 The Victorian Government is also considering the recommendations of a related review of the Child Witness Service.<sup>17</sup> We therefore do not make any recommendations in relation to this service, although we note the praise we heard for the quality of its work.<sup>18</sup>
- 12.19 The Victim Services Review proposed a new model that would provide three tiers of support:
- A Victims Support Centre. This would replace the current Victims of Crime Helpline. The service would go beyond its current focus on referrals by providing a risk and needs assessment, psychological first aid, funds to meet immediate needs, 'light touch' case coordination and referrals to other services.
  - Clients with higher needs would be referred to the Victims Support and Recovery Program. This would replace the existing Victims Assistance Program. The revised program would provide more active case management.
  - A specialised service for bereaved family members.<sup>19</sup>
- 12.20 The model would also include a Victims Legal Advice Service consisting of a network of funded legal services co-located with the Victims Support Centre and Victims Support and Recovery program providers.<sup>20</sup> In May 2021, the Victorian Government announced funding for a Victims Legal Service.<sup>21</sup>
- 12.21 The Victim Services Review sets out a model which sees victim support services as a 'lynchpin' of the system that 'actively navigates people through the service system'.<sup>22</sup> This proposed model would greatly improve the experiences of victim survivors in the criminal justice system. If adopted, it would:
- help people to find and navigate services
  - improve the quality of the responses
  - improve access to legal information and advice (discussed below).
- 12.22 In Chapter 10 we discuss changes to Victoria's financial assistance scheme for victims of crime. These changes will make it easier for victims of crime to access support.<sup>23</sup>

16 Centre for Innovative Justice, RMIT University, *Strengthening Victoria's Victim Support System: Victim Services Review* (Final Report, November 2020) <<https://cij.org.au/cms/wp-content/uploads/2020/11/strengthening-victorias-victim-support-system-victim-services-review-centre-for-innovative-justice-november-2020.pdf>>.

17 As of 1 July 2021, this had not yet been published: 'Child Witness Service Review', RMIT Centre for Innovative Justice (Web Page, 2019) <<https://cij.org.au/research-projects/child-witness-service-review/>>.

18 Consultations 23 (Sexual Assault Services Victoria Specialist Children's Services), 61 (Children's Court of Victoria), 86 (Magistrates' Court of Victoria (No 2)).

19 Centre for Innovative Justice, RMIT University, *Strengthening Victoria's Victim Support System: Victim Services Review* (Final Report, November 2020) 16–17 <<https://cij.org.au/cms/wp-content/uploads/2020/11/strengthening-victorias-victim-support-system-victim-services-review-centre-for-innovative-justice-november-2020.pdf>>.

20 Ibid 17, 147–55.

21 Victorian Government, 'Keeping Women and Children Safe', *Victorian Budget 21/22* (Web Page, 20 May 2021) <<http://www.budget.vic.gov.au/keeping-women-and-children-safe>>.

22 Centre for Innovative Justice, RMIT University, *Strengthening Victoria's Victim Support System: Victim Services Review* (Final Report, November 2020) 215 <<https://cij.org.au/cms/wp-content/uploads/2020/11/strengthening-victorias-victim-support-system-victim-services-review-centre-for-innovative-justice-november-2020.pdf>>.

23 These reforms are based on recommendations by the Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996* (Report No 36, July 2018).

## The foundation of our supports must be strengthened

### There is a need to invest in and improve existing services

CASA is [extremely] underfunded, and it took four months for me to be allocated a counsellor. At the time, the service had not hired any counsellor for the Melton region, which is a low socio-economic region. Everyone at CASA is really lovely, but they are so underfunded.<sup>24</sup>

- 12.23 In Chapter 4, we recommend as an urgent priority increasing our investment in the sexual assault 'system', including support services. The Victorian Government has invested more in sexual assault counselling services in recent times.<sup>25</sup>
- 12.24 However, waiting lists are still far too long. Throughout this inquiry, we heard of people waiting months to access counselling or feeling forced to pay for their own psychologist.<sup>26</sup> One person told us of waiting nine months before a trial.<sup>27</sup> We were told that the Sexual Assault Crisis Line, which provides after-hours counselling support, needed to be better funded, connected and promoted.<sup>28</sup> We were also told of gaps in counselling and other supports for family members affected by sexual offences, such as child sexual exploitation.<sup>29</sup>
- 12.25 The impact of coronavirus (COVID-19) and extensive media coverage of sexual violence has increased demand for counselling. Demand will increase further if we succeed as a community in encouraging people to speak about their experiences.<sup>30</sup>

I spent the whole day locked away in an airless little room to make sure that I didn't run into the man who had abused me. It wasn't right that he could roam around and go outside for a walk at lunchtime and get fresh air, and I was stuck there, I couldn't go anywhere. The fear was overwhelming ... No one from the Victims and Witness Assistance Service was there on the day of the committal to provide support or assistance —Cecilia.<sup>31</sup>

While a mother we spoke to said they received good support from the Victims and Witness Assistance Service, she told us 'their funding has been cut ... and half their office has gone' —Alison, mother of a rape survivor.<sup>32</sup>

- 12.26 Sexual Assault Services Victoria and Victoria Police identified the resourcing of the Victims and Witness Assistance Service (VWAS) as an issue.<sup>33</sup> Sexual Assault Services Victoria told us it could only support the 'most high-risk and vulnerable witnesses while they are actually giving evidence'. It said that Court Network volunteers were commonly used to support people in remote witness facilities. While this service was valued, many of these clients would have benefited from professional support provided through VWAS.<sup>34</sup>

24 Consultation 63 (A victim survivor of sexual assault, name withheld).  
 25 In February 2019, the government reported it had increased funding for support services by 32% since 2014: Victorian Government, *Annual Report 2018—Royal Commission into Institutional Responses to Child Sexual Abuse* (Report, February 2019) 9 <<https://apo.org.au/node/223711>>.  
 26 Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021).  
 27 Ibid.  
 28 Submissions 10 (Carolyn Worth AM and Mary Lancaster), 17 (Sexual Assault Services Victoria), 44 (Dr Patrick Tidmarsh and Dr Gemma Hamilton).  
 29 Submission 51 (PartnerSPEAK).  
 30 Submission 56 (Domestic Violence Victoria).  
 31 Consultation 56 (Cecilia, a victim survivor of sexual assault).  
 32 Consultation 99 (Alison, the mother of a rape survivor).  
 33 Submissions 67 (Sexual Assault Services Victoria), 68 (Victoria Police).  
 34 Submission 17 (Sexual Assault Services Victoria).



- 12.27 We heard that the Child Witness Service, while extremely valuable, was 'really stretched'.<sup>35</sup> The Office of the Public Advocate told us that the independent third persons program (discussed in Chapter 15) was not resourced to respond to the increasing demand and complexity of cases.<sup>36</sup>
- 12.28 We agree with the Victim Services Review that more could and should be done to promote the Victims of Crime Helpline and Victims Assistance Program. Many people identified gaps in support that could have been filled by these services.
- 12.29 One parent told us how after a year of trying to get information about their court case, they had 'finally stumbled' across the 'fantastic' helpline, which had referred them to an 'amazing' support worker. The parent concluded:
- The key challenge for us was that we really needed that support at the outset and missed out on very important support for a whole 12 months after the crime was committed. ... I feel strongly that police, CASA, GPs and psychologists should all refer victims and families to the hotline and referral service as soon as they become aware of a serious crime.<sup>37</sup>
- 12.30 In Chapter 5, we note that there is room to improve referrals between these programs, CASAs and Orange Doors.
- 12.31 The first and most crucial task of reform is to invest in sexual assault support services. If people cannot get support when they need it, our other efforts—to encourage people to tell their story, to make sure they are believed and supported, and to support them to engage with the justice system if they choose to—are not only wasted, but more likely to cause harm than good.
- 12.32 In Chapter 8 we deal with the need to strengthen the ability of other organisations to respond to sexual violence, including by funding specialist sexual assault services to support such organisations to respond appropriately to sexual violence.

## Recommendation

- 43 The Victorian Government should invest in strengthening the support available to people who have experienced sexual violence, including supporting any decision making about their justice options or interactions with the justice system. This investment should include:
- a. significant increases in resourcing centres against sexual assault to meet demand
  - b. funding training, secondary consultation and other supports needed to extend the capacity of other parts of the service system to respond to sexual violence.

35  
36  
37

Ibid.  
Submission 41 (Office of the Public Advocate).  
Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021).

## Victim survivors need immediate practical support

I had no protection getting to or leaving court. I received a summons with \$12 in the mail to get myself to court, which meant I had to take public transport – this amount wouldn't cover a taxi or uber. So, I was expected to hop on a train to court and then catch it home, when the man who abused me was still out there after the committal and I didn't know if he would be trying to track me down.—Cecilia<sup>38</sup>

- 12.33 People also told us that they needed practical support. For example, they should be able to get taxi vouchers to get to their appointments or to forensic examinations, and people fearing for their safety should be able to get credit for a mobile phone.<sup>39</sup>
- 12.34 People told us as well of the practical barriers in getting to court. For example, Lucille told us that her police officer gave her a \$5 note for travel into court, which she described as 'barely a bus ticket'. She told us that, while she understood 'we don't have all the funds in the world', that being reimbursed \$23 a day for taking a week off work to go to court was 'not going to ... pay the rent'.<sup>40</sup>
- 12.35 Victims Assistance Program providers already have 'brokerage' funding that can be used to meet these practical needs, but many people do not know about this funding as typically people are referred to it after reporting to the police.<sup>41</sup>
- 12.36 Community organisations offer support to people experiencing family violence through 'flexible support packages', introduced as part of the family violence reforms. They provide funding that can be used to address the individual needs of clients.<sup>42</sup> Orange Doors have access to similar 'brokerage' funds.<sup>43</sup>
- 12.37 However, CASAs and other organisations do not have access to similar funds. Some organisations, such as Djirra, have flexible support funding for those who have experienced family violence, but not for clients who have experienced sexual violence outside that context.<sup>44</sup>
- 12.38 Flexible support packages are 'highly regarded by clients' and the family violence sector.<sup>45</sup> Domestic Violence Victoria reports that their introduction statewide has 'revolutionised the nature and timeliness of specialist family violence support' by:
- providing support that is 'tailored in a more responsive and agile way'
  - increasing the 'dignity and choice of victims-survivors when they are rebuilding their lives'
  - improving efficiency within the system because they can prevent cases from escalating and minimise 'client churn'.<sup>46</sup>
- 12.39 Domestic Violence Victoria notes the importance of such packages for people on temporary visas.<sup>47</sup> This group of people has very limited access to mainstream services and supports because of their visa status.

38 Consultation 56 (Cecilia, a victim survivor of sexual assault).

39 Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021).

40 Consultation 54 (Lucille Kent, a victim survivor of sexual assault).

41 Centre for Innovative Justice, RMIT University, *Strengthening Victoria's Victim Support System: Victim Services Review* (Final Report, November 2020) 70, 201 <<https://cij.org.au/cms/wp-content/uploads/2020/11/strengthening-victorias-victim-support-system-victim-services-review-centre-for-innovative-justice-november-2020.pdf>>.

42 Family Safety Victoria, *Family Violence Flexible Support Package Initiative: Summary and Next Steps* (Report, June 2019) <<https://www.vic.gov.au/sites/default/files/2019-06/Flexible%20Support%20Package%20summary%20and%20next%20steps.pdf>>.

43 Victorian Government, *The Orange Door Service Model* (Guide, December 2019) <<http://www.vic.gov.au/orange-door-service-model>>.

44 Submission 9 (Djirra).

45 Family Violence Reform Implementation Monitor, *Report of the Family Violence Reform Implementation Monitor* (Report, 1 November 2020) 69 <<http://www.fvrim.vic.gov.au/fourth-report-parliament-1-november-2020-tabled-may-2021>>.

46 Domestic Violence Victoria, *Monitoring the Family Violence Reforms* (Submission No 121, Family Violence Implementation Monitor, July 2020) 8–9 <[https://www.fvrim.vic.gov.au/sites/default/files/2020-09/Submission%20%23121%20-%20Organisation%20-%20Domestic%20Violence%20Victoria\\_2.PDF](https://www.fvrim.vic.gov.au/sites/default/files/2020-09/Submission%20%23121%20-%20Organisation%20-%20Domestic%20Violence%20Victoria_2.PDF)>.

47 Ibid 9.

- 12.40 People who experience sexual violence often have immediate and practical needs like those who experience family violence. These needs could be met through the Victims Assistance Program, but that is not where many people go for support. We recommend building upon the success of flexible support packages by extending them to those who experience sexual violence so they can be delivered by all organisations supporting them, including CASAs.
- 12.41 This kind of support would help address some of the practical barriers people face in accessing justice, and can help to keep them engaged with the system and see it as a source of support. It can also make people more confident to take part in the criminal justice system.<sup>48</sup>

## Recommendation

- 44 The Victorian Government should make flexible support packages that were introduced as part of family violence reforms available to people who have experienced sexual violence.

## There is a need for continuous support: 'a little bit of light'

Geraldine had a 'brilliant' court support worker [through family violence services] who was consistently there for her throughout her various court experiences. She would email Geraldine before a court hearing and would be there in front of court waiting. She provided practical help as well as emotional support, holding Geraldine's hand while she gave her victim impact statement. 'She was a little bit of light in a very dark place.'<sup>49</sup>

- 12.42 Strengthening the foundation of our support system should be the first step. The next step should be to move towards a model that joins up our support services and our legal systems for victim survivors—a model that means there is always someone bringing in a 'little bit of light'.

## England and Wales have an independent adviser model

- 12.43 In England and Wales, independent sexual violence advisers have been available since 2007. They are usually social workers or counsellors who provide practical and emotional support to people who have experienced sexual violence. Scotland has recently piloted a similar model.<sup>50</sup>

48 Oona Brooks-Hay et al, *Evaluation of the Rape Crisis Scotland National Advocacy Project* (Briefing No 01/2018, Scottish Centre for Crime and Justice Research, January 2018) 3–4 <<https://www.sccjr.ac.uk/publications/evaluation-of-the-rape-crisis-scotland-national-advocacy-project-summary-report-jan-2018/>>; Victims' Commissioner for England and Wales, *Victim Advocates: A Rapid Evidence Assessment* (Report, February 2019) 12 <<https://victimscommissioner.org.uk/published-reviews/victim-advocates-a-rapid-evidence-assessment/>>.

49 Consultation 31 (Geraldine, Deputy Chairperson of the Victim Survivors' Advisory Council).

50 Oona Brooks-Hay et al, *Evaluation of the Rape Crisis Scotland National Advocacy Project* (Briefing No 01/2018, Scottish Centre for Crime and Justice Research, January 2018) <<https://www.sccjr.ac.uk/publications/evaluation-of-the-rape-crisis-scotland-national-advocacy-project-summary-report-jan-2018/>>.

- 12.44 The advisers:
- tailor support to the individual needs of the person they are supporting
  - provide accurate and impartial information to them and their families
  - provide emotional and practical support
  - provide support before, during and after criminal and civil proceedings
  - act as a single point of contact
  - ensure their safety and the safety of their families.<sup>51</sup>
- 12.45 A person does not have to make a police report to access an adviser. However, if a person chooses to report, the adviser supports them through and beyond the criminal justice process. The adviser's role is broad and includes advocating for, educating, liaising for and supporting victim survivors. For example, they can liaise with police and deal with housing issues.<sup>52</sup>
- 12.46 Advisers empower a person to make informed decisions about what to do. They address issues that could cause victim survivors to disengage from support services. They support people in dealing with the disruptions caused to their relationships. They also provide support to families of victim survivors.<sup>53</sup>
- 12.47 These advisers mostly sit within sexual assault referral centres (similar to Victoria's multi-disciplinary centres, a co-located set of services including police) and voluntary rape crisis centres (similar to our CASAs). The Home Office part-funds most roles within these services, although some advisers are funded by services themselves or through other means. An audit found a wide range of different models across England and Wales. It recommended some central oversight and coordinated training and supervision.<sup>54</sup>
- 12.48 There are reforms underway to strengthen this model, including a new fund to expand recruitment, a consultation on setting out their role in legislation, and a national framework of standards, professionalisation and training. The government will also work to address concerns that the role of advisers is 'not always fully understood by wider services and the courts'. There will also be changes to guidance to allow these advisers to better support victim survivors, including at police interviews, and to help them review and challenge requests for information from police and prosecutors.<sup>55</sup>
- 12.49 This model was inspired by a similar model of independent domestic violence advisers. It has since been extended to child and adult trafficking victims.<sup>56</sup> The child trafficking advocate pilot has been positively evaluated, with the service appearing to be 'important in ensuring clarity, coherence and continuity for the child'.<sup>57</sup>

## There are existing advocacy models in Australia

- 12.50 This adviser role is referred to as an 'advocate' in other contexts. This does not mean a legal advocate, but someone who gives information, helps people navigate a range of services and supports, and ensures their rights and entitlements are achieved. Advocates identify barriers to people getting what they need and help remove these barriers if asked to do so.<sup>58</sup>

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51 Home Office (UK), *The Role of the Independent Sexual Violence Adviser: Essential Elements* (Report, September 2017) <<https://www.gov.uk/government/publications/the-role-of-the-independent-sexual-violence-adviser-isva>>.

52 See *ibid*; 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, 324.

53 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, 315, 324.

54 Susan Lea et al, *An Audit of Independent Sexual Violence Advisors (ISVAs) in England and Wales* (Report, February 2015).

55 Ministry of Justice (UK), *The End-to-End Rape Review Report on Findings and Actions* (Consultation Paper No 437, June 2021) [55]–[60] <<https://www.gov.uk/government/publications/end-to-end-rape-review-report-on-findings-and-actions>>.

56 Ravi KS Kohli et al, *Evaluation of Independent Child Trafficking Advocates Trial: Final Report* (Research Report No 86, Home Office UK, 17 December 2015) <<https://www.gov.uk/government/publications/evaluation-of-independent-child-trafficking-advocates-trial-final-report>>; 'UK Victim Navigator Pilot', *Justice and Care* (Web Page, 2018) <<https://justiceandcare.org/uk-victim-navigator-pilot/>>.

57 Ravi KS Kohli et al, *Evaluation of Independent Child Trafficking Advocates Trial: Final Report* (Research Report No 86, Home Office UK, 17 December 2015) 6 <<https://www.gov.uk/government/publications/evaluation-of-independent-child-trafficking-advocates-trial-final-report>>.

58 Victims' Commissioner for England and Wales, *Victim Advocates: A Rapid Evidence Assessment* (Report, February 2019) 1 <<https://victimscommissioner.org.uk/published-reviews/victim-advocates-a-rapid-evidence-assessment/>>.

- 12.51 This broader sense of advocacy is often used, especially in social services, to convey the sense that the role goes beyond advising someone about what they should do and extends to advocating for their best interests. The counsellor advocates in CASAs act as advocates in this broader sense, and we use the term in the same way.
- 12.52 The Child Witness Service also acts as an independent advocate for the child's voices and wishes.<sup>59</sup> However, the service does not include support before charges are laid and its scope of advocacy is narrower because its focus is on supporting a person to give evidence. We heard many comments about the value of the Child Witness Service that echo those for independent advocates.<sup>60</sup>
- 12.53 An intensive support program exists for victims of forced marriage under the Commonwealth's Support for Trafficked Persons Program (see box). The nature of this crime tends to involve complex trauma and often affects migrant and refugee communities.<sup>61</sup>

### Support for Trafficked Persons Program

This program, funded by the Australian Government and delivered by the Australian Red Cross, supports those who have experienced human trafficking, forced labour or forced marriage. When a victim survivor is identified and referred to the Program by the Australian Federal Police, Red Cross undertakes a comprehensive assessment of their strengths and needs. Complex case managers then support and empower them to move on from their experiences.

Case managers support victim survivors to access education and training services, housing, essential items, legal and migration advice, links to community supports, as well as a living allowance and other supports. They also advocate for their clients in a broad way (for example, helping them challenge decisions in Centrelink). They play a support role for clients engaging with the justice system. They advocate for access to things such as witness support services and information about steps taken by the police, as well as ensuring connection to relevant psychological supports.

All clients need to report to police before being referred to the program. People at risk of forced marriage no longer need to engage in a criminal justice process to access longer-term support. However, people referred to the program for other forms of exploitation can only access supports for a limited time without engaging in a criminal justice process.<sup>62</sup>

<sup>59</sup> Consultation 15 (Child Witness Service).

<sup>60</sup> See, eg, Consultation 23 (Sexual Assault Services Victoria Specialist Children's Services).

<sup>61</sup> The program has supported people coming from 48 different countries: Australian Red Cross, *Support for Trafficked People Program—Data Snapshot: 2009 to 2019* (Report, November 2019) 4 <<https://www.redcross.org.au/getmedia/7a957782-a7a1-4b25-97c0-86930dbf0f53/ARC-Support-For-Trafficked-People-Program-Data-Snapshot-2009-to-2019-small.pdf.aspx>>.

<sup>62</sup> Consultation 44 (Red Cross Support for Trafficked Persons Program).

## Independent advocates have value

### As a reform independent advocates are 'hard to beat'

- 12.54 An independent review of the criminal justice system in England and Wales observed that, as 'an example of a reform to a system that is effective, cost-effective and affordable, the establishment of [independent sexual violence advocates] is hard to beat'.<sup>63</sup> Another review identified the model as one of the key reforms that improves support of victims (see box).<sup>64</sup>

#### Findings from a survey of rape survivors in England and Wales

A survey by the Victims' Commissioner for England and Wales found that 'It [the only bright spot of the research] was the praise for independent sexual violence advisers (ISVAs), which were highly valued.

The survey found that 59 per cent of survivors said they felt supported by their support worker, such as an adviser or case worker, during the police investigation. Advisers were also very highly valued, with 65 per cent of 150 respondents rating their adviser as very important as a source of support, ranking only behind a trained counsellor or psychologist. As one gay man said:

'I was lucky. I had an ISVA supporting me from [victims' service organisation] and they took all the pressure off for me and so everything was smooth and plain sailing and stress free. An ISVA is vital – extremely important.'

The report said that support workers and advisers helped victim survivors in chasing for updates. Others said that they would not have been able to go through the process without their adviser.

As discussed below, the report found a link between those who had the support of an ISVA and the progress of their case. Those survivors with an ISVA or other support services were also significantly more likely to agree that rape and sexual offence survivors are fully supported by the police.<sup>65</sup>

- 12.55 The evaluation of a similar model in Scotland also concluded that clients found such support 'invaluable and life-changing'. They valued the information about the criminal justice process, the emotional support, and the range of support, which extended beyond the criminal justice system. The evaluation found, however, that more could be done to improve access before a police report and after a trial.<sup>66</sup>
- 12.56 The Australian Institute of Family Studies has identified a role similar to an adviser as one of the three key reforms that could improve the experience of the justice system for complainants. Participants in that study said that such a role would:
- give them access to a person who was independent from others involved in the criminal justice system and focused solely on their concerns
  - address the confusion about who was responsible for communicating with the complainant (as discussed in Chapter 17)

63 Vivien Stern, *The Stern Review: An Independent Review into How Rape Complaints Are Handled by Public Authorities in England and Wales* (Report, Home Office (UK), 2010) 105.

64 Elaine Wedlock and Jacki Tapley, *What Works in Supporting Victims of Crime: A Rapid Evidence Assessment* (Report, Victims' Commissioner for England and Wales and University of Portsmouth, March 2016) 5 <<https://victimscommissioner.org.uk/published-reviews/what-works-in-supporting-victims-of-crime-a-rapid-evidence-assessment/>>.

65 Julian Molina and Sarah Poppleton, *Rape Survivors and the Criminal Justice System* (Report, 20 October 2020) 7, 26, 42, 56, 59, 64 <<https://victimscommissioner.org.uk/published-reviews/rape-survivors-and-the-criminal-justice-system/>>.

66 Oona Brooks-Hay et al, *Evaluation of the Rape Crisis Scotland National Advocacy Project* (Briefing No 01/2018, Scottish Centre for Crime and Justice Research, January 2018) <<https://www.sccjr.ac.uk/publications/evaluation-of-the-rape-crisis-scotland-national-advocacy-project-summary-report-jan-2018/>>.



- help with the workloads of police and prosecutors in following up with people, especially when cases take so long to progress
  - potentially provide support after the case had ended.<sup>67</sup>
- 12.57 An evaluation of the New Zealand Sexual Violence Pilot Courts made a similar recommendation for an independent person to help navigate services and the legal system for young witnesses.<sup>68</sup>

### Victim advocates are a link between support and justice

- 12.58 These evaluations indicate that independent advocates improve the experiences of those in the justice system. In some cases, their role can be lifesaving.

You know when you're on a low point, and you start thinking to yourself, is it really worth you being here? And you feel like you're banging against a brick wall. Honestly and you can quote me on this, I've told her this to her face: I really do not believe I'd a' been here if it wasn't for [the advocate].<sup>69</sup>

- 12.59 Advocates can improve engagement with the criminal justice system. Their support can enable victim survivors to report to the police. Advocates ease people's fears about court and they can be 'crucial' in helping people if they go to court. They also support them to deal with painful court outcomes.<sup>70</sup>
- 12.60 There is increasing evidence of the value of the English adviser model. This research shows that advocates can make it easier for people to get justice, in the sense of helping them to recover from sexual violence.<sup>71</sup> They can also influence practice and policy within organisations.<sup>72</sup>
- 12.61 A recent review of the case files of over 500 rape cases in England has found a strong link between specialist support and criminal justice outcomes. Cases where a person received support from specialist services were significantly more likely to be deemed a crime, result in charge and almost twice as likely to result in a conviction than cases where a person did not. They were 42 per cent less likely to result in police taking 'no further action' and 49 per cent were less likely to withdraw from the process than people who did not receive specialist support.<sup>73</sup>
- 12.62 A survey by the Victims' Commissioner for England and Wales also found a promising link between support and attrition, with 10 per cent of those receiving support choosing to take no further action or withdrawing support, compared to 20 per cent of those who did not have support (see Figure 17). There is not enough research, however, to indicate that such support makes arrests, prosecutions or convictions more likely than in cases where a person does not receive support.<sup>74</sup>

67 Nicole Bluett-Boyd and Bianca Fileborn, *Victim/Survivor-Focused Justice Responses and Reforms to Criminal Court Practice* (Research Report No 27, Australian Institute of Family Studies (Cth), April 2014) xi–xiii, 46 <<https://aifs.gov.au/publications/victim-survivor-focused-justice-responses-and-reforms-criminal-court-practice>>.

68 Isabel Randell et al, *Young Witnesses in New Zealand's Sexual Violence Pilot Courts* (Report, New Zealand Law Foundation, May 2020) 62 <[https://www.lawfoundation.org.nz/wp-content/uploads/2020/05/2018\\_45\\_10\\_Young-Witnesses-in-NZs-Sexual-Violence-Pilot-Courts-final-research-report-rcvd-7.5.2020.pdf](https://www.lawfoundation.org.nz/wp-content/uploads/2020/05/2018_45_10_Young-Witnesses-in-NZs-Sexual-Violence-Pilot-Courts-final-research-report-rcvd-7.5.2020.pdf)>.

69 Quoted in 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, 318.

70 D Cody Gaines and William Wells, 'Investigators' and Prosecutors' Perceptions of Collaborating with Victim Advocates on Sexual Assault Casework' (2017) 28(6) *Criminal Justice Policy Review* 555, 560–4; 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, 319–21.

71 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, 324–5.

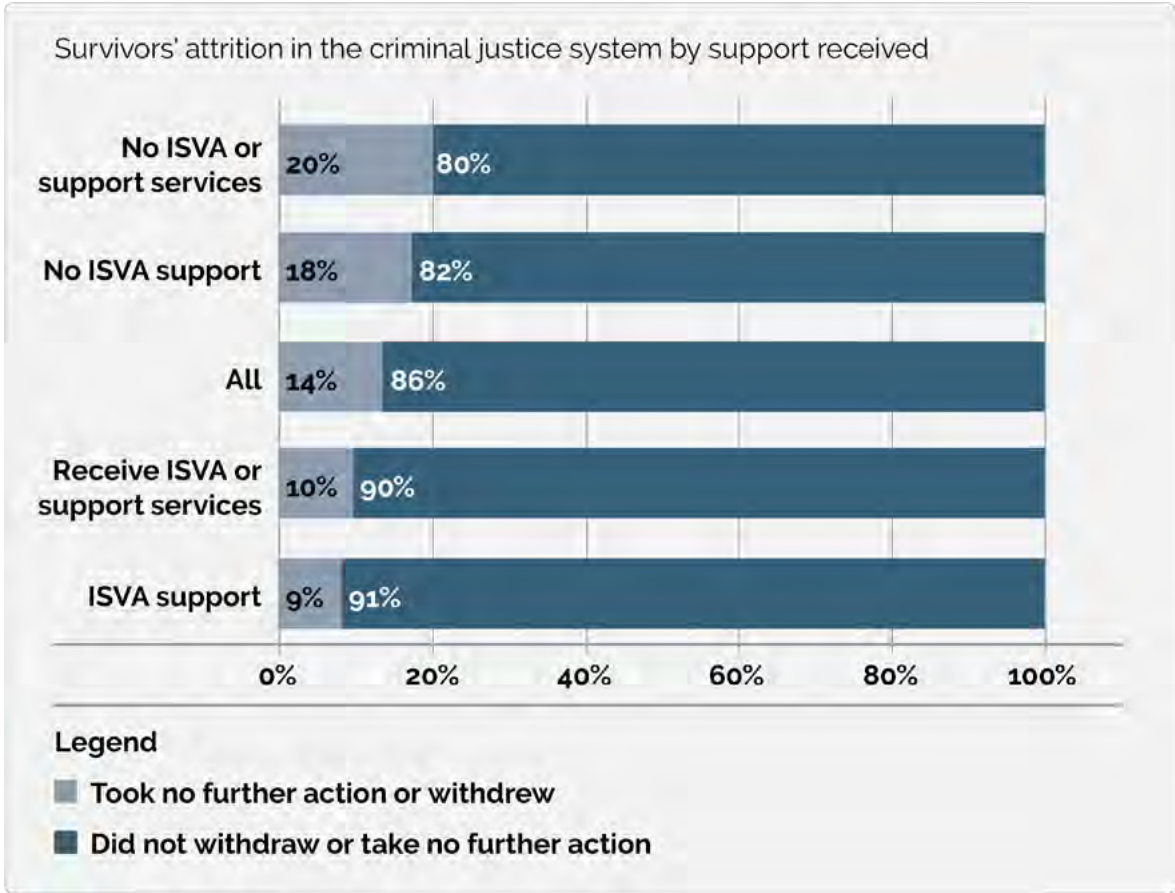
72 Oona Brooks-Hay et al, *Evaluation of the Rape Crisis Scotland National Advocacy Project* (Briefing No 01/2018, Scottish Centre for Crime and Justice Research, January 2018) 4–5 <<https://www.sccjr.ac.uk/publications/evaluation-of-the-rape-crisis-scotland-national-advocacy-project-summary-report-jan-2018/>>.

73 Sarah-Jane Lilley Walker et al, 'Rape, Inequality and the Criminal Justice Response in England: The Importance of Age and Gender' (2021) 21(3) *Criminology & Criminal Justice* 297, 304. The research defined specialist support services as including both independent advisers and Rape Crisis Centres (voluntary organisations similar to our centres against sexual assault).

74 Victims' Commissioner for England and Wales, *Victim Advocates: A Rapid Evidence Assessment* (Report, February 2019) 12–13 <<https://victimscommissioner.org.uk/published-reviews/victim-advocates-a-rapid-evidence-assessment/>>.



Figure 17: The link between support and attrition<sup>75</sup>



- 12.63 There is some evidence in Australia that people supported by independent advocates are retraumatised less often and are less likely to withdraw from the criminal justice process than those who do not receive such support.<sup>76</sup> The limited research in Australia does not identify a link between support and the rates of reporting and conviction. A few overseas studies do identify a link between support and justice outcomes, although it is difficult to rely on these because of the different models and contexts.<sup>77</sup> One study found a significant difference in the number of people reporting to police when they had been supported by advocates through an outreach service for women from culturally and linguistically diverse communities.<sup>78</sup>
- 12.64 There was no change in justice outcomes in Western Australia after adopting a multi-agency model with a child advocate. However, the model improved the experience of the child and the speed of the process.<sup>79</sup> A small Australian case study of people with disability found an advocate had been important to the progression of a case.<sup>80</sup>

75 Julian Molina and Sarah Poppleton, *Rape Survivors and the Criminal Justice System* (Report, 20 October 2020) 42 <<https://victimscommissioner.org.uk/published-reviews/rape-survivors-and-the-criminal-justice-system/>>.

76 Debra Parkinson, *Supporting Victims through the Legal Process: The Role of Sexual Assault Service Providers* (ACSSA Wrap No 8, Australian Institute of Family Studies (Cth), 2010) 6–7 <<http://www.aifs.gov.au/acssa/pubs/wrap/wrap8/index.html>>.

77 See, eg, Natalie Slade, *Literature Review on International Best Court Support Models for Victim-Survivors of Sexual Violence* (Report, Ministry of Social Development (NZ), January 2020) 18–19 <<https://msd.govt.nz/documents/about-msd-and-our-work/publications-resources/literature-reviews/literature-review-on-international-best-court-support-models-for-victim-survivors-of-sexual-violence.pdf>>.

78 Victims' Commissioner for England and Wales, *Victim Advocates: A Rapid Evidence Assessment* (Report, February 2019) 11 <<https://victimscommissioner.org.uk/published-reviews/victim-advocates-a-rapid-evidence-assessment/>>.

79 James Herbert and Leah Bromfield, *Multiagency Investigation & Support Team (MIST) Pilot: Evaluation Report* (Report, Australian Centre for Child Protection, July 2017) 114–15.

80 Margaret Camilleri, 'DisAbled Justice: Why Reports of Sexual Assault Made by Adults with Cognitive Impairment Fail to Proceed through the Justice System' (PhD, University of Ballarat, 2009) 200, 209 <<https://core.ac.uk/reader/212996548>>.

- 12.65 Those on the frontline have observed a link between support and justice. We were told that the Child Witness Service had been important in increasing the sentences given to some people who had been found guilty.<sup>81</sup> The Magistrates' Court of Victoria said the Child Witness Service had made the process fairer and improved the court's ability to manage proceedings.<sup>82</sup>

## There was widespread support for independent advocates

- 12.66 In our issues paper we asked how we could improve support for people experiencing sexual violence and identified the independent sexual violence adviser as a potential model.<sup>83</sup> We heard widespread support for this or a similar model.<sup>84</sup>
- 12.67 The Victims of Crime Commissioner supported the introduction of advisers based on the English model. The Commissioner noted that, while some of the functions of these models were already performed in Victoria, 'it is not clear that these services are integrated in a way that victims have a single point of contact throughout'. In the Commissioner's view, an independent advocate model should:
- act as a 'connector' across both the service and justice system, providing victims of sexual assault with a single point of contact from the point of disclosure through to the completion of the criminal process (if relevant).<sup>85</sup>
- 12.68 The Commissioner noted that such roles could encourage more genuine participation by people who had experienced sexual violence. An adviser could also encourage organisations to comply with their obligations under the *Victims' Charter Act 2006* (Vic), including through encouraging people to complain about breaches of the Victims' Charter Act.<sup>86</sup>
- 12.69 Members of the Victims of Crime Consultative Committee also supported the idea of a victims' advocate as a 'point of contact' who could provide holistic support and 'make you feel as though you're being heard, and your case is important'. Current support services are focused on procedural issues, rather than ensuring the wellbeing of people affected by crime.<sup>87</sup>
- 12.70 Djirra saw value in an independent sexual violence adviser if cultural safety was prioritised. The service would have to be properly funded, co-designed and delivered through a specialist Aboriginal organisation, and supported through meaningful training and clinical supervision.<sup>88</sup>
- 12.71 Djirra emphasised the need for support before and after any court or alternative justice process. The adviser's role should be broad and there should be no pressure for someone to engage with a justice process.<sup>89</sup>
- 12.72 A member of the Safe Pathways to Healing Working Group also supported a specialist advocate model for Aboriginal victims.<sup>90</sup> Similarly, an anonymous member of the Aboriginal community supported the idea of a 'journey walker' who could, for example, help the person to find safe housing when the offender was released. The community member said this would address the 'biggest problem' of who was responsible for each part of the case and make sure the responsible person was accountable to support the victim survivor from start to finish.<sup>91</sup>
- 12.73 Flat Out, which works with women in and outside the prison system, also supported the idea of an independent advocate.<sup>92</sup>

81 Consultation 23 (Sexual Assault Services Victoria Specialist Children's Services).

82 Consultation 71 (Magistrates' Court of Victoria (No 1)).

83 Victorian Law Reform Commission, *Sexual Offences: Key Issues in the Criminal Justice System* (Issue Paper B, October 2020) Question 6.

84 Submissions 7 (Dr Bianca Fileborn, Dr Rachel Loney-Howes, Dr Tully O'Neill and Sophie Hindes), 9 (Djirra); Consultations 56 (Cecilia, a victim survivor of sexual assault), 58 (Victims of Crime Consultative Committee representatives), 77 (Witness J).

85 Submission 45 (Victims of Crime Commissioner).

86 Ibid.

87 Consultation 58 (Victims of Crime Consultative Committee representatives).

88 Submission 9 (Djirra).

89 Ibid.

90 Consultation 29 (Safe Pathways to Healing Working Group (North Metropolitan Aboriginal Sexual Assault Prevention and Healing Advisory Group)).

91 Submission 20 (Anonymous member of Aboriginal community).

92 Consultation 60 (Flat Out).

A lot of the available support systems look fantastic in theory, but in my experience, they are quite disjointed. The whole system is overwhelming ... A year later, I have accumulated so much documentation and so much evidence. Because there hasn't been one centralised support from the start, I've found myself really overwhelmed ...

When you are in trauma mode, you can't even read emails. You need to be able to bounce ideas and thoughts [off] someone – someone who can help you make decisions ...

A victims assistance case manager would be so good – one centralised support person should be provided and available at one location.<sup>93</sup>

- 12.74 There was support from some others who had experienced sexual violence.<sup>94</sup> People who responded to our online form spoke strongly of the need for much greater support. One woman said she would have liked to 'have one body available that would listen and guide me through the process'.<sup>95</sup>
- 12.75 Some people also told us of the lack of support after a criminal process ended. One person told us that after the police had decided there was not enough evidence, she was 'left to find my own way home' and 'felt tossed out by the police'.<sup>96</sup> Deborah told us that she needed a 'proper debriefing after the trial', and 'not just a quick phone conversation where it was difficult to say anything substantive'.<sup>97</sup>

[The] system in general basically wants to hear about an incident and then very quickly turns its back on the person who has gone through the gruelling effort of reporting such horrific experiences. We never hear of people continuing to receive support for years after an incident or anyone from an agency—whether it's the police or otherwise.<sup>98</sup>

- 12.76 Some responses identified risks. Madison, for example, cautioned about the risks of an advocate being dismissive or creating a power imbalance. Instead, the adviser should be a tool to help empower and liberate people who had experienced sexual violence.<sup>99</sup> Similarly, Marie warned that there was a need for intensive training to address the advocate's own views and bias.<sup>100</sup>
- 12.77 Victoria Police saw value in considering a 'dedicated service that aims to support victims as they make the decision to report to police, and through the investigative process'. Ongoing support through the process, by professionals with expertise in justice procedures, could complement existing support by CASA counsellors.<sup>101</sup>
- 12.78 Victoria Police said that such support could put people in a better position to provide detailed police statements or other evidence, which may lead to better court outcomes. It also emphasised that support services needed to be accessible and appropriate for those reporting historical sexual offences, including from communities that face greater barriers to justice.<sup>102</sup>

93 Consultation 63 (A victim survivor of sexual assault, name withheld).

94 See, eg, Consultation 56 (Cecilia, a victim survivor of sexual assault).

95 Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021).

96 Ibid.

97 Consultation 69 (Deborah, a victim survivor of sexual assault).

98 Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021).

99 Submission 37 (Madison).

100 Consultation 64 (Marie (a pseudonym)).

101 Submission 68 (Victoria Police).

102 Ibid.

- 12.79 Several judges of the County Court of Victoria supported investigating the merits of the independent sexual violence adviser model in England and Wales.<sup>103</sup> The Magistrates' Court of Victoria noted that there was currently no support for complainants in summary contested matters. It thought there would be benefit to a properly resourced statewide support service for complainants, although it emphasised that expanding the intermediary scheme should take priority.<sup>104</sup>

### **We recommend moving toward an independent advocate model**

- 12.80 It is very clear that 'joining up' the support for people who experience sexual violence can, for some people, be a form of justice itself. It can make a real difference to their experience of the justice system.<sup>105</sup> It may also make a difference to conventional justice outcomes, although that should not be the main focus of an advocate model.
- 12.81 We recognise that this kind of intensive support would benefit other victims of crime. However, there are reasons that justify more intensive support for those who have experienced sexual violence. These crimes, by their nature, profoundly violate a person's sense of self. The traumatic effects of the crime mean that many will need support to access services and to exercise their rights.
- 12.82 Further, as discussed in Chapter 19, the nature of the criminal justice system makes it especially difficult for people to get justice for the sexual violence they experience. It is difficult for people to report sexual offending and difficult for these crimes to be prosecuted. For these reasons, we consider that a more intensive model of support can be justified for people who have experienced sexual violence.

### **What should be the key features of an independent advocate model?**

- 12.83 We recommend that the Victorian Government move toward a model of single advocates, funded and appropriately trained and skilled, who can provide individualised and holistic support for people who have experienced sexual violence.
- 12.84 The functions of these advocates should include:
- providing information about justice options and general information about legal processes
  - supporting victim survivors to understand and exercise their rights, including their rights to information, and information about the progress of their cases, under the Victims' Charter Act
  - supporting their individual needs, including by identifying any needs and referring them to services
  - liaising with, and advocating for them to, services and legal systems.
- 12.85 We do not propose to design specific models of service delivery. These matters require close consultation and co-design, and are beyond this inquiry.
- 12.86 However, through our research and consultations, we have identified some key principles for any such model. The aim of the advocate should be to empower and liberate the person they are supporting. This is consistent with existing models, including CASA's counsellor advocate model and the Support for Trafficked Persons Program.
- 12.87 It is important that access to an advocate should not be limited to those who engage with the criminal justice system. People should have choice and control, and for many people the criminal justice system will not be the right path. Similarly, access to an advocate should not end after engagement with the criminal justice system stops. Access to support should also not depend on which court a person is attending.

<sup>103</sup> Submission 59 (County Court of Victoria).

<sup>104</sup> Consultation 71 (Magistrates' Court of Victoria (No 1)).

<sup>105</sup> Victims' Commissioner for England and Wales, *Victim Advocates: A Rapid Evidence Assessment* (Report, February 2019) 17–18 <<https://victimscommissioner.org.uk/published-reviews/victim-advocates-a-rapid-evidence-assessment/>>.

- 12.88 The need for support is often greatest for people who also face the greatest barriers in accessing justice. One concern with the English model is that it tends to provide support to those who may face fewer barriers to accessing support, probably because most advisers are located within existing support services.<sup>106</sup>
- 12.89 The design of the model should address this risk by prioritising those who are under-served by existing services and the justice system. These people often also face the most complex interactions between services and systems and therefore need more support in navigating them. We discuss children and people with disability as people to prioritise below.
- 12.90 The model should be built with diverse access points in mind. These will need to be designed with those communities and with people who have experienced sexual violence. We discuss this below.
- 12.91 Another key feature of the model is that the independent advocates will need supervision and specialist training. We should learn from the lessons in England and Wales and ensure that an appropriate body provides oversight of the model. We discuss this in Chapter 22.

### What are the priorities in an independent advocate model?

- 12.92 We recognise that such a model cannot be implemented immediately for everyone. Below, we identify some key priority areas which could provide useful stages as we move towards a model of supporting everyone.

### We should build on Victoria's model of counsellor advocates

- 12.93 The simplest and most effective place to start would be to begin with counsellor advocates within CASAs. They are both counsellors and advocates, who already advocate for their clients across a broad range of services.
- 12.94 Sexual Assault Services Victoria identified two key barriers to fulfilling a broader advocacy role along the English model. First, sexual assault services had previously fulfilled at least part of this role, but as referral and wait times have increased, their ability to fulfill this role has been reduced. Secondly, they needed to be recognised and respected, both formally and in practice, as playing a key role in supporting victim survivors through the justice system.
- 12.95 However, if these barriers could be addressed and sexual assault services resourced, centres against sexual assault would be in an excellent position to fill this role. For example, this could be funded as a stream of the victim support services run by the Department of Justice and Community Safety, similar to the English model.
- 12.96 This new role would need to be formalised. Relationships with existing services (such as the Victims and Witness Assistance Service) would need to be clearly set out, so it is understood who would provide court support and how this would be coordinated.<sup>107</sup> Similarly, the role of the advocate should be clearly defined in relation to investigating and prosecuting agencies.<sup>108</sup> For example, there should be guidance to clarify the limits of the assistance in preparing evidence. In Chapter 4, we recommend that this be done through a multi-agency protocol.

### Children are a priority

- 12.97 We have identified children as a priority group that needs more support because of their age, the effects of sexual violence on their development, and the more complex interactions between services and the legal system.

<sup>106</sup> Amanda L Robinson, *Independent Sexual Violence Advisors: A Process Evaluation* (Final Evaluation Report, Home Office (UK), 24 November 2009) 16 <<http://orca.cf.ac.uk/24241/1/isvareport.pdf>>.

<sup>107</sup> For example, the need for role clarity was identified by some advisers in the UK: *ibid* 39–40.

<sup>108</sup> D Cody Gaines and William Wells, 'Investigators' and Prosecutors' Perceptions of Collaborating with Victim Advocates on Sexual Assault Casework' (2017) 28(6) *Criminal Justice Policy Review* 555, 564–5.



- 12.98 The Commission for Children and Young People strongly encouraged establishing a free support service for children and young people, because of the 'fragmented service system that missed important opportunities to intervene and support some of the most vulnerable children and young people in Victoria'.<sup>109</sup>
- 12.99 The Gatehouse Centre, which provides counselling, advocacy and crisis care for children and young people who have experienced child sexual abuse, strongly supported a model of independent child advocates similar to the English model of independent sexual violence advisers.<sup>110</sup> As well as performing the same functions as independent sexual violence advisers, these advocates could help them prepare for interviews, advocate for an intermediary, and help prosecutors communicate their decisions to children and young people. They could also represent children in the procedure for cross-examination recommended in Chapter 21.
- 12.100 A roundtable focused on children and young people also broadly supported this model. One participant spoke of the value of having someone who was a specialist in the child and their experience and would know their needs, such as how to best communicate with the child. This would reduce the need for the child's story to be retold. It was also noted that the model could address a gap in support for children in non-criminal proceedings, including under the Reportable Conduct Scheme.<sup>111</sup>
- 12.101 Child and family advocates perform similar roles in the child advocacy centres (which are like multi-disciplinary centres) in Western Australia. These advocates provide support from the time a child enters the centre, including through the investigation and criminal process and beyond. They take part in multi-disciplinary care team meetings weekly, which include updates and discussions on the progress of cases.<sup>112</sup> Bravehearts supported a model similar to these child advocacy centres, which are commonly used in the United States, but noted that implementation in Australia was inconsistent and did not reflect best practice.<sup>113</sup>
- 12.102 The New South Wales Ombudsman reported that all agencies involved in Western Australia's model supported the role of the advocate. The police, while 'initially reluctant', were now 'particularly positive'.<sup>114</sup> Evaluations of the Western Australian model have found that caregivers are much more satisfied and there is a high engagement with therapeutic services.<sup>115</sup>
- 12.103 While there is a compelling need for child advocates, the model would have to define clearly the relationship between the child advocate, the Child Witness Service and intermediaries. We consider that this can be achieved through good design.
- 12.104 We note the child advocates in Western Australia work well with the specialist Child Witness Service in that state, and intermediaries are court officers whose role is to help the court rather than to support the child. We also note that the Child Witness Service, intermediaries and others in the support system already work together well.<sup>116</sup>
- 12.105 There are fewer overlaps between services in rural and regional areas, as the Child Witness Service has limited reach in the regions and intermediaries have not yet expanded to the regions (see Chapter 15).

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109 Submission 57 (Commission for Children and Young People (Vic)). See also Commission for Children and Young People (Vic), *Neither Seen nor Heard: Inquiry into Issues of Family Violence in Child Deaths* (Report, December 2016) <<https://ccyp.vic.gov.au/upholding-childrens-rights/systemic-inquiries/neither-seen-nor-heard/>>; Commission for Children and Young People (Vic), *Lost, Not Forgotten: Inquiry into Children Who Died by Suicide and Were Known to Child Protection* (Report, 2019).

110 Submission 14 (Gatehouse Centre, Royal Children's Hospital).

111 Consultation 85 (Roundtable on the experience of children and young people).

112 New South Wales Ombudsman, *The JIRT Partnership—20 Years On* (Report, August 2017) 47–8 <<https://www.ombo.nsw.gov.au/news-and-publications/publications/reports/child-protection/the-jirt-partnership-20-years-on>>.

113 Submission 38 (Bravehearts).

114 New South Wales Ombudsman, *The JIRT Partnership—20 Years On* (Report, August 2017) 47 <<https://www.ombo.nsw.gov.au/news-and-publications/publications/reports/child-protection/the-jirt-partnership-20-years-on>>.

115 James Leslie Herbert and Leah Marie Bromfield, 'A Quasi-Experimental Study of the Multi-Agency Investigation & Support Team (MIST): A Collaborative Response to Child Sexual Abuse' (2021) 111 *Child Abuse and Neglect* 1, 11–12; James Herbert and Leah Bromfield, *Multiagency Investigation & Support Team (MIST) Pilot: Evaluation Report* (Report, Australian Centre for Child Protection, July 2017) 110.

116 Consultation 15 (Child Witness Service).

- 12.106 Another area of need is for children in out-of-home care, who are less likely than other children to have family members, friends or other informal supports.<sup>117</sup> The Law Institute of Victoria in its submission supported a recommendation for an independent advocate made in a previous report by the Commission for Children and Young People.<sup>118</sup>

### People with disability are a priority

- 12.107 As discussed in Chapter 2, people with disability are more likely to experience sexual violence than people without disability but they face many challenges in accessing justice.<sup>119</sup> They are also likely to interact with multiple systems, including disability-specific systems.
- 12.108 For these reasons, advocacy plays a pivotal role in ensuring that their disclosures of sexual violence are taken seriously and acted on, which increases the likelihood of access to justice.<sup>120</sup>
- 12.109 A member of the Victim Survivors' Advisory Council, who identified as a person with disability, spoke of the need for an 'independent advocate' to help with forms and support people with disability throughout the process.<sup>121</sup> The Victorian Advocacy League for Individuals with Disability also identified a need for clear advice about the justice system and a person to provide practical support in courts.<sup>122</sup>
- 12.110 Sexual Assault Services Victoria strongly supported extending a pilot program, Making Rights Reality, which aimed to address the needs of people with disability by enhancing existing services.<sup>123</sup>
- 12.111 The program involved a partnership between a CASA and a volunteer-run student legal clinic in south-east Melbourne. The Office of the Public Advocate trained CASA workers to work with people with disability, including to act as independent third persons (discussed in Chapter 15). Counsellor advocates provided ongoing advocacy and support during any criminal processes.
- 12.112 An evaluation recommended rolling out the program, although it noted the limited data from the pilot, and the need to make the program more visible.<sup>124</sup> It found that one of the most valuable parts of the program was the project worker who could be consulted by counsellor advocates when dealing with cases. The project worker also developed useful Easy English materials.<sup>125</sup>
- 12.113 This program provides a model that could improve access to justice for people with disability.

### The independent advocate model could keep expanding

- 12.114 While starting with the CASAs makes sense, the model should not be confined to these organisations. As we discuss in Chapter 8, people reach out for support in many places.

117 Consultation 65 (Commission for Children and Young People).

118 Submission 40 (Law Institute of Victoria). The advocate model proposed in that report is more limited, and would include presenting the views of the child to an expert placement panel and hearing complaints from children: Commission for Children and Young People (Vic), *...As a Good Parent Would...* (Final Report, August 2015) 110, 117 <<https://ccyp.vic.gov.au/upholding-childrens-rights/systemic-inquiries/as-a-good-parent-would/>>.

119 Jan Breckenridge and Gabrielle Flax, *Service and Support Needs of Specific Population Groups That Have Experienced Child Sexual Abuse: Report for the Royal Commission into Institutional Responses to Child Sexual Abuse* (Report, Gendered Violence Research Network, University of New South Wales, July 2016) 38–9 <<https://apo.org.au/node/67423>>; Law Reform Committee, Parliament of Victoria, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and Their Families and Carers* (Parliamentary Paper No 216, March 2013) 27–8 <<https://www.parliament.vic.gov.au/57th-parliament/lawreform/inquiries/article/1461>>; JaneMaree Maher et al, *Women, Disability and Violence—Barriers to Accessing Justice* (Horizons Research Report No 02/2018, ANROWS Australia's National Research Organisation for Women's Safety, April 2018) <<https://apo.org.au/node/173826>>; Victorian Equal Opportunity and Human Rights Commission, *Beyond Doubt: The Experiences of People with Disabilities Reporting Crime—Research Findings* (Report, July 2014) <<https://www.humanrights.vic.gov.au/resources/beyond-doubt-the-experiences-of-people-with-disabilities-reporting-crime-jul-2014/>>.

120 See, eg, Margaret Camilleri and Cassie Pedersen, *Hear Us: The Experiences of Persons with Complex Communication Needs in Accessing Justice* (Report, Federation University, 2019) 77.

121 Consultation 32 (Anonymous member, Victim Survivors' Advisory Council).

122 Submission 64 (Victorian Advocacy League for Individuals with Disability).

123 Submission 17 (Sexual Assault Services Victoria).

124 Patsie Frawley, *Making Rights Reality* (Final Evaluation Report, La Trobe University, 2014) 33–4.

125 Ibid 10–11.



- 12.115 We see potential for this model to extend to community-specific organisations such as Djirra<sup>126</sup> or through a peer navigator model for LGBTIQ+ people.<sup>127</sup> Similarly, funding could be provided to family violence services and settlement services that work with refugees for similar functions. As noted earlier, there would need to be appropriate clinical supervision and oversight. We discuss who should carry out these functions in Chapter 22.
- 12.116 As with CASAs, the funding could be used in different ways. Some organisations could extend or support existing roles. Some services may find it more effective to pool resources to deal with particular functions. For other organisations, a flexible model could attach funding to the person.<sup>128</sup>
- 12.117 In some areas, the model could build upon existing workers within the Victims Assistance Program (or its replacement). For example, we heard of close collaboration between Koori Engagement Workers funded through the Victims Assistance Program.<sup>129</sup>

## Recommendation

- 45 The Victorian Government should consult on and co-design a model of victim support that uses single advocates to provide continuous support for people who have experienced sexual violence across services and legal systems. These independent advocates should:
- provide information about justice options
  - support them to understand and exercise their rights, including their rights under the *Victims' Charter Act 2006* (Vic)
  - support their individual needs, including through referrals to services
  - liaise with, and advocate for them to, services and legal systems.

The model of an independent advocate should:

- aim to empower those experiencing sexual violence
- enable advocates to provide holistic, individualised and specialised support, including specialised expertise and understanding of working with children and young people
- not depend upon a person's engagement with the criminal justice system
- give priority to people who are under-served and/or who face the most complex interactions between services and systems
- include diverse points of access to such support
- be co-designed with under-served communities and people who have experienced sexual violence
- include support and training for advocates
- include oversight of the scheme.

<sup>126</sup> Submission 9 (Djirra).

<sup>127</sup> Consultation 40 (Roundtable consultation with Transgender Victoria, Bisexual Alliance and Drummond Street Services).

<sup>128</sup> For example, Targeted Care Packages fund transitions for children and young people out of residential care but attach the funding to the person, with a 'key worker' typically funded as part of that package: Department of Health and Human Services (Vic), *Targeted Care Packages* (Implementation Manual, January 2020) 9–10 <<https://fac.dhhs.vic.gov.au/tcp-implementation-manual>>.

<sup>129</sup> Consultation 67 (Loddon Mallee Regional Aboriginal Justice Advisory Committee).

## Victim survivors need legal advice and representation

### There is a gap in legal assistance

- 12.118 People who experience sexual violence need to understand their legal rights and options so that they can exercise them. As Dr Kerstin Braun submitted:
- It is important to note that victims of sexual offences in Victorian criminal proceedings mainly act alone and frequently may not be aware of the rights already available to them .... Consequently, although victims' rights in Victoria may exist on paper many victims may not or only sparingly exercise them in practice. The large number of different laws and policies relating to victims in general and particularly to victims of sexual offences may make it extremely difficult for a lay person to identify what their rights are and how to exercise them.<sup>130</sup>
- 12.119 As noted above, a Victims Legal Service was announced by the Victorian Government in May 2021 'to provide critical support during criminal proceedings'.<sup>131</sup> However, the scope of this service is not yet clear.
- 12.120 We have previously recommended a legal service for victims of violent indictable crime.<sup>132</sup> A victims' legal service was also recommended in the Victim Services Review, although the models differed.<sup>133</sup> Other inquiries have also identified the need for legal assistance in areas such as victims' compensation,<sup>134</sup> and compensation and restitution matters.<sup>135</sup>
- 12.121 The model proposed by the Victim Services Review would provide legal advice for victims of crime against the person and high-impact crimes that could not be met by other funded legal services. It recommended that legal advice should be available not only in relation to the criminal proceedings, but also intersecting areas of the law.
- 12.122 The model we proposed in 2016 was for a legal service that focused on the 'substantive legal entitlements' of victims. This referred to times during a trial when victims had the power to decide to exercise an entitlement under law independently of the prosecution. In those cases, it would not be appropriate to rely on the prosecution to give legal advice or assistance, because of potential conflicts between the interests of complainants and the public interest.<sup>136</sup>
- 12.123 For example, complainants in sexual offence cases have rights to:
- object to requests to produce their confidential communications, such as counselling records (discussed in Chapter 21)
  - object to evidence of their previous sexual history being discussed (see Chapter 21)
  - object to being compelled to give evidence if they are a spouse, partner, parent or child of an accused person in a criminal proceeding<sup>137</sup>

<sup>130</sup> Submission 2 (Dr Kerstin Braun).

<sup>131</sup> Victorian Government, 'Keeping Women and Children Safe', *Victorian Budget 21/22* (Web Page, 20 May 2021) <<http://www.budget.vic.gov.au/keeping-women-and-children-safe>>.

<sup>132</sup> Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) Recommendation 23.

<sup>133</sup> Centre for Innovative Justice, RMIT University, *Strengthening Victoria's Victim Support System: Victim Services Review* (Final Report, November 2020) 147–155 <<https://cij.org.au/cms/wp-content/uploads/2020/11/strengthening-victorias-victim-support-system-victim-services-review-centre-for-innovative-justice-november-2020.pdf>>.

<sup>134</sup> A case-management function was included as part of the proposal for a reformed victims of crime compensation scheme: Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996* (Report No 36, July 2018) Recommendation 16.

<sup>135</sup> Sentencing Advisory Council (Vic), *Restitution and Compensation Orders* (Report, 25 October 2018) Recommendation 8 <<https://www.sentencingcouncil.vic.gov.au/publications/restitution-and-compensation-orders-report>>. The Coronial Council has also recommended a victims' service for families involved in coronial processes: Coronial Council of Victoria, *Coronial Council Appeals Review* (Report, November 2017) Recommendation 6 <<https://engage.vic.gov.au/coronialappeals>>.

<sup>136</sup> Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 122–3 [6.95]–[6.103], Recommendation 23. The recommendation also extended to asserting a human right or protecting vulnerable people, in exceptional circumstances.

<sup>137</sup> *Evidence Act 2008* (Vic) s 18. The person is not required to give evidence if a court finds that the likelihood of harm to the relationship between the person and the accused outweighs the desirability of having the evidence given.

- object to giving evidence that may tend to prove that they have committed an offence or are liable for a civil penalty (the privilege against self-incrimination)<sup>138</sup>
  - apply for an order for compensation against the offender following a guilty finding.<sup>139</sup>
- 12.124 We also recommended in 2016 that victims of crime should be entitled to request a restorative justice conference as part of the sentencing or compensation and restitution order process and that, if implemented, the legal service should also be available to advise on this entitlement.<sup>140</sup> This recommendation was not implemented. In Chapter 9, we recommend a restorative justice scheme that should be available in these circumstances, among others.
- 12.125 We recommended that the legal service should be modelled on the Sexual Assault Communications Privilege Service at Legal Aid NSW,<sup>141</sup> which provides legal advice and representation for complainants in sexual offence cases in relation to requests to produce confidential communications. Queensland established a similar legal service in December 2017.<sup>142</sup>
- 12.126 We heard in this inquiry that people's entitlements to protection of confidential communications and their sexual history are still not being fulfilled.<sup>143</sup> For example, the Gatehouse Centre (a counselling service that works with children) told us that while it regularly challenged applications to produce counselling records, it was 'concerned that vulnerable families and less well-resourced support agencies submit to such applications because they lack the knowledge and wherewithal to assert their rights'.<sup>144</sup> (See Chapter 21.)
- 12.127 We also heard that children were not being given effective legal advice about giving evidence against their parents or the privilege against self-incrimination. When they were given legal advice pro bono, this was usually given too late. They may also need to be given such advice more than once for them to understand it. The Child Witness Service estimated around 400 child witnesses may need such legal advice.<sup>145</sup>
- 12.128 The County Court of Victoria also suggested a need to consider independent legal representation for cases where subpoenas were filed requesting a complainant's personal information, such as bank records (see Chapter 21).<sup>146</sup>
- 12.129 Several submissions to this inquiry repeated their support for a dedicated victims legal service, including Victoria Legal Aid and the Victims of Crime Commissioner.<sup>147</sup> Springvale Monash Legal Service told us that community legal services are well placed to offer dedicated and holistic legal support.<sup>148</sup>
- 12.130 For the reasons explained in our review of the role of victims of crime, there continues to be a real need for an independent legal service for victims so that their entitlements in law can be exercised in practice. This is reflected in the recommendation at the end of this chapter.

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138 Ibid s 128. The court must determine whether the person has reasonable grounds for this belief, and it can only require the witness to give evidence if satisfied the evidence is not likely to incriminate the person. If so, the person must be given a certificate that can be used to prevent the evidence being used in any other proceeding, other than for proceedings in respect of the falsity of the evidence.

139 *Sentencing Act 1991* (Vic) s 85B. See also Submission 14 (Gatehouse Centre, Royal Children's Hospital).

140 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 122 [6.g6], Recommendations 23, 32.

141 Ibid Recommendation 23.

142 'Sexual Assault Counselling Privilege (Counselling Notes Protect)', *Legal Aid Queensland* (Web Page, 2020) <<https://www.legalaid.qld.gov.au/About-us/Policies-and-procedures/Grants-Handbook/What-do-we-fund/Civil-law/Sexual-Assault-Counselling-Privilege-Counselling-Notes-Protect>>; *Evidence Act 1977* (Qld) Div 2A.

143 The research is discussed by Submission 23 (Dr Mary Iliadis).

144 Submission 14 (Gatehouse Centre, Royal Children's Hospital).

145 Consultation 15 (Child Witness Service).

146 Submission 59 (County Court of Victoria).

147 Submissions 27 (Victoria Legal Aid), 45 (Victims of Crime Commissioner).

148 Submission 55 (Springvale Monash Legal Service).

## There is a need for separate legal representation for victim survivors

### There was support for legal representation

- 12.131 Several submissions called for complainants in sexual offence cases to have separate legal representation. This would extend beyond legal advice to representation in court.
- 12.132 The Victims of Crime Commissioner recommended that there should be a right to an independent lawyer to represent the rights and interests of complainants at key stages of the criminal justice process, including in relation to:
- applications to subpoena, access or use confidential medical or counselling records
  - applications to be cross-examined on, or admit evidence about, the sexual activities of the complainant
  - access and eligibility for the intermediary scheme
  - special protections and alternative arrangements for giving evidence.<sup>149</sup>
- 12.133 Dr Mary Iliadis recommended that separate legal representation should be introduced in defined contexts to protect complainants' sensitive third-party evidence, including evidence of their previous sexual history, medical and counselling records and digital communications.<sup>150</sup>
- 12.134 The Victims of Crime Commissioner recommended extending this to cross-examinations.<sup>151</sup> Dr Kerstin Braun made a similar recommendation that a representative should be able to object to inadmissible questions during cross-examination.<sup>152</sup>
- 12.135 We also heard from people who had experienced sexual violence who felt that providing them with a lawyer from the start would reduce power imbalances.<sup>153</sup>
- 12.136 These submissions argued that the benefits of independent legal representation for complainants included:
- giving them a sense of having 'rights, legitimacy and identity' in the justice process<sup>154</sup>
  - enabling them to be more involved in the criminal justice process<sup>155</sup>
  - helping to reduce their anxiety and potentially encourage reporting and reduce attrition<sup>156</sup>
  - ensuring that complainants are provided with the information they need<sup>157</sup>
  - improving the quality of testimony by providing support during cross-examination<sup>158</sup>
  - acting as a check on other actors in the criminal justice process by, for example, identifying gaps in the information provided and encouraging everyone to take the complainant more seriously<sup>159</sup>
  - protecting against inadmissible and inappropriate questions being asked.<sup>160</sup>

149 Submission 45 (Victims of Crime Commissioner).

150 Submission 23 (Dr Mary Iliadis). See also Mary Iliadis, 'The Prospect of ILR for Sexual Assault Victims within Victoria's Criminal Prosecution Process' in *Adversarial Justice and Victims' Rights* (Routledge, 2020) 126; Mary Iliadis, Kate Fitz-Gibbon and Sandra Walklate, 'Improving Justice Responses for Victims of Intimate Partner Violence: Examining the Merits of the Provision of Independent Legal Representation' (2019) 45(1) *International Journal of Comparative and Applied Criminal Justice* 105.

151 Submission 45 (Victims of Crime Commissioner).

152 Submission 2 (Dr Kerstin Braun). See also Kerstin Braun, 'Legal Representation for Sexual Assault Victims—Possibilities for Law Reform?' (2014) 25(3) *Current Issues in Criminal Justice* 819.

153 Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021).

154 Submission 2 (Dr Kerstin Braun).

155 Submission 62 (Shine Lawyers (on behalf of Ms Kim Elzaibak)).

156 Submissions 2 (Dr Kerstin Braun), 23 (Dr Mary Iliadis).

157 Submission 2 (Dr Kerstin Braun).

158 Ibid.

159 Ibid.

160 Ibid.

## There is a trend towards separate legal representation

- 12.137 There is a growing literature investigating the value of legal representation for victim survivors of sexual offences ('separate legal representation').<sup>161</sup> While traditionally separate legal representation has been more common in countries with civil law systems,<sup>162</sup> it is also increasingly used in common law systems for complainants in cases involving sexual offences. A recent review in Northern Ireland (the Gillen Review) identified the following examples:
- In Ireland, the complainant has a right to separate representation in relation to an application by a defendant to introduce evidence about the complainant's previous sexual history, with state-funded legal advice available for the application itself, and also more recently for applications for counselling records.
  - In Scotland, courts have established a complainant's right to legal aid to object to disclosure of their medical records.
  - In various states in the United States, legal representation is available for applications to introduce sexual history evidence.
  - In Canada, some provinces provide legal representation for third-party disclosure applications and legislation was introduced in 2017 to provide a right to legal representation for proceedings in relation to confidential communications.<sup>163</sup>
- 12.138 The chief concern about introducing separate lawyers in common law jurisdictions has been how such a role would fit within the adversarial system, including the right to a fair trial. For example, there are concerns about the right of such a representative to cross-examine other witnesses and the accused, and to access privileged documents.<sup>164</sup>
- 12.139 Dr Mary Iliadis argues that these concerns do not apply if separate legal representation is confined to 'specific matters of evidence and procedure that interfere with the privacy and interests of victims'.<sup>165</sup> This would be consistent with the common law trend. This would also help realise the protection of the privacy interests of complainants, including under the Victorian Charter of Human Rights.<sup>166</sup>
- 12.140 Two recent innovations draw such a line. For example, lawyers in a pilot program for sexual violence complainants' advocates in Northumbria, England:
- advise on the reporting process
  - attend police interviews to ensure police follow procedures and victims are aware of their options
  - protect their privacy rights during the investigation and disclosure
  - act in their best interests in relation to the right to cross-examination on sexual history.<sup>167</sup>

<sup>161</sup> This is also called independent legal representation. See, eg, Kelly Alison Behre, 'Ensuring Choice and Voice for Campus Sexual Assault Victims: A Call for Victims' Attorneys' (2017) 65 *Drake Law Review* 293; Kerstin Braun, 'Legal Representation for Sexual Assault Victims—Possibilities for Law Reform?' (2014) 25(3) *Current Issues in Criminal Justice* 819; Mary Iliadis, 'The Prospect of ILR for Sexual Assault Victims within Victoria's Criminal Prosecution Process' in *Adversarial Justice and Victims' Rights* (Routledge, 2020) 126; Mary Iliadis, Kate Fitz-Gibbon and Sandra Walklate, 'Improving Justice Responses for Victims of Intimate Partner Violence: Examining the Merits of the Provision of Independent Legal Representation' (2019) 45(1) *International Journal of Comparative and Applied Criminal Justice* 105; Fiona E Raitt, *Independent Legal Representation for Complainers in Sexual Offence Trials* (Research Report, Rape Crisis Scotland, 2010).

<sup>162</sup> For example, there are well-established schemes in Denmark, Sweden and Germany. These are discussed in Submission 2 (Dr Kerstin Braun).

<sup>163</sup> John Gillen, *Gillen Review: Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (Report, 9 May 2019) 167–9, 171 <<https://www.justice-ni.gov.uk/sites/default/files/publications/justice/gillen-report-may-2019.pdf>>.

<sup>164</sup> Submissions 2 (Dr Kerstin Braun), 23 (Dr Mary Iliadis); Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016).

<sup>165</sup> Submission 23 (Dr Mary Iliadis).

<sup>166</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 13. See generally Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 200 [8.126]–[8.130].

<sup>167</sup> Olivia Smith and Ellen Daly, *Evaluation of the Sexual Violence Complainants' Advocate Scheme* (Final Report, December 2020) 43–5 <<http://www.northumbria-pcc.gov.uk/v2/wp-content/uploads/2020/12/SVCA-Evaluation-Final-Report-2.pdf>>. The pilot ran from September 2018 to December 2019; Ministry of Justice (UK), *The End-to-End Rape Review Report on Findings and Actions* (Consultation Paper No 437, June 2021) [61] <<https://www.gov.uk/government/publications/end-to-end-rape-review-report-on-findings-and-actions>>.

- 12.141 These lawyers attended the trial as a 'silent party' to ensure sexual history evidence is not introduced unless allowed. A recent evaluation has been positive about this pilot.<sup>168</sup> The United Kingdom Government has committed to taking key lessons from this pilot to design and test a model of enhanced support and access to legal advice.<sup>169</sup>
- 12.142 In Northern Ireland, a pilot scheme has begun to implement the recommendations of the Gillen Review. The Review recommended a scheme for legal advocates that would provide legal advice from the time the matter is first reported to the police up until, but not including trial, for a limited number of hours. This would include appearances at a cross-examination discussion (discussed in Chapter 21), so the legal advocate could challenge the appropriateness of intended questioning and uphold the complainant's rights to dignified and respectful treatment. The Gillen Review found that this would be cost-effective.<sup>170</sup>

### **We recommend a pilot scheme for separate legal representation**

- 12.143 In addition to our 2016 recommendation for an independent legal service, we consider it is time to pilot a scheme of separate lawyers for complainants in sexual offence cases. Consistently with our previous recommendation, this would focus on the substantive legal entitlements of complainants, and their rights to privacy and dignified treatment. Separate legal representation would go a long way to make sure their rights and entitlements are realised in practice.
- 12.144 Legal representation that focuses on the substantive legal entitlements of complainants provides a way to strike the balance between a fair trial and protecting the rights of victims. Models in Australia and overseas indicate this balance can be struck fairly.
- 12.145 Most of these rights and interests are dealt with before the trial, in applications to introduce evidence, or in the case of compensation, after the trial. Practices adopted during COVID-19 also show that many pre-trial applications can be conducted without a hearing in court. This would further reduce the risk and the costs.
- 12.146 Our recommendation follows the approach adopted by the Gillen Review, and recommends legal advice and representation up to the point of trial. We have not recommended at this stage extending this to allow them to object during cross-examination.
- 12.147 Allowing for lawyers to be present during a trial raises complex issues, including:
- how this role fits within the adversarial system with two parties, the prosecutor and the accused
  - it may appear to elevate private interests so that they are equal to that of the state
  - potentially confusing the jury, especially if there were multiple complainants
  - the risk of 'complicat[ing] an already complex process' and prolonging the trial
  - the costs of funding a legal representative to attend trials.<sup>171</sup>
- 12.148 Further, in Chapter 18, we recommend greater specialisation of defence lawyers to minimise improper questioning happening. In Chapter 21, we address the need for judges to use their powers to prevent improper questioning, including through a process to plan more effectively for a complainant's participation at trial. The issues a complainant wishes to raise can be dealt with efficiently during this process, with the input of the complainant's legal representative.

168 Olivia Smith and Ellen Daly, *Evaluation of the Sexual Violence Complainants' Advocate Scheme* (Final Report, December 2020) 8 <<http://www.northumbria-pcc.gov.uk/v2/wp-content/uploads/2020/12/SVCA-Evaluation-Final-Report-2.pdf>>.

169 Ministry of Justice (UK), *The End-to-End Rape Review Report on Findings and Actions* (Consultation Paper No 437, June 2021) [61] <<https://www.gov.uk/government/publications/end-to-end-rape-review-report-on-findings-and-actions>>.

170 John Gillen, *Gillen Review: Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (Report, 9 May 2019) ch 5 <<https://www.justice-ni.gov.uk/sites/default/files/publications/justice/gillen-report-may-2019.pdf>>.

171 Ibid [5.103].



- 12.149 This also follows the model proposed in the Gillen Review. However, the option of attending as a 'silent party' could be explored in the design of the pilot. The design of the pilot should also consider the legal or ethical obligations of the legal representative, such as whether they would have a duty to disclose material relevant to the case. The evaluation of the pilot should consider the merits of the legal representative participating in the cross-examination of the complainant.
- 12.150 We recommend extending the role of counsellor advocates to providing support at trials. This would partly address the need for support during cross-examination, without introducing another lawyer into the process.
- 12.151 While we do not recommend that the legal representative should have a role at trial, the same concerns about confusion of roles do not apply to related hearings addressing substantive entitlements, such as applications for compensation orders after a trial. We therefore recommend that the legal representative should also be available in such hearings.
- 12.152 To clarify the relationship between the victim's representative and the prosecutor, we recommend in Chapter 4 that their respective roles be clearly set out as part of the multi-agency protocol recommended in that chapter. This should include guidance on how the prosecutor and representative will work together to address issues at cross-examination such as improper questioning.
- 12.153 The pilot should establish a scheme with the same lawyer providing legal advice and representation if needed. This would mean that there is no need to establish a separate scheme for representation in court. The new Victims Legal Service could be extended to provide such support.
- 12.154 This follows the model in New South Wales, where Legal Aid NSW's service for sexual assault privilege represents the victim survivor in hearings if needed. This would be more efficient and consistent with the principle of continuity of support recommended in this chapter.
- 12.155 Our recommendation identifies the rights and interests that should be included within the program. This includes entitlements and interests that would flow from other recommendations in this report, such as advice on the implications of taking part in restorative justice and referrals when applying for compensation or restitution orders (see Chapters 9 and 10).

## Recommendation

- 46 The Victorian Government should fund legal advice and, where necessary, representation until the point of trial and in related hearings, to ensure victim survivors can exercise their rights and protect their interests, including:
- their rights and privileges in relation to evidence (for example, the confidential communication privilege, alternative arrangements and special protections, access to intermediaries)
  - their rights to privacy in relation to disclosures of personal information (for example, information about their sexual history, the nature of cross-examination, or suppression orders)
  - their options for compensation, including under the *Sentencing Act 1991* (Vic), victims of crime compensation, and civil or other compensation schemes
  - the implications of taking part in restorative justice and referrals to restorative justice when applying for compensation or restitution orders.



# CHAPTER 13

## Preventing sexual offending

270 Overview

270 Preventing sexual violence must be a part of the picture

271 What do we know about sexual offending?

272 Early intervention could prevent sexual violence

278 Support for diversion for young people and others

279 Better reintegration support could prevent sexual violence

282 The Register of Sex Offenders still needs reform

## 13. Preventing sexual offending

### Overview

- To respond effectively to sexual violence, we need to focus on perpetration.
- An ideal response would stop sexual violence before it happens or stop it continuing.
- We need to intervene early to stop people from offending, in a safe and coordinated way. In future we must consider programs to divert people from the criminal justice system.
- We also need to prevent reoffending. We must support people who have committed sexual offences to return to the community with adequate reintegration programs. We recommend a stronger focus on reintegration in Victoria. There should be a trial of Circles of Support and Accountability.
- The sex offender registration regime does not work effectively. The government should adopt our past recommendations on sex offender registration. Registration of sex offenders needs to be more focused and effective.

### Preventing sexual violence must be a part of the picture

- 13.1 Previous reforms to the justice system, and the way it deals with sexual violence, have often focused on victim survivors and the legal system. They have tried to make reporting easier and going to court less traumatic. But sexual violence is a problem of behaviour. A clear focus on stopping this behaviour is important to an effective justice system response.
- 13.2 The focus on perpetrator interventions is growing and is now seen as critical to addressing family and sexual violence. The National Plan to Reduce Violence against Women and their Children 2010–2022 recognised that a 'holistic approach to working with perpetrators' is important.<sup>1</sup> In Victoria, the Expert Advisory Committee on Perpetrator Interventions stressed the need to 'shift the burden away from victim survivors who have had to bear responsibility for action for far too long'.<sup>2</sup>
- 13.3 We agree that reforms to the justice system should also focus on:
- interventions to stop sexual violence from happening
  - the actions of people who commit sexual violence.

<sup>1</sup> Commonwealth of Australia, *Fourth Action Plan—National Plan to Reduce Violence against Women and Their Children 2010–2022* (Policy, 2019) 18 <<https://www.dss.gov.au/women-publications-articles-reducing-violence/fourth-action-plan>>.

<sup>2</sup> Victorian Government, *Expert Advisory Committee on Perpetrator Interventions* (Final Report, 2018) 3 <<https://nla.gov.au/nla.obj-2942345725/view>>. The Expert Advisory Committee was established following the recommendations of the Royal Commission into Family Violence: *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016) Recommendation 86 <<http://rcfv.archive.royalcommission.vic.gov.au/Report-Recommendations.html>>.

- 13.4 This new focus might enable people to seek help for their behaviour. This would shift the burden to report from victim survivors. For some victim survivors, having the person responsible for sexual violence go through treatment might be a form of justice.<sup>3</sup>
- 13.5 We have been told there is a need for better developed, funded and tailored perpetrator interventions. This feedback came from sexual assault services, criminal justice actors and services supporting people who have offended:
- There are numerous examples, around the world, where communities take a more proactive approach to prevention, early intervention, and offender rehabilitation and community reintegration ... None of these initiatives, with all the potential community safety benefits they bring, is present here.<sup>4</sup>
- 13.6 In this chapter, we propose reforms to support a 'continuum' of options for preventing sexual violence—from early intervention to reintegration and sex offender registration.<sup>5</sup> Victoria needs an approach to sexual violence as comprehensive as the one recommended for family violence by the Royal Commission into Family Violence.<sup>6</sup>
- 13.7 Our recommendations reflect our broad focus on responses to offending behaviour. We do not discuss correctional policy and practice in detail, or sentencing.<sup>7</sup> In Chapter 15, we make recommendations to support people accused of sexual offences to receive a fair trial (for example, by providing them with an intermediary).

## What do we know about sexual offending?

- 13.8 Rates of reporting are low for sexual violence. There are gaps in the data and our picture of sexual offending is incomplete (see Chapters 6 and 7). In short, we do not know how common sexual violence is. Research is largely based on offenders who have had contact with the criminal justice system—but they are just a small fraction of those who perpetrate sexual violence.<sup>8</sup> We discuss the need for more research on sexual offending in Chapter 6.
- 13.9 What we do know is that people convicted of sexual offences are diverse. They are different in their behaviour, traits and needs.<sup>9</sup> They are mostly male and mostly known to their victims (for example, a partner or a parental figure) (see Chapter 2).

3 Consultation 23 (Sexual Assault Services Victoria Specialist Children's Services); Haley Clark, "What Is the Justice System Willing to Offer?" *Understanding Sexual Assault Victim/Survivors' Criminal Justice Needs* (2010) 85 *Family Matters* 28, 30.

4 Submission 44 (Dr Patrick Tidmarsh and Dr Gemma Hamilton).

5 Focusing on the value of restorative approaches, the Jesuit Social Services stated that a 'continuum of responses is critical, including preventative programs and targeted post-sentence/post-prison support services, as well as carefully implemented restorative justice programs': Submission 24 (Jesuit Social Services).

6 See especially *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016) Recommendations 85–93 <<http://rcfv.archive.royalcommission.vic.gov.au/Report-Recommendations.html>>.

7 For example, the Victorian Aboriginal Legal Service made important proposals about Aboriginal Community Justice Reports (which provide the sentencing judge with a more comprehensive account of someone's background and situation and community-based alternatives) and the Spent Convictions scheme (including that it should not exclude sexual offences and about any waiting periods): Submission 67 (Victorian Aboriginal Legal Service). See also Submission 21 (Victorian Aboriginal Child Care Agency) which supports 'alternative sentencing measures ... for Aboriginal peoples with the purpose of addressing underlying disadvantages and traumas caused by colonisation and legacies of child removal policies'.

8 Antonia Quadara, 'The Everydayness of Rape: How Understanding Sexual Assault Perpetration Can Inform Prevention Efforts' in Nicola Henry and Anastasia Powell (eds), *Preventing Sexual Violence: Interdisciplinary Approaches to Overcoming a Rape Culture* (Palgrave Macmillan UK, 2014) 41, 42.

9 See, eg, Andrew Day, Elli Darwinkel and James Vess, 'The Characteristics of Registered Sexual Offenders in an Australian Jurisdiction' (2017) 14(2) *Journal of Investigative Psychology and Offender Profiling* 120, 1–3; Antonia Quadara et al, *Conceptualising the Prevention of Child Sexual Abuse* (Research Report No 33, Australian Institute of Family Studies (Cth), 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* (Parts VII to X and Appendices, 2017) 363.

- 13.10 There are many explanations for why people commit sexual offences. These include social causes (for example, gender inequality), individual factors (such as problems with empathy) and the environment the person is in (such as whether there is an opportunity to offend).<sup>10</sup>
- 13.11 People who are convicted of sexual offences generally have a low rate of reoffending.<sup>11</sup> But some are more likely to reoffend than others.<sup>12</sup>

## Early intervention could prevent sexual violence

### What is early intervention?

- 13.12 Early intervention programs support or treat someone who may offend—such as a person who has thought of offending, but has not done so. People can identify themselves as needing help, or other people might identify that they are at risk of offending.
- 13.13 Early intervention programs are important. Also called 'secondary prevention', they may prevent sexual offending before it happens.<sup>13</sup>
- 13.14 They are different to diversion (where someone receives support or treatment after they have offended) or primary prevention (which is often about changing attitudes using education).

#### Examples of early intervention programs

*Stop it Now!* is a confidential helpline and a website for people worried about committing child sexual abuse, or concerned about the potential offending of others. Callers are given information and support, a plan to help ensure they do not offend, short-term support and referrals to specialist services for ongoing support if they want. Sometimes the program includes primary prevention programs. It operates in the United States of America, the United Kingdom and Ireland and the Netherlands. A version of the program operated for about 10 years in Bundaberg, Queensland.<sup>14</sup>

*Prevention Project Dunkelfeld* is a German program that offers voluntary and confidential face-to-face treatment for people who are worried about their sexual interest in children. It provides year-long medical and psychological support to prevent sexual offending behaviour.<sup>15</sup>

*Men's Behaviour Change Programs* in the community can also address some sexual violence, given the overlap between family violence and sexual violence.

10 Antonia Quadara, 'The Everydayness of Rape: How Understanding Sexual Assault Perpetration Can Inform Prevention Efforts' in Nicola Henry and Anastasia Powell (eds), *Preventing Sexual Violence: Interdisciplinary Approaches to Overcoming a Rape Culture* (Palgrave Macmillan UK, 2014) 41, 43, 45, 54.

11 Erin Mackay et al, *Perpetrator Interventions in Australia: Part One—Literature Review* (State of Knowledge Paper Issue PP01, ANROWS Australia's National Research Organisation for Women's Safety, November 2015) 37 <<https://www.anrows.org.au/publication/perpetrator-interventions-in-australia/>>; Antonia Quadara, 'The Everydayness of Rape: How Understanding Sexual Assault Perpetration Can Inform Prevention Efforts' in Nicola Henry and Anastasia Powell (eds), *Preventing Sexual Violence: Interdisciplinary Approaches to Overcoming a Rape Culture* (Palgrave Macmillan UK, 2014) 41, 55.

12 Victorian Law Reform Commission, *Sex Offenders Registration* (Report No 23, April 2012) [4.45]–[4.47] <<https://www.lawreform.vic.gov.au/project/sex-offenders-registration/>>.

13 Commonwealth of Australia, *Fourth Action Plan—National Plan to Reduce Violence against Women and Their Children 2010–2022* (Policy, 2019) 4 <<https://www.dss.gov.au/women-publications-articles-reducing-violence/fourth-action-plan>>.

14 Jesuit Social Services, *Stop It Now! A Scoping Study on Implementation in Australia* (Report, January 2019) 4–8, 16, 19–20 <<https://jss.org.au/wp-content/uploads/2019/07/Stop-It-Now.pdf>>. See also *Royal Commission into Institutional Responses to Child Sexual Abuse: Final Report* (Report, December 2017) vol 6, 93 <<https://www.childabuseroyalcommission.gov.au/final-report>>.

15 *Royal Commission into Institutional Responses to Child Sexual Abuse: Final Report* (Report, December 2017) vol 6, 97–8 <<https://www.childabuseroyalcommission.gov.au/final-report>>. There is an associated online treatment program available outside Germany: Institute of Sexology and Sexual Medicine at the Charité—Universitätsmedizin Berlin, *Troubled Desire* (Web Page, 22 September 2020) <<https://troubled-desire.com/en/>>.

## There was support for early intervention

- 13.15 We heard support for developing early intervention programs for sexual offending.<sup>16</sup> The County Court of Victoria told us that 'the most effective way of addressing sexual offending is by early intervention before the criminal justice system is engaged'.<sup>17</sup>
- 13.16 Victoria Legal Aid viewed early intervention programs as a way to prevent sexual offending.<sup>18</sup> For example, they may address the underlying causes of someone's offending.<sup>19</sup>
- 13.17 Jesuit Social Services strongly called for the establishment of a Stop it Now! program in Australia.<sup>20</sup> It has funding for a pilot of the program, which will be used to develop supporting materials and guides. The pilot will document the program's operation and value. We note that the Royal Commission into Institutional Responses to Child Sexual Abuse also endorsed Stop it Now!, proposing it as a model for early intervention services in Australia.<sup>21</sup>
- 13.18 Other stakeholders also acknowledged Stop it Now! or Prevention Project Dunkelfeld.<sup>22</sup>

## There are gaps relating to early intervention

### There are not enough early treatment services in Victoria

- 13.19 We heard that there is a lack of treatment options for people who might be worried about sexual offending. Jesuit Social Services explained that '[t]here isn't a suite of activities and that is the problem in this space'.<sup>23</sup> People may not be able to afford the programs that are in place. There is no government support to access them.<sup>24</sup>
- 13.20 Even when a court orders treatment in the community, there are long waiting lists. Victoria Legal Aid told us that this is 'a missed opportunity for timely intervention to meet the therapeutic needs of this cohort'.<sup>25</sup> Treatment programs may not be available in regional areas.<sup>26</sup>
- 13.21 We also heard that treatment programs (both in the community and in prison) could better:
- address sexual offending alongside other issues that might affect a person's offending (such as mental health challenges or their own history of trauma)<sup>27</sup>
  - reflect community diversity and be tailored to people's different needs (see box)<sup>28</sup>
  - respond to the nature of someone's offending (for example, their use of technology).<sup>29</sup>

16 See, eg, Submissions 10 (Carolyn Worth AM and Mary Lancaster), 17 (Sexual Assault Services Victoria), 24 (Jesuit Social Services), 27 (Victoria Legal Aid), 41 (Office of the Public Advocate), 44 (Dr Patrick Tidmarsh and Dr Gemma Hamilton), 59 (County Court of Victoria), 65 (Aboriginal Justice Caucus), 68 (Victoria Police). Other stakeholders also supported early intervention for children and young people: see, eg, Submissions 21 (Victorian Aboriginal Child Care Agency), 14 (Gatehouse Centre, Royal Children's Hospital).

17 Submission 59 (County Court of Victoria).

18 Submission 27 (Victoria Legal Aid).

19 See, eg, Submission 65 (Aboriginal Justice Caucus).

20 Submission 24 (Jesuit Social Services). See generally Jesuit Social Services, *Stop It Now! A Scoping Study on Implementation in Australia* (Report, January 2019) Recommendations 1–23 <<https://jss.org.au/wp-content/uploads/2019/07/Stop-It-Now.pdf>>.

21 *Royal Commission into Institutional Responses to Child Sexual Abuse: Final Report* (Report, December 2017) Recommendation 6.2(g) <<https://www.childabuseroyalcommission.gov.au/final-report>>.

22 Submissions 38 (Bravehearts), 59 (County Court of Victoria).

23 Jesuit Social Services in Consultation 39 (Victorian Association for the Care and Resettlement of Offenders and Jesuit Social Services); *Royal Commission into Institutional Responses to Child Sexual Abuse: Final Report* (Report, December 2017) vol 6, 59 <<https://www.childabuseroyalcommission.gov.au/final-report>>.

24 Submissions 27 (Victoria Legal Aid), 68 (Victoria Police). See also *Royal Commission into Institutional Responses to Child Sexual Abuse: Final Report* (Report, December 2017) Vol 6, 59 <<https://www.childabuseroyalcommission.gov.au/final-report>>.

25 Submission 27 (Victoria Legal Aid). In terms of treatment programs generally, the Magistrates' Court of Victoria noted 'there are gaps in terms of what is available': Consultation 71 (Magistrates' Court of Victoria (No 1)).

26 Submission 27 (Victoria Legal Aid); Consultation 67 (Loddon Mallee Regional Aboriginal Justice Advisory Committee).

27 Submissions 27 (Victoria Legal Aid), 68 (Victoria Police).

28 Submissions 27 (Victoria Legal Aid), 68 (Victoria Police). Victoria Legal Aid also mentioned the value of individualised as well as group approaches to treatment. Victoria Police also highlighted the need for the post-sentence regime to respond more appropriately to diverse needs, including the needs of people with disability.

29 Submissions 27 (Victoria Legal Aid), 68 (Victoria Police).

- 13.22 There was also support for culturally appropriate and Aboriginal community-led interventions.<sup>30</sup>

### Gaps in support for people with cognitive disabilities

We heard that people with cognitive disabilities who have committed sexual offences have not, or do not, receive enough support. A range of initiatives are needed. These include:

- better education about sexual violence (see Chapter 3)<sup>31</sup>
- early intervention and treatment programs focused on sexual offending<sup>32</sup>
- rehabilitative and reintegrative support programs (see below).<sup>33</sup>

We discuss proposals for therapeutic diversion and more individualised approaches to sex offender registration for people with cognitive disabilities in this chapter.

Chapter 15 suggests strengthening support for people with cognitive disabilities in their interactions with police and in court.

### Early intervention is an important but 'underdeveloped' area

- 13.23 Early intervention for sexual offending has not received as much attention as interventions after a conviction. McKibbin and Humphreys say that the early intervention agenda is 'particularly underdeveloped and is in need of more research to support the development of evidence-based strategies'.<sup>34</sup> They state, for example, that we need to know more about who might be at a risk of perpetrating child sexual abuse and how their behaviour might get worse over time.<sup>35</sup>
- 13.24 Research about men's behaviour change programs highlights the gaps in our knowledge. We do not know enough about how effective these programs are in stopping people using violence and keeping victim survivors safe.<sup>36</sup> Rodney Vlasis, an expert in family violence perpetrator interventions, told us that men's behaviour change programs need to develop a more comprehensive focus on sexual violence.<sup>37</sup>

30 Submissions 21 (Victorian Aboriginal Child Care Agency), 27 (Victoria Legal Aid), 49 (inTouch Multicultural Centre Against Family Violence), 54 (Victorian Multicultural Commission); Consultation 67 (Loddon Mallee Regional Aboriginal Justice Advisory Committee).

31 Submission 27 (Victoria Legal Aid).

32 See Consultation 19 (Dr Frank Lambrick); Submissions 27 (Victoria Legal Aid), 41 (Office of the Public Advocate).

33 See Consultation 39 (Victorian Association for the Care and Resettlement of Offenders and Jesuit Social Services).

34 Gemma McKibbin and Cathy Humphreys, 'Future Directions in Child Sexual Abuse Prevention: An Australian Perspective' (2020) 105 *Child Abuse & Neglect* 1, 5. See also *Royal Commission into Institutional Responses to Child Sexual Abuse: Final Report* (Report, December 2017) vol 6, 58 <<https://www.childabuseroyalcommission.gov.au/final-report>>.

35 Gemma McKibbin and Cathy Humphreys, 'Future Directions in Child Sexual Abuse Prevention: An Australian Perspective' (2020) 105 *Child Abuse & Neglect* 1, 5–6.

36 Australia's National Research Organisation for Women's Safety (ANROWS), *Men's Behaviour Change Programs: Measuring Outcomes and Improving Program Quality: Key Findings and Future Directions* (Research to Policy and Practice No 01/2019, 2019) 2 <<https://www.anrows.org.au/publication/mens-behaviour-change-programs-measuring-outcomes-and-improving-program-quality-key-findings-and-future-directions-2/>>; *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016) vol 3, 273–4 <<http://rcfv.archive.royalcommission.vic.gov.au/Report-Recommendations.html>>.

37 Consultation 18 (Rodney Vlasis). On the use of men's behaviour change programs for sexual violence, see also Consultations 2 (Centre for Innovative Justice) (regarding available supports in restorative justice for people responsible for violence), 39 (Victorian Association for the Care and Resettlement of Offenders and Jesuit Social Services).

- 13.25 Evaluations of programs like Stop it Now! and Prevention Project Dunkelfeld in other countries do indicate the value of early intervention programs. Studies suggest that:
- There is demand for these programs—some people can identify their risk of offending and are willing to seek help.<sup>38</sup>
  - People who use the programs might not otherwise be known to authorities.<sup>39</sup>
  - Programs help participants feel as though they can identify and manage risky situations and address problematic beliefs.<sup>40</sup>
  - Programs may break down some of the stigma linked with sexual offending to assist in keeping the community safe.<sup>41</sup>

## We recommend a coordinated approach to sexual offending, including early intervention

Prevention is better than a cure but what the prevention looks like operationally needs to be explored in detail.—Victorian Aboriginal Legal Service<sup>42</sup>

- 13.26 Early intervention programs have a role to play in preventing sexual violence. They could address a wider range of people than criminal justice processes can.
- 13.27 We do not propose setting up a specific program, because a coordinated approach to preventing sexual offending is needed first. As discussed above, the gaps that need to be addressed include:
- early treatment services
  - a stronger knowledge base.
- 13.28 Any early intervention programs need to be supported by the right services and enough research.
- 13.29 Early intervention programs should be done safely. We must take a coordinated approach, supported by:
- strong program standards
  - risk management
  - clear program aims
  - strong safety and accountability plans.<sup>43</sup>

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38 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; 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; 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>>; *Royal Commission into Institutional Responses to Child Sexual Abuse: Final Report* (Report, December 2017) vol 6, 94 <<https://www.childabuseroyalcommission.gov.au/final-report>>.

39 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>>.

40 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](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.

41 *Royal Commission into Institutional Responses to Child Sexual Abuse: Final Report* (Report, December 2017) vol 6, 58, 101 <<https://www.childabuseroyalcommission.gov.au/final-report>>.

42 Consultation 52 (Victorian Aboriginal Legal Service).

43 Australia's National Research Organisation for Women's Safety (ANROWS), *Men's Behaviour Change Programs: Measuring Outcomes and Improving Program Quality: Key Findings and Future Directions* (Research to Policy and Practice No 01/2019, 2019) 3–7 <<https://www.anrows.org.au/publication/mens-behaviour-change-programs-measuring-outcomes-and-improving-program-quality-key-findings-and-future-directions-2/>>.



## What does a coordinated approach look like?

- 13.30 In recommending a program of perpetrator interventions for family violence, the Royal Commission into Family Violence proposed a multi-stage process. It was based on building a knowledge base of initiatives and then a coordinated approach to perpetrator interventions. This included:
- identifying key principles
  - reviewing minimum service standards
  - making services available
  - setting up processes for monitoring people's attendance
  - making specific funding available.<sup>44</sup>
- 13.31 The approach resulted in significant research outcomes, as well as new standards for men's behaviour change programs—all of which are relevant to responding to sexual violence (especially in a family violence context).<sup>45</sup>
- 13.32 Similarly, the Royal Commission into Institutional Responses to Child Sexual Abuse suggested that early intervention initiatives should be developed as part of a broader strategy to prevent child sexual abuse. Prevention efforts would reflect existing knowledge and draw on research and evaluation to better understand what works.<sup>46</sup>
- 13.33 Early intervention initiatives for sexual violence should take a similarly evidence-informed approach. Taking a approach similar to that of the family violence reforms, the Victorian Government should start with building a knowledge base of initiatives, then turn to the design and monitoring of programs. It should identify key principles and standards, and there should be ongoing funding for programs.<sup>47</sup> The government has already committed funding to perpetrator interventions in the 2021/22 budget, connected to its family violence reform efforts.<sup>48</sup>
- 13.34 In this inquiry people told us that early intervention programs need to:
- be victim-centred and protect community and victim safety—for example, by effectively managing people's risk of offending in ongoing relationships<sup>49</sup>
  - address the accountability of people who commit sexual violence<sup>50</sup>
  - manage effectively people's risk of offending—for example, through risk assessments, processes for contacting authorities and sometimes longer-term programs<sup>51</sup>
  - be tailored to diverse needs, including of people with cognitive disabilities (see box above)<sup>52</sup>
  - be accessible and affordable.<sup>53</sup>

44 See *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016) Recommendations 85–92 <<http://rcfv.archive.royalcommission.vic.gov.au/Report-Recommendations.html>>.

45 See, eg, Erin Mackay et al, *Perpetrator Interventions in Australia: Part One—Literature Review* (State of Knowledge Paper Issue PP01, ANROWS Australia's National Research Organisation for Women's Safety, November 2015) <<https://www.anrows.org.au/publication/perpetrator-interventions-in-australia/>>; Erin Mackay et al, *Perpetrator Interventions in Australia: Part Two—Perpetrator Pathways and Mapping* (Landscapes, State of Knowledge Paper Issue PP01.01, ANROWS Australia's National Research Organisation for Women's Safety, November 2015) <<http://anrows.org.au/publications/landscapes/perpetrator-interventions-in-australia>>; Victorian Government, *Expert Advisory Committee on Perpetrator Interventions* (Final Report, 2018) <<https://nla.gov.au/nla.obj-2942345725/view>>.

46 *Royal Commission into Institutional Responses to Child Sexual Abuse: Final Report* (Report, December 2017) vol 6, 101–2 <<https://www.childabuseroyalcommission.gov.au/final-report>>.

47 See, eg, *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016) Recommendations 85–6, 88 <<http://rcfv.archive.royalcommission.vic.gov.au/Report-Recommendations.html>>.

48 'Strengthened Perpetrator Interventions', *National Plan to Reduce Violence against Women and Their Children* (Web Page, 11 March 2021) <<https://plan4womenssafety.dss.gov.au/initiative/strengthened-perpetrator-interventions/>>.

49 Submissions 44 (Dr Patrick Tidmarsh and Dr Gemma Hamilton), 56 (Domestic Violence Victoria).

50 Submission 44 (Dr Patrick Tidmarsh and Dr Gemma Hamilton). Family Safety Victoria observed that 'accountability has been important for family violence', raising the issue of what this might look like in responses to sexual violence: Consultation 73 (Family Safety Victoria (No 1)). See also Submission 17 (Sexual Assault Services Victoria), which refers to interventions that have 'powers to restrict the offenders' behaviours'.

51 Submissions 44 (Dr Patrick Tidmarsh and Dr Gemma Hamilton), 68 (Victoria Police); Consultation 18 (Rodney Vlasis).

52 Submissions 27 (Victoria Legal Aid), 41 (Office of the Public Advocate); Consultations 19 (Dr Frank Lambrick), 39 (Victorian Association for the Care and Resettlement of Offenders and Jesuit Social Services).

53 Submissions 27 (Victoria Legal Aid), 68 (Victoria Police).

- 13.35 Many of these principles reflect the Headline Standards in the National Outcome Standards for Perpetrator Interventions, as well as research and practice in treating sex offending. The Standards are part of the National Plan to Reduce Violence Against Women and their Children (which brings together work being done across Australia to stop violence against women and children). They are designed to guide states and territories to make sure their social and legal systems work together to address the behaviour of perpetrators.<sup>54</sup>
- 13.36 The Standards prioritise:
- women and children's safety in all perpetrator interventions (Headline Standard 1)
  - accountability for using violence (Headline Standard 3)
  - risk management, which runs throughout many of the Standards that aim to 'keep the perpetrator visible to the accountability system'<sup>55</sup>
  - effective approaches to intervention, addressing diverse needs and community-led approaches (Headline Standards 2, 4 and 6).
- 13.37 The Headline Standards also underscore the need for evidence-informed interventions (Headline Standard 5) delivered by a skilled workforce (Headline Standard 6).
- 13.38 These principles should inform the coordinated approach to preventing sexual offending. This coordinated approach can be developed as part of the Victorian Government's broader Sexual Assault Strategy (Chapter 1).
- 13.39 Once a strong legal, policy and service framework is in place, programs such as Stop It Now! could then operate.<sup>56</sup> This framework could also enable the development of supports for people who have committed sexual offences who are involved in restorative justice (see Chapter 9).<sup>57</sup>

## Recommendation

- 47 As part of the Sexual Assault Strategy, the Victorian Government should develop a coordinated approach to preventing sexual offending, with a focus on early intervention programs that meet the Headline Standards in the National Outcome Standards for Perpetrator Interventions.

<sup>54</sup> See Council of Australian Governments, *National Outcome Standards for Perpetrator Interventions* (Policy, 21 November 2015) <<https://plan4womenssafety.dss.gov.au/national-outcome-standards-for-perpetrator-interventions/>>.

<sup>55</sup> Ibid 8–9.

<sup>56</sup> Carolyn Worth and Mary Lancaster also suggested the extension of existing Forensicare and Mensline support to people who are concerned about offending: Submission 10 (Carolyn Worth AM and Mary Lancaster).

<sup>57</sup> On the need for supports for people responsible for sexual violence participating in restorative justice programs: see Consultation 2 (Centre for Innovative Justice).

## Support for diversion for young people and others

### What is diversion?

- 13.40 After someone has committed an offence, diversion programs direct them away from the criminal justice system. Usually they are directed to treatment or rehabilitation programs. After they complete a diversion program, they will not have a criminal record.<sup>58</sup>
- 13.41 Diversion programs may help people address the causes of their offending behaviour and reduce their risk of reoffending. They may provide an incentive for people to take responsibility for their offending behaviour, allowing charges to be resolved more quickly and victim survivors to avoid the trial process.<sup>59</sup>
- 13.42 In Victoria, there are diversion programs for people under 18 who have been or could be charged with a sexual offence (the Therapeutic Treatment Order framework). While there are general adult diversion programs, these may not address someone's sexual offending behaviour and are not available to everyone charged with a sexual offence.<sup>60</sup> The Therapeutic Treatment Order framework specifically addresses harmful sexual behaviour and is available for sexual offences.

### People supported extending the Therapeutic Treatment Order regime to others

- 13.43 The Therapeutic Treatment Order framework for children is widely regarded as a success (see Chapter 8).<sup>61</sup> In this inquiry some people supported extending this framework to young people up to 21 or 25 years of age.<sup>62</sup>
- 13.44 A therapeutic approach would reflect the cognitive development of young people.<sup>63</sup> The Sentencing Advisory Council recently noted 'mounting scientific evidence that young adults aged 18 to 25 are developmentally distinct from older adults and should be treated as such by the justice system'.<sup>64</sup>
- 13.45 Victoria Legal Aid told us that a therapeutic response may be appropriate for people with a cognitive disability.<sup>65</sup> We also heard some support for diversion to be available for everyone charged with a sexual offence.<sup>66</sup>

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58 *Criminal Procedure Act 2009* (Vic) s 59.

59 An evaluation of the former Cedar Cottage program in New South Wales found that it significantly reduced sexual reoffending by people considered to be 'low-risk offenders'. The participant could be a biological parent, step-parent or de-facto spouse: Jane Goodman-Delahunty, *The NSW Pre-Trial Diversion of Offenders (Child Sexual Assault) Program: An Evaluation of Treatment Outcomes* (Report, 2009) 5, 8, 9–10 <[https://www.researchgate.net/publication/298788143\\_The\\_NSW\\_Pre-trial\\_Diversion\\_of\\_Offenders\\_Child\\_Sexual\\_Assault\\_Program\\_An\\_evaluation\\_of\\_treatment\\_outcomes](https://www.researchgate.net/publication/298788143_The_NSW_Pre-trial_Diversion_of_Offenders_Child_Sexual_Assault_Program_An_evaluation_of_treatment_outcomes)>. 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>>.

60 For example, both the Criminal Justice Diversion program and the Court Integrated Services Program (which focuses on supporting people on bail) work in the Magistrates' Court of Victoria: 'Diversion: A Way for Low-Level Offenders to Avoid a Criminal Record by Undertaking Conditions That Benefit the Victim, the Community and Themselves', *Magistrates' Court of Victoria* (Web Page, 16 March 2020) <<https://www.mcv.vic.gov.au/find-support/diversion>>; 'Bail Support (CISP)', *Magistrates' Court of Victoria* (Web Page, 4 July 2019) <<https://www.mcv.vic.gov.au/find-support/bail-support-cisp>>.

61 Submissions 10 (Carolyn Worth AM and Mary Lancaster), 14 (Gatehouse Centre, Royal Children's Hospital), 27 (Victoria Legal Aid), 40 (Law Institute of Victoria), 44 (Dr Patrick Tidmarsh and Dr Gemma Hamilton); Consultation 61 (Children's Court of Victoria).

62 Submissions 21 (Victorian Aboriginal Child Care Agency), 27 (Victoria Legal Aid), 57 (Commission for Children and Young People (Vic)).

63 Submission 27 (Victoria Legal Aid).

64 Sentencing Advisory Council (Vic), *Rethinking Sentencing for Young Adult Offenders* (Report, 2019) xii <[https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-11/Rethinking\\_Sentencing\\_for\\_Young\\_Adult\\_Offenders.pdf](https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-11/Rethinking_Sentencing_for_Young_Adult_Offenders.pdf)>.

65 Submission 27 (Victoria Legal Aid).

66 Ibid (for 'low level' sexual offending specifically); Submission 40 (Law Institute of Victoria); Consultation 52 (Victorian Aboriginal Legal Service). Victoria Legal Aid also proposed making existing diversionary options in the Magistrates' Court more accessible, by removing the requirement for the police to consent to diversion. The Magistrates' Court of Victoria was interested in 'additional sentencing options that would require offenders to engage in treatment designed to reduce their risk of re-offending and promote community safety': Consultation 71 (Magistrates' Court of Victoria (No 1)). Sexual Assault Services Victoria supported exploring further diversion options for people over 18: Submission 17 (Sexual Assault Services Victoria).

## Diversion for sexual offending has risks

- 13.46 We do not recommend extending diversion programs to more young people and others. That would be a significant step given the proportion of people who are accused of sexual violence who are young. Between 2010 and 2016, almost one third (28.7 per cent) of alleged offenders for sexual offences were aged 15–24.<sup>67</sup>
- 13.47 Diverting 18–25-year-olds could mean that high numbers of people charged with sexual offences would not be tried for them. This could create a false impression that sexual offending by young men is not taken seriously.<sup>68</sup> Victoria Police and Sexual Assault Services Victoria all noted that sexual violence is a serious harm for which diversion might not be appropriate.<sup>69</sup>
- 13.48 Extending the Therapeutic Treatment Order regime to young adults is not straightforward. This framework is managed through the Children's Court and the *Children, Youth and Families Act 2005* (Vic). This means that a separate diversionary pathway would be needed. As we discuss in relation to early intervention above, the standards and services for this framework may not yet exist.<sup>70</sup>
- 13.49 For these reasons, we do not recommend a new diversionary pathway for sexual offending, although this may be possible in the future with the development of a coordinated approach to preventing sexual offending (see above).<sup>71</sup>

## Better reintegration support could prevent sexual violence

### What is reintegration support?

- 13.50 Reintegration support helps people in prison to re-join (or reintegrate into) the community. It can start before someone is released from prison, as part of their parole or after release. To re-join the community successfully, a person needs a range of supports such as housing, employment and social support.<sup>72</sup>
- 13.51 Reintegration support is crucial to ensure people convicted of sexual offences successfully transition back into the community, without offending again.<sup>73</sup>
- 13.52 In Victoria there are reintegration programs for serious sex offenders, along with other programs that respond to the needs of particular groups.<sup>74</sup> These can help people get housing, connect them to treatment programs, and give them training before their release.

67 'Spotlight: Sexual Offences', *Crime Statistics Agency Victoria* (Web Page, 2017) <<https://www.crimestatistics.vic.gov.au/crime-statistics/historical-crime-data/year-ending-31-december-2016/spotlight-sexual-offences>>. Of these people, 16.4% were aged 15–19 and 12.4% were aged 20–24.

68 Consultation 84 (Aboriginal Justice Caucus).

69 Submission 68 (Victoria Police); Consultation 89 (Sexual Assault Services Victoria (No 2)).

70 The lack of these conditions may also complicate the use of existing diversion programs.

71 In relation to people with cognitive disabilities, Victoria Legal Aid also suggested using existing civil orders under the *Disability Act 2006* (Vic) and *Mental Health Act 2014* (Vic), which should also be considered: Submission 27 (Victoria Legal Aid).

72 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) [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/>>.

73 Submissions 38 (Bravehearts), 53 (Liberty Victoria).

74 See, eg, reintegration programs for young people, women and Aboriginal women mentioned in Department of Justice and Community Safety (Vic), *Annual Report 2019–2020* (Report, 2020) 11, 20–1 <<https://www.justice.vic.gov.au/annual-reports/annual-report-2019-20>>. See also 'ReConnect', *Jesuit Social Services* (Web Page, 2021) <<https://jss.org.au/what-we-do/justice-and-crime-prevention/reconnect/>>; Victorian Government, 'Transitional Programs', *Corrections, Prisons and Parole* (Web Page, 18 March 2021) <<https://www.corrections.vic.gov.au/release/transitional-programs>>.

### Circles of Support and Accountability

Circles of Support and Accountability are a reintegrative initiative specifically for people who have committed sexual offences. The 'circles' provide two levels of support for people when they are released from prison. An immediate circle of trained volunteers stays in touch regularly with the released person, to support them and monitor their progress (including any risks of reoffending). This circle is supported by a second tier of health, justice and other professionals. This second tier of supports can also contact the justice system if needed.<sup>75</sup>

Circles of Support and Accountability aim to assist people to establish a post-offending lifestyle and prevent them from reoffending. They are based on the two principles that 'no-one is disposable' and there should be 'no more victims'.<sup>76</sup>

Circles of Support and Accountability currently operate in South Australia and overseas (including Canada and the United Kingdom).

## Reintegration support needs are not being met

- 13.53 People who have committed sexual offences have specific needs when they are released into the community. Many have spent long periods in prison. They may have few social networks and experience social stigma. They might need support with housing, independent living skills and to develop social connections.<sup>77</sup> If these needs are met, they may be less likely to reoffend.<sup>78</sup>
- 13.54 But we heard that people's reintegration needs were not always met:
- There is a lack of reintegration programs for people who have sexually offended. These people have different needs to the general offending cohort.<sup>79</sup>
- 13.55 The Victorian Aboriginal Legal Service and Jesuit Social Services told us how important accommodation is, including culturally appropriate accommodation for Aboriginal people.<sup>80</sup> We also heard about the value of 'wrap-around support' to address people's many needs (such as housing, employment and therapeutic support).<sup>81</sup>
- 13.56 We were told that existing programs (such as Reconnect) should be better funded and expanded.<sup>82</sup> The Reconnect program brings together different community agencies to help people connect with friends and family, get housing, meet their parole conditions and access programs to address issues like drug and alcohol use.<sup>83</sup>
- 'It's the best support I've ever had in my life. When I found out I'd been offered the house it was awesome. It made me cry because I've never had so much good support like that.'<sup>84</sup>

75 Kelly Richards, Jodi Death and Kieran McCartan, *Community-Based Approaches to Sexual Offender Reintegration* (Research Report No 7, ANROWS Australia's National Research Organisation for Women's Safety, March 2020) 15–16 <<https://www.anrows.org.au/project/community-based-approaches-to-sexual-offender-reintegration/>>.

76 Stacey Hannem and Michael Petrunik, 'Circles of Support and Accountability: A Community Justice Initiative for the Reintegration of High Risk Sex Offenders' (2007) 10(2) *Contemporary Justice Review* 153, 153; Submission 4 (Associate Professor Kelly Richards et al); Consultation 39 (Victorian Association for the Care and Resettlement of Offenders and Jesuit Social Services).

77 Consultation 39 (Victorian Association for the Care and Resettlement of Offenders and Jesuit Social Services).

78 Kelly Richards, Jodi Death and Kieran McCartan, *Community-Based Approaches to Sexual Offender Reintegration* (Research Report No 7, ANROWS Australia's National Research Organisation for Women's Safety, March 2020) 14, 21–2 <<https://www.anrows.org.au/project/community-based-approaches-to-sexual-offender-reintegration/>>.

79 Consultation 39 (Victorian Association for the Care and Resettlement of Offenders and Jesuit Social Services). See also Submission 17 (Sexual Assault Services Victoria).

80 Submissions 24 (Jesuit Social Services), 67 (Victorian Aboriginal Legal Service).

81 Submissions 10 (Carolyn Worth AM and Mary Lancaster), 17 (Sexual Assault Services Victoria), 24 (Jesuit Social Services).

82 Submissions 24 (Jesuit Social Services), 67 (Victorian Aboriginal Legal Service).

83 Submission 24 (Jesuit Social Services); 'ReConnect', *Jesuit Social Services* (Web Page, 2021) <<https://jss.org.au/what-we-do/justice-and-crime-prevention/reconnect/>>.

84 Service user cited in Submission 24 (Jesuit Social Services).

- 13.57 Tailored support was highlighted as a priority for Aboriginal people, as well as for people with disability or from migrant communities.<sup>85</sup> The Victorian Government recently announced more funding for Aboriginal community-led diversion and residential programs—for example, Ngarra Jarranounith Place, a residential behaviour change program for Aboriginal men focusing on family violence.<sup>86</sup>
- 13.58 People on post-sentence supervision orders were also identified as needing more reintegrative supports that address their complex needs.<sup>87</sup>
- 13.59 We also heard that people may not have access to enough rehabilitative programs in custody.<sup>88</sup> Rehabilitative programs were identified as needing further funding and development.<sup>89</sup>

## We recommend piloting Circles of Support and Accountability

- 13.60 We recommend piloting Circles of Support and Accountability (CoSAs) to support the reintegration of people who have committed sexual offences.<sup>90</sup>
- 13.61 We found support for CoSAs in our inquiry.<sup>91</sup> People pointed to their capacity to prevent reoffending and to keep the community safe by:
- providing people with a social support system<sup>92</sup>
  - monitoring their behaviour and reporting any concerns<sup>93</sup>
  - helping with their successful reintegration (for example, by helping them to develop independent living skills).<sup>94</sup>
- 13.62 Submissions referred to research which indicates that CoSAs prevent reoffending, are cost-effective and receive support from some victim survivors.<sup>95</sup>

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85 In relation to Aboriginal people who have offended, cultural mentoring and healing programs were discussed: Submissions 4 (Associate Professor Kelly Richards et al), 21 (Victorian Aboriginal Child Care Agency). People with disability, for example, can face barriers to accessing mainstream disability support and forensic disability services: Submission 68 (Victoria Police); Consultation 39 (Victorian Association for the Care and Resettlement of Offenders and Jesuit Social Services).

86 Premier of Victoria, 'Better Outcomes for Victims and Young People' (Media Release, 20 May 2021) <<http://www.premier.vic.gov.au/better-outcomes-victims-and-young-people>>; Victorian Government, *Creating Jobs, Caring for Victorians* (Budget Paper No 3, May 2021) 6.

87 Submissions 59 (County Court of Victoria) (on treatment, case management and housing needs), 68 (Victoria Police) (on the need to be supported when transitioning off the orders). Submissions also commented more generally on the desirability and operation of the post-sentence framework: see, eg, Submissions 38 (Bravehearts), 53 (Liberty Victoria), 68 (Victoria Police). Problems can include people not having access to treatment at the start of longer sentences; people's engagement with services being compromised when they are moved between prisons; or services not being available at the prison where they are detained: Submission 27 (Victoria Legal Aid); Consultation 39 (Victorian Association for the Care and Resettlement of Offenders and Jesuit Social Services).

89 Submission 68 (Victoria Police). Liberty Victoria highlighted justice reinvestment approaches: Submission 53 (Liberty Victoria).

90 A trial might build on the Support and Awareness Groups run with Corrections Victoria: see Lorana Bartels, Jamie Walvisch and Kelly Richards, 'More, Longer, Tougher ... or Is It Finally Time for a Different Approach to the Post-Sentence Management of Sex Offenders in Australia?' [2019] 43(1) *Criminal Law Journal* 41, 55–6.

91 Submissions 4 (Associate Professor Kelly Richards et al), 14 (Gatehouse Centre, Royal Children's Hospital), 24 (Jesuit Social Services), 38 (Bravehearts), 44 (Dr Patrick Tidmarsh and Dr Gemma Hamilton).

92 Submissions 4 (Associate Professor Kelly Richards et al), 14 (Gatehouse Centre, Royal Children's Hospital) (in relation to children and young people specifically), 24 (Jesuit Social Services).

93 Submissions 4 (Associate Professor Kelly Richards et al), 24 (Jesuit Social Services), 44 (Dr Patrick Tidmarsh and Dr Gemma Hamilton).

94 Submissions 4 (Associate Professor Kelly Richards et al), 24 (Jesuit Social Services), 44 (Dr Patrick Tidmarsh and Dr Gemma Hamilton).

95 Submissions 4 (Associate Professor Kelly Richards et al), 38 (Bravehearts). See also Kelly Richards, Jodi Death and Kieran McCartan, *Community-Based Approaches to Sexual Offender Reintegration* (Research Report No 7, ANROWS Australia's National Research Organisation for Women's Safety, March 2020) 21 <<https://www.anrows.org.au/project/community-based-approaches-to-sexual-offender-reintegration/>>.



- 13.63 CoSAs have been positively evaluated. In North America, studies suggest that CoSAs can reduce general and sexual reoffending.<sup>96</sup> A recent Australian study found that CoSAs can support people to meet their parole conditions, challenge any justifications of offending, provide social support and help people build a new life.<sup>97</sup> Other research indicates that CoSA participation can contribute to better access to housing, relationships and employment.<sup>98</sup>
- 13.64 Implementing CoSAs will be challenging. They require community participation (as community volunteers form the 'circle'), so people in the community would need to be willing to take part.<sup>99</sup> Community volunteers would need training. For example, they must understand people's parole conditions in order to support compliance with those conditions.<sup>100</sup> In its support for the program, Jesuit Social Services set out principles that can guide any trial of CoSAs, including funding, training, evaluation and service integration (we discuss reform evaluation in Chapter 6).<sup>101</sup>

## Recommendation

- 48 To help prevent reoffending, the Victorian Government should ensure that reintegration programs for people who have committed sexual offences are available and funded to meet demand. This should include a trial of the Circle of Support and Accountability program in Victoria.

## The Register of Sex Offenders still needs reform

### What is the Register of Sex Offenders?

- 13.65 In Victoria, people who are sentenced for certain sexual offences against children must be placed on a register when they are released into the community. Other people convicted of sexual offences (including offences against adults) can be placed on this list based on the court's discretion.<sup>102</sup>
- 13.66 In deciding whether to place someone on the register, the court will consider factors such as the person's risk of sexual reoffending and the burden of the reporting requirements.<sup>103</sup>

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96 Grant Duwe, 'Can Circles of Support and Accountability (CoSA) Significantly Reduce Sexual Recidivism? Results from a Randomized Controlled Trial in Minnesota' (2018) 14 *Journal of Experimental Criminology* 463, 479; Erin Mackay et al. *Perpetrator Interventions in Australia: Part One—Literature Review* (State of Knowledge Paper Issue PP01, ANROWS Australia's National Research Organisation for Women's Safety, November 2015) 40 <<https://www.anrows.org.au/publication/perpetrator-interventions-in-australia/>>; Submission 4 (Associate Professor Kelly Richards et al).

97 Kelly Richards, Jodi Death and Kieran McCartan, *Community-Based Approaches to Sexual Offender Reintegration* (Research Report No 7, ANROWS Australia's National Research Organisation for Women's Safety, March 2020) 68 <<https://www.anrows.org.au/project/community-based-approaches-to-sexual-offender-reintegration/>>.

98 Ibid 21–2; Andrew Bates et al, 'Ever-Increasing Circles: A Descriptive Study of Hampshire and Thames Valley Circles of Support and Accountability 2002–09' (2012) 18(3) *Journal of Sexual Aggression* 355, 358–9. Although both articles note that the studies did not involve control groups.

99 Grant Duwe, 'Can Circles of Support and Accountability (CoSA) Significantly Reduce Sexual Recidivism? Results from a Randomized Controlled Trial in Minnesota' (2018) 14 *Journal of Experimental Criminology* 463, 479–80. Supporting people who have committed sexual offences 'can be at odds with the public's perception of sex offenders': ibid 480.

100 Kelly Richards, Jodi Death and Kieran McCartan, *Community-Based Approaches to Sexual Offender Reintegration* (Research Report No 7, ANROWS Australia's National Research Organisation for Women's Safety, March 2020) 68 <<https://www.anrows.org.au/project/community-based-approaches-to-sexual-offender-reintegration/>>.

101 Submission 24 (Jesuit Social Services). For a discussion on the difficulties of confirming the efficacy of CoSAs in reducing reoffending: see Grant Duwe, 'Can Circles of Support and Accountability (CoSA) Significantly Reduce Sexual Recidivism? Results from a Randomized Controlled Trial in Minnesota' (2018) 14 *Journal of Experimental Criminology* 463, 480–1.

102 *Sex Offenders Registration Act 2004* (Vic) ss 6–7, 11, sch 1–2. There are a few limited exceptions: ss 6(2A)–(2B), 6(4)–(6). Sections 6(A)–(2B) relate to registration exemption orders, which can be applied for by someone who was 18 or 19 years old at the time of the offending in certain circumstances: ss 11A–B.

103 See *Sex Offenders Registration Act 2004* (Vic) s 11(3); 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>>. See also *Bowden v The Queen* [2013] VSCA 382, [40]–[42], (2013) 44 VR 229.



- 13.67 While on the register, a person 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 must report for at least eight years. They can be required to report for the rest of their life. It is a serious offence to fail to report.<sup>104</sup>
- 13.68 The aims of the register are:
- to prevent people from reoffending
  - to make it easier to investigate and prosecute someone if they reoffend
  - to prevent people who have committed child sexual offences working in child-related employment
  - to enable the making of prohibition orders to prevent people from engaging in certain conduct.<sup>105</sup>

### The current register is too broad, inflexible and difficult to manage

- 13.69 In our inquiry we heard that the Register of Sex Offenders framework in Victoria is:
- *inflexible*. It is mandatory for people who commit certain offences to be put on the register for lengthy and specific periods. Other similar schemes take a more individualised approach and include regular review.<sup>106</sup>
  - *over-inclusive*. The mandatory registration of people for lengthy periods has resulted in many people being included in the register, including people who might be at a low risk of re-offending.<sup>107</sup>
  - *ineffective*. Because the register is too large, it is difficult to monitor and manage. People who do pose a high risk of reoffending may not receive enough supervision.<sup>108</sup>
  - *disproportionate*. Being on the register involves burdensome reporting requirements and carries social stigma. For people who might be at a low-risk of reoffending, the impact of being on the register might outweigh the risk they pose to the community.<sup>109</sup> The penalties that someone faces if they breach their reporting obligations—in some cases—might be more serious than their original sentence.<sup>110</sup>

On the day of my sentencing, the thing I remember most vividly was the judge saying he did not want to hand this sentence down, the act is unforgiving, and that he wished me well. I was sentenced to a period of life on the Sexual Offenders Register.<sup>111</sup>

- 13.70 There were also concerns that mandatory registration makes it less likely that people will admit responsibility for sexual offending.<sup>112</sup>

104 *Sex Offenders Registration Act 2004* (Vic) ss 14, 16–17 (on details to report); ss 34–35 (on duration of order for adults and children); s 46 (on failure to report).

105 Ibid s 1. Another aim is also to empower the Independent Broad-based Anti-corruption Commission (IBAC) to monitor compliance with this Act.

106 Submissions 27 (Victoria Legal Aid), 53 (Liberty Victoria), 59 (County Court of Victoria). For example, the County Court highlighted that the court has to consider the risk an individual person poses before making a supervision order: *Serious Offenders Act 2018* (Vic) s 14.

107 Submissions 16 (Owen Ormerod), 44 (Dr Patrick Tidmarsh and Dr Gemma Hamilton), 53 (Liberty Victoria).

108 A 2019 review of Victoria Police's management of people on the Sex Offender Register found that 'Victoria Police cannot be assured that all its units are best managing the risks these offenders pose, beyond the minimum legislated compliance requirements'. This review made recommendations about appropriate resourcing of the register, training needs, reporting and evaluating performance: Victorian Auditor-General's Office, *Managing Registered Sex Offenders* (Independent Assurance Report No 1, 28 August 2019) 7, Recommendations 1–9 <<https://audit.vic.gov.au/report/managing-registered-sex-offenders>>.

109 Submissions 40 (Law Institute of Victoria), 53 (Liberty Victoria).

110 Submission 27 (Victoria Legal Aid). Liberty Victoria also highlighted the significant penalties for breaching post-sentence supervision orders: Submission 53 (Liberty Victoria).

111 Submission 46 (Name withheld).

112 Submissions 47 (Criminal Bar Association), 59 (County Court of Victoria); Consultation 26 (Greg Byrne PSM, Legal Policy Consultant, Greg Byrne Law). Victoria Legal Aid also raised this concern regarding post-sentence supervision: Submission 27 (Victoria Legal Aid).

- 13.71 Liberty Victoria and Victoria Legal Aid stressed that post-sentence measures generally (including post-sentence supervision) should not replace adequate rehabilitation programs in prison and reintegration processes.<sup>113</sup> These are more appropriate ways to address people's risk of reoffending. Victoria Police was concerned about the lack of reintegrative and rehabilitative support for people on the register, even though its aim is to prevent reoffending.<sup>114</sup>
- 13.72 We also heard that current reporting requirements were broad (especially regarding contact with children). They are not specific to someone's offending and sometimes complicated to meet, resulting in technical breaches.<sup>115</sup>

### **The approach to registering children and young people needs to change**

- 13.73 There was some opposition to the current approach to registering children and young people.<sup>116</sup> The Children's Court has discretion to place a child on the register, if the prosecution applies for it.<sup>117</sup> A young person whose case is heard in an adult jurisdiction is subject to registration (with limited exemptions).<sup>118</sup> Some submissions considered that sex offender registration was not developmentally appropriate for children and young people.<sup>119</sup>

The story ends here really, but it continues to write itself day by day, I'm almost 25 now and still on the register ... Every day I think about my actions and how they [a]ffected my community, and [I] feel terrible for what I've done, but I'm unable to show my community I'm sorry, I want to make it better.<sup>120</sup>

### **Implementing our previous recommendations would address continuing concerns**

- 13.74 The key issues with the Register of Sex Offenders can be addressed by implementing recommendations from our 2012 inquiry (see Table 13).<sup>121</sup>

113 Submissions 27 (Victoria Legal Aid), 53 (Liberty Victoria).

114 Submission 68 (Victoria Police).

115 Submissions 27 (Victoria Legal Aid), 53 (Liberty Victoria); Consultation 39 (Victorian Association for the Care and Resettlement of Offenders and Jesuit Social Services). Liberty Victoria strongly agreed with our previous recommendations about integrating Part 5 of the *Sex Offenders Registration Act 2004* (Vic) into the *Working with Children Act 2005* (Vic): Submission 53 (Liberty Victoria); Victorian Law Reform Commission, *Sex Offenders Registration* (Report No 23, April 2012) Recommendation 2 <<https://www.lawreform.vic.gov.au/project/sex-offenders-registration/>>. The Victorian Aboriginal Legal Service supported amending the Working with Children Check framework to enable a select category of young people convicted of sexual offences to have their applications considered, on the basis of a risk assessment: Submission 67 (Victorian Aboriginal Legal Service).

116 Submissions 17 (Sexual Assault Services Victoria), 27 (Victoria Legal Aid), 40 (Law Institute of Victoria), 59 (County Court of Victoria), 67 (Victorian Aboriginal Legal Service).

117 *Sex Offenders Registration Act 2004* (Vic) s 11.

118 For example, someone who is 18 or 19 years old at the time of the offending can also apply for a registration exemption order: *ibid* ss 11A–B.

119 Submissions 27 (Victoria Legal Aid), 59 (County Court of Victoria).

120 Submission 46 (Name withheld).

121 Victorian Law Reform Commission, *Sex Offenders Registration* (Report No 23, April 2012) <<https://www.lawreform.vic.gov.au/project/sex-offenders-registration/>>.

Table 13: Improving the Register of Sex Offenders

Stakeholder proposals to our inquiry	Sex Offenders Registration report recommendations	Concerns addressed
<p><b>Judicial discretion</b> as to who is registered and for how long.<sup>122</sup></p> <p><b>Individualised assessment:</b> People are registered based on a qualified assessment of their risk of reoffending.<sup>123</sup></p>	<p><b>Mandatory registration should be discontinued.</b> (Recommendation 4)</p> <p><b>More judicial discretion, with individualised assessments:</b> The court should have more discretion as to whether to register someone who has committed a registrable offence. It should have more discretion <i>not</i> to register someone for a Category 2 offence and <i>whether to</i> register someone for a Category 3 offence. In both situations, the court should consider a professional assessment of an individual's risk of reoffending. The decision not to register someone convicted of a Category 1 offence is more limited.<sup>124</sup> (Recommendations 8–10)</p>	That the current register is inflexible, over-inclusive, ineffective and disproportionate
<b>Shorter registration periods</b> <sup>125</sup>	<b>Shorter registration periods</b> (5 and 3 years), which can be extended. (Recommendations 20–1)	
<b>Processes for the review of someone's registration:</b> For example, people should have a regular, stipulated right to review and the right to review if their circumstances change. <sup>126</sup>	See above: Shorter registration periods effectively enable regular review of someone's registration.	
<b>Rationalisation of existing register:</b> The current register should be reviewed with the possibility that people are removed. <sup>127</sup>	<b>Transitional review process:</b> When the new discretionary regime is introduced, the registration of people listed under the previous framework should be reviewed. (Recommendations 70–9)	

122 Submissions 27 (Victoria Legal Aid), 40 (Law Institute of Victoria), 47 (Criminal Bar Association), 53 (Liberty Victoria), 59 (County Court of Victoria).

123 Submissions 16 (Owen Ormerod), 40 (Law Institute of Victoria).

124 Our report recommended a revision of the character and categorisation of registrable offences included in the sex offender registration scheme: Victorian Law Reform Commission, *Sex Offenders Registration* (Report No 23, April 2012) 68–72 [5.62]–[5.73]. Recommendations 5–7 <<https://www.lawreform.vic.gov.au/project/sex-offenders-registration/>>. The categories only cover sexual offences against children and broadly reflect the nature of the harm that could result from reoffending: *ibid* [5.77], Appendix D.

125 Submission 53 (Liberty Victoria).

126 Submissions 16 (Owen Ormerod), 53 (Liberty Victoria).

127 Submissions 16 (Owen Ormerod), 40 (Law Institute of Victoria), 59 (County Court of Victoria).

Stakeholder proposals to our inquiry	Sex Offenders Registration report recommendations	Concerns addressed
<b>Children—a presumption against registration</b> unless exceptional circumstances can be demonstrated. <sup>128</sup>	<b>Presumption against the registration of children</b> unless it would serve a useful protective purpose (based on an individualised risk assessment). (Recommendation 13)	The placement of children and young people on the register
<b>Young people—judicial discretion</b> with a commitment to registration only in exceptional circumstances. <sup>129</sup>	<b>Discretion for more young people:</b> An exception to registration for Category 1 offences where the conduct is only an offence because of the age of the parties; the other party is over 14 years of age and the age difference is small; and there is no useful protective purpose in registration. (Recommendation 8)  This recommendation is partially implemented in the exemption available to people who were 18–19 years old at the time of the offence, where similar circumstances exist. <sup>130</sup> However, our recommendation applied to more young people as it did not specify an age limit for this exception. <sup>131</sup> We also recommended limited discretion for everyone for Category 1 offences (see above).	
<b>Rehabilitative support</b> —there is not a focus on rehabilitation to reduce reoffending. <sup>132</sup>	<b>Rehabilitation can be a condition of a registration order:</b> Courts should be able to require someone to attend and participate in rehabilitation programs. (Recommendation 17) <sup>133</sup>	That people on the register need to receive support not to reoffend

- 13.75 These recommendations were designed to strengthen the registration scheme by sharpening its focus. Because the register was over-inclusive, large and expensive, we proposed to limit its use to those most likely to reoffend. We recommended that people's registration should be based on their risk of reoffending, and that their reporting obligations be tailored to their needs.<sup>134</sup>

<sup>128</sup> Submissions 27 (Victoria Legal Aid), 67 (Victorian Aboriginal Legal Service).

<sup>129</sup> Submissions 40 (Law Institute of Victoria), 59 (County Court of Victoria).

<sup>130</sup> *Sex Offenders Registration Act 2004* (Vic) ss 11A–B.

<sup>131</sup> See Victorian Law Reform Commission, *Sex Offenders Registration* (Report No 23, April 2012) 73 [5.101] <<https://www.lawreform.vic.gov.au/project/sex-offenders-registration/>>. Our recommendation also has the requirement that the conduct would not constitute an offence but for the age of the parties involved: *ibid* Recommendation 8.

<sup>132</sup> Submission 68 (Victoria Police). Victoria Police observed that people at a high risk of reoffending may benefit from coordinated, multi-agency rehabilitative support.

<sup>133</sup> We also recommended that the *Sex Offenders Registration Act 2004* (Vic) should outline the way it seeks to achieve the revised purpose (to protect children against sexual abuse), including by 'supporting the rehabilitation of those registered sex offenders who seek assistance': Victorian Law Reform Commission, *Sex Offenders Registration* (Report No 23, April 2012) Recommendation 3(f) <<https://www.lawreform.vic.gov.au/project/sex-offenders-registration/>>.

<sup>134</sup> *Ibid* xii–xv [23]–[54], chs 5, 6.

- 13.76 Our 2012 review and recommendations were highlighted in submissions to this inquiry by the Law Institute of Victoria, Liberty Victoria and the Criminal Bar Association.<sup>135</sup>
- 13.77 We received multiple submissions opposing a public register (which would be open to the public to view).<sup>136</sup> But we are not considering this issue given it is already the focus of a current parliamentary inquiry.<sup>137</sup> In our previous inquiry, we noted that much of the research has found that making registers publicly available does not reduce the risk of re-offending. It can even have negative outcomes (including stigma and increasing someone's chance of re-offending).<sup>138</sup>

## Recommendation

- 49 Key outstanding recommendations from the Victorian Law Reform Commission's *Sex Offenders Registration* inquiry should be immediately implemented to enable
- an individualised and discretionary approach to registration
  - shorter registration periods with more regular review
  - protection for children and young people from registration
  - any necessary transitional arrangements.

<sup>135</sup> Submissions 40 (Law Institute of Victoria), 47 (Criminal Bar Association), 53 (Liberty Victoria). See also Submission 16 (Owen Ormerod).

<sup>136</sup> See, eg, Submissions 4 (Associate Professor Kelly Richards et al), 14 (Gatehouse Centre, Royal Children's Hospital) (in relation specifically to people who were minors when they committed the offence). See also Submission 68 (Victoria Police). The County Court of Victoria also said that protecting the identity of people on post-sentence supervision orders was crucial, particularly for people with lived experience of mental illness: Submission 59 (County Court of Victoria).

<sup>137</sup> Parliament of Victoria, 'Inquiry into Management of Child Sex Offender Information', *Committees* (Web Page, 25 August 2020) <<https://www.parliament.vic.gov.au/lric-lc/article/4323>>.

<sup>138</sup> Victorian Law Reform Commission, *Sex Offenders Registration* (Report No 23, April 2012) Appendix F [1.16], [1.19]–[1.20] <<https://www.lawreform.vic.gov.au/project/sex-offenders-registration/>>.



# CHAPTER 14

## PART FIVE: IMPROVING THE CRIMINAL JUSTICE RESPONSE

# Legal definitions of sexual violence

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## 14. Legal definitions of sexual violence

### Overview

- Sexual offence laws define what kinds of sexual violence are crimes. Victoria's sexual offence laws were reformed in 2015.
- A lack of consent is a key element of rape. How consent is defined and the fault element for rape should be reviewed. We should move to a stronger model of affirmative consent.
- It is a crime to remove a device such as a condom without consent, but this needs to be made explicit in the definition of consent.
- Image-based sexual abuse is a growing problem and can result in serious harm. Victoria's laws need to recognise its seriousness by increasing the powers for these offences.
- The sexual offence laws reformed in 2015 need to explain how those offences apply in cases before the reformed offences commenced (also known as 'transitional provisions').
- Recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse in relation to child sexual abuse offences should be implemented.

### A note on the language we use in this Part

**Complainant:** term used in the *Criminal Procedure Act 2009* (Vic) and other legislation to describe the person against whom a sexual offence is alleged to have been committed.

**The accused:** the person accused of being responsible for the harm (also known informally as the 'defendant').

The 'complainant' and 'accused' are legal terms.<sup>1</sup> We use these terms to be consistent with the language used in criminal trials.

**Lawyer:** includes barristers, who specialise in appearing in court (also known as counsel), and solicitors.

**Judicial officer:** includes judges of the County Court of Victoria, and magistrates in the Magistrates' Court of Victoria. It includes judges of the Victorian Court of Appeal in some contexts.

**Trial:** includes trials in the County Court of Victoria and contested hearings<sup>2</sup> in the Magistrates' Court of Victoria.

## Victoria's sexual offence laws are strong, with room for improvement

- 14.1 Sexual offence laws make it a crime to commit various kinds of sexual violence, such as to touch someone sexually or sexually penetrate them without consent. For example, rape covers sexual penetration without consent. The maximum sentence for rape is 25 years imprisonment.<sup>3</sup>
- 14.2 The way sexual offences are defined sets standards for behaviour. The way they are defined shapes the community's understandings of sexual violence. Sexual offences set the boundaries for what sexual interactions are acceptable in society. As the *Crimes Act 1958* (Vic) states, 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'.<sup>4</sup>
- 14.3 The way sexual offences are defined can help, or make it more difficult, to investigate or prosecute someone for sexual offending. Having sexual offences that are defined well supports an effective justice system response to sexual violence.
- 14.4 Victoria's sexual offences were recently revised to make them as 'clear, simple, consistent and effective as possible'.<sup>5</sup>
- 14.5 In our issues paper, we asked if there was a need to change any of these offences or to create new offences to address existing or emerging forms of sexual violence.<sup>6</sup> We heard the 2015 reforms were working well but could be clarified. In this chapter we identify key ways to strengthen them.

1 In Victoria some legislation also uses the terminology of 'victims', including the *Victims' Charter Act 2006* (Vic) and *Victims of Crime Assistance Act 1996* (Vic).

2 These are like trials but there is no jury: Victorian Government, 'Court Process in the Magistrates' Court', *Victims of Crime* (Web Page, 20 April 2021) <<https://www.victimsofcrime.vic.gov.au/going-to-court/types-of-courts/court-process-in-the-magistrates-court>>.

3 *Crimes Act 1958* (Vic) s 38(2).

4 *Ibid* s 37A(a).

5 Department of Justice (Vic), *Review of Sexual Offences* (Consultation Paper, September 2013) vii <<http://www.justice.vic.gov.au/review-of-sexual-offences-consultation-paper>>; Department of Justice and Regulation (Vic), *Victoria's New Sexual Offence Laws: An Introduction* (Report, Criminal Law Review, June 2015) <<https://www.justice.vic.gov.au/victorias-new-sexual-offence-laws-an-introduction>>.

6 Victorian Law Reform Commission, *Defining Sexual Offences* (Issues Paper C, October 2020) Questions 1, 3–4.

## What are Victoria's sexual offences?

14.6 In this chapter, we use the term 'sexual offence' to describe sexual violence that is criminalised. The main sexual offences in Victoria are set out in Table 14.

**Table 14: Sexual offences in Victoria**

Category	Key offences	Description
Rape, sexual assault and associated sexual offences <sup>7</sup>	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 <sup>8</sup>	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 an adult has committed a sexual offence against a child to fail to report to police. <sup>9</sup>	Maximum penalties are heavier for offences against children under 12 years. <sup>10</sup>  Children under the age of 16 cannot consent to sexual activity. <sup>11</sup> 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. <sup>12</sup> 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. <sup>13</sup>
Child exploitation material <sup>14</sup>	Possession of child exploitation material.  Federal offences may also apply where this type of material is distributed online or through telecommunication services. <sup>15</sup>	Also known as 'child abuse material' or 'child pornography'. <sup>16</sup> 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. <sup>17</sup>
Sexual offences against people with a cognitive impairment or mental illness <sup>18</sup>	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 <sup>19</sup>	Summary offences include sexual exposure in public spaces and image-based sexual abuse. <sup>20</sup>

7 *Crimes Act 1958* (Vic) pt 1 div 1 sub-div 8A.

8 *Ibid* pt 1 div 1 sub-div 8B.

9 *Ibid* s 327.

10 See, eg, *ibid* s 49A(2).

11 *Ibid* s 49B.

12 *Ibid* ss 49–UV.

13 *Ibid* ss 49C, 49E.

14 *Ibid* pt 1 div 1 sub-div 8D.

15 *Criminal Code Act 1995* (Cth) sch 1 pt 10.6 sub-div D ('*Criminal Code* (Cth)').

16 The term 'child pornography' is not used here as the word 'pornography' can suggest that the material is a 'legitimate subgenre of adult pornography'. Jeremy Prichard and Caroline Spiranovic, *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 <<https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/Research%20Report%20-%20Child%20Exploitation%20Material%20in%20the%20Context%20of%20Institutional%20Child%20Sexual%20Abuse%20-%20Causes.pdf>>.

17 *Crimes Act 1958* (Vic) s 51A (definition of 'child abuse material').

18 *Ibid* pt 1 div 1 sub-div 8E.

19 See, eg, *ibid* pt 1 div 1 sub-divs 8C, 8F; *Summary Offences Act 1966* (Vic) ss 19, 41A–DB.

20 *Summary Offences Act 1966* (Vic) ss 19, 41A–DB.

- 14.7 Sexual offences may occur in broader contexts of violence and abuse. They can occur as part of family violence or sexual exploitation.<sup>21</sup>
- 14.8 People may commit sexual offences together with other state or federal offences (for example, forced marriage, female genital cutting or stalking).<sup>22</sup>
- 14.9 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).<sup>23</sup> Most indictable sexual offences can be heard and determined summarily in the Magistrates' Court of Victoria, except offences such as rape and sexual penetration of children.<sup>24</sup>

## Consent is a key factor of sexual offences

### Victoria has a model of communicative consent

- 14.10 For many sexual offences involving adults, a lack of consent is a key part of the offence.<sup>25</sup> For these offences, the prosecution must prove the following elements related to consent:
- that the complainant did not consent to the sexual act (a 'physical element')
  - that the accused did not reasonably believe in consent (the 'fault element').<sup>26</sup>
- 14.11 Victoria's laws are based on a model of 'communicative consent' (see box).<sup>27</sup> This model is reflected in:
- the definition of consent as 'free agreement'<sup>28</sup>
  - circumstances in which consent is not freely given (for example, there is no consent if a person did not say or do anything to indicate consent)<sup>29</sup>
  - the requirement that the accused did not reasonably believe in consent<sup>30</sup> (the fault element).<sup>31</sup>

21 See, eg, *Family Violence Protection Act 2008* (Vic) s 5(1)(i); *Crimes Act 1958* (Vic) s 37A(b). For example, online child sexual exploitation, which involves the 'use of technology or the internet to facilitate the sexual abuse of a child', including producing and sharing child sexual abuse material online: Australian Centre to Counter Child Exploitation, *Online Child Sexual Exploitation: Understanding Community Awareness, Perceptions, Attitudes and Preventative Behaviours* (Research Report, February 2020) 1.

22 See *Criminal Code* (Cth) ss 270.7A–B; *Crimes Act 1958* (Vic) ss 21A, 32.

23 *Magistrates' Court Act 1989* (Vic) s 25; *County Court Act 1958* (Vic) s 36A.

24 The indictable offences that can be heard summarily, if the accused consents, are defined by the maximum sentence or set out in the legislation: see *Criminal Procedure Act 2009* (Vic) ss 28–29, sch 2.

25 Consent is not a factor for offences against children under the age of consent: see, eg, *Crimes Act 1958* (Vic) s 49B.

26 See, eg, *ibid* s 38(1)(b)–(c) (rape), 40(1)(c)–d (sexual assault).

27 Department of Justice and Regulation (Vic), *Victoria's New Sexual Offence Laws: An Introduction* (Report, Criminal Law Review, June 2015) 12–13 <<https://www.justice.vic.gov.au/victorias-new-sexual-offence-laws-an-introduction>>. This had its origins in Victorian Law Reform Commission, *Sexual Offences* (Report No 5, July 2004) ch 8.

28 *Crimes Act 1958* (Vic) s 36(1).

29 *Ibid* s 36(2).

30 See, eg, *ibid* s 38(1)(c) (rape).

31 Serious crimes are made up of 'physical elements' and 'fault elements'. Physical elements of an offence relate to the conduct and any circumstances that must be proved. Fault elements set out the person's mental state that must be proved.

### Communicative consent

This model of consent requires that consensual sex activity should 'only take place where there has been communication and agreement between the parties'. Consent is 'not merely an internal state of mind or attitude (like willingness or acceptance) but ... permission that is *given* by one person to another'. It is 'something that needs to be communicated (by words or other conduct) by the person giving the consent to the person receiving it'.<sup>32</sup>

Communicative consent replaces traditional force and resistance-based models which assessed a lack of consent by the amount of force used or resistance offered, rather than a lack of positively communicated agreement.<sup>33</sup>

Victoria has long used a model of communicative consent.<sup>34</sup>

14.12 Consent that needs to be communicated is also part of the 'affirmative consent' model.<sup>35</sup> There are different interpretations of affirmative consent.<sup>36</sup> Affirmative consent may be described as a 'yes means yes' approach, where consent is actively and positively expressed by the person giving it. Some commentators also say 'enthusiastic consent' must be obtained by the initiator of sexual activity under this model.<sup>37</sup>

14.13 Rachael Burgin argues:

Affirmative consent requires that a person demonstrates willingness to engage in a sexual act either verbally or through their actions. The onus is on the initiator of sex to take steps to ensure that the other party(ies) is consenting. Consent is ongoing and performative; indications of consent must be actively given before and during the sexual act.<sup>38</sup>

14.14 Requiring a person who is seeking to engage in sexual activity to find out if the other person has clearly expressed consent is viewed as a stronger model of consent than is currently the case. People who support this model say that it may shift the focus of the trial from the complainant's behaviour to the accused's actions.<sup>39</sup>

### What is the definition of consent?

14.15 Consent is defined in Victoria as 'free agreement'. The law includes a list of some circumstances in which a person does not give consent (see box).

32 Department of Justice and Regulation (Vic), *Victoria's New Sexual Offence Laws: An Introduction* (Report, Criminal Law Review, June 2015) 12–13 <<https://www.justice.vic.gov.au/victorias-new-sexual-offence-laws-an-introduction>>.

33 Eithne Dowds, 'Rethinking Affirmative Consent' in Rachel Killeen, Eithne Dowds and Anne-Marie McAlinden (eds), *Sexual Violence on Trial: Local and Comparative Perspectives* (Routledge, 2021) 163.

34 Victorian Law Reform Commission, *Sexual Offences* (Report No 5, July 2004) ch 8.

35 The law in Victoria is sometimes described as encompassing an affirmative consent standard: Rachael Burgin, 'Persistent Narratives of Force and Resistance: Affirmative Consent as Law Reform' (2019) 59(2) *The British Journal of Criminology* 296, 296.

36 Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) [4.52].

37 Eithne Dowds, 'Rethinking Affirmative Consent' in Rachel Killeen, Eithne Dowds and Anne-Marie McAlinden (eds), *Sexual Violence on Trial: Local and Comparative Perspectives* (Routledge, 2021) 165–6; Kellie Scott, 'Active Consent Doesn't Sound Sexy, but It Can Lead to More Pleasure', *ABC Everyday* (Web Page, 22 January 2020) <<https://www.abc.net.au/everyday/active-consent-can-lead-to-more-pleasure/11473678>>.

38 Rachael Burgin, 'Persistent Narratives of Force and Resistance: Affirmative Consent as Law Reform' (2019) 59(2) *The British Journal of Criminology* 296, 302 (citations omitted).

39 Rachael Burgin and Asher Flynn, 'Women's Behavior as Implied Consent: Male "Reasonableness" in Australian Rape Law' (2021) 21(3) *Criminology & Criminal Justice* 334, 335.

### **Circumstances in which consent (free agreement) is not given by a person—Crimes Act, section 36(2)**

#### **The person:**

- submits to the act because of force or the fear of force, whether to that person or someone else
- submits to the act because of the fear of harm of any type, whether to that person or someone else or an animal
- submits to the act because the person is unlawfully detained
- is asleep or unconscious
- is so affected by alcohol or another drug as to be incapable of consenting to the act
- is so affected by alcohol or another drug as to be incapable of withdrawing consent to the act (for example, where a person gave consent when not so affected by alcohol or another drug as to be incapable of consenting)
- is incapable of understanding the sexual nature of the act
- is mistaken about the sexual nature of the act
- is mistaken about the identity of any other person involved in the act
- mistakenly believes that the act is for medical or hygienic purposes
- mistakenly believes that, if the act involves an animal, it is for veterinary or agricultural purposes or scientific research purposes
- does not say or do anything to indicate consent to the act
- consents but later withdraws consent to the act taking place or continuing.

14.16 Judges are required to give directions to juries about consent. These include that a person who is not consenting to a sexual act might not protest or physically resist the act.<sup>40</sup> Jury directions are discussed in more detail in Chapter 20.

### **What is a reasonable belief in consent?**

#### **What is the Victorian approach?**

14.17 In its 2015 reforms to sexual offences, Victoria introduced a fault element of no 'reasonable belief' in consent (see box).<sup>41</sup> This was explained as a 'hybrid' standard of reasonableness which:

does not involve the construction and use of a reasonable person. The test focuses on the accused's belief and whether that belief was reasonable in the circumstances. This approach will involve considering some of the accused's particular characteristics and the circumstances of [their] situation. The standard then becomes a matter of what it would be reasonable for a person with those relevant characteristics and in that situation to believe.<sup>42</sup>

<sup>40</sup> *Jury Directions Act 2015* (Vic) s 46(3)(d)(ii).

<sup>41</sup> Department of Justice and Regulation (Vic), *Victoria's New Sexual Offence Laws: An Introduction* (Report, Criminal Law Review, June 2015) 13–14 <<https://www.justice.vic.gov.au/victorias-new-sexual-offence-laws-an-introduction>>.

<sup>42</sup> *Ibid* 14.

- 14.18 This fault element replaced the previous three alternative fault elements.<sup>43</sup> These fault elements were seen to be unclear and complex. They led to many convictions being overturned on appeal. The Victorian Government explained in its review that there was 'also concern that ... the offence is too narrow because it does not criminalise situations where the accused's belief that the complainant consented is unreasonable in all the circumstances'.<sup>44</sup>
- 14.19 In introducing the new fault element, the Victorian Government stated that it largely followed the law in the United Kingdom and the approach is similar to that used in New Zealand and New South Wales.<sup>45</sup>

#### **Reasonable belief in consent—Crimes Act, section 36A**

(1) Whether or not a person reasonably believes that another person is consenting to an act depends on the circumstances.

(2) Without limiting subsection (1), the circumstances include any steps that the person has taken to find out whether the other person consents or, in the case of an offence against section 42(1), would consent to the act.

- 14.20 The law does not impose a duty or requirement on a person to 'take steps' to find out if the other person is consenting.
- 14.21 The law leaves it to the jury to assess the circumstances in which someone's belief is reasonable. Guidance from other cases in places with similar laws suggests that this focuses on matters over which the accused has no control—it tends to not include a person's values or character. For example, these could include the age of the accused, or any disability affecting their capacity to understand the situation.<sup>46</sup>
- 14.22 The aim of introducing into the law the circumstance of 'any steps' taken was to provide 'helpful guidance to jurors by drawing attention to the importance of examining the accused's conduct in assessing the reasonableness of [their] beliefs'. The report explained that, while the law did not impose a legal duty or requirement to take active steps, this would be a factor for the jury to take into account.<sup>47</sup>
- 14.23 In the 'usual case, such a failure will count strongly against the belief being a reasonable one', and an accused 'is very unlikely to evade conviction by arguing that, while [they] did not try to find out if the other person consented', they assumed the other person was consenting because the other person hadn't said or done anything to suggest otherwise'.<sup>48</sup>
- 14.24 The law leaves it to the jury to assess the kinds of steps that would be appropriate. For example, the report explaining this reform said a longstanding intimate relationship between people may involve steps that are subtle and non-verbal. If the person is a stranger, then 'much more clear and explicit steps' will usually be expected.<sup>49</sup>

43 These were: (1) the accused is aware that the complainant is not consenting ('knowledge') (2) the accused is aware that the complainant might not be consenting ('a form of recklessness') (3) the accused does not give any thought to whether the complainant is not consenting or might not be consenting ('non-advertence'). Department of Justice (Vic), *Review of Sexual Offences* (Consultation Paper, September 2013) 20 <<http://www.justice.vic.gov.au/review-of-sexual-offences-consultation-paper>>.

44 Ibid 16.

45 Department of Justice and Regulation (Vic), *Victoria's New Sexual Offence Laws: An Introduction* (Report, Criminal Law Review, June 2015) 13 <<https://www.justice.vic.gov.au/victorias-new-sexual-offence-laws-an-introduction>>.

46 Ibid 14–15.

47 Ibid 16–17.

48 Ibid 17.

49 Ibid.



## What is the law in other places?

- 14.25 A similar definition of consent is used elsewhere in Australia. For example, New South Wales defines consent as meaning a person 'freely and voluntarily agrees to the sexual activity'.<sup>50</sup> The New South Wales Law Reform Commission recommended that consent should continue to be defined this way and that consent 'must exist at the time of the sexual activity'.<sup>51</sup>
- 14.26 In Queensland, consent is 'freely and voluntarily given by a person with the cognitive capacity to give the consent'.<sup>52</sup> The Queensland Law Reform Commission did not recommend any changes to this definition.<sup>53</sup>
- 14.27 As noted above, Victoria's 'reasonable belief' requirement is based on similar provisions in England and Wales. Other places similarly direct that any steps should be taken into account, rather than requiring a person to take steps.<sup>54</sup>
- 14.28 Different approaches exist elsewhere. In Canada, an accused cannot use the defence of belief in consent if, among other things:
- the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.<sup>55</sup>
- 14.29 In Tasmania, the law states that 'a mistaken belief by the accused as to the existence of consent is not honest or reasonable' if, among other things, the accused 'did not take reasonable steps, in the circumstances known to him or her at the time of the offence, to ascertain that the complainant was consenting to the act'.<sup>56</sup>
- 14.30 Victoria does not have a defence of 'mistaken belief' in consent. Instead, an accused person will rely on the jury deciding their belief in consent was reasonable.<sup>57</sup>

## What are the key issues with consent?

- 14.31 In our issues paper, we asked how well Victoria's model of 'communicative consent' was working and whether there was any need to improve the law of consent in Victoria.<sup>58</sup> We heard several suggestions for strengthening the definition of consent, including the requirement to take steps to find out if there is consent.

## There are a range of ideas to make the definition of consent stronger

### Making consent ongoing could strengthen the definition

- 14.32 Sexual Assault Services Victoria (SAS Victoria) and others suggested that the definition of consent should be improved. Several researchers recommended defining consent as agreement that is 'ongoing, actively communicated, prioritises mutual pleasure, and care for the self and others'.<sup>59</sup> SAS Victoria also supported a model that emphasised the need for mutual, continuous and 'enthusiastic' consent.<sup>60</sup>

50 *Crimes Act 1900* (NSW) s 61HE(2).

51 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) Recommendations 5.1–5.2.

52 *Criminal Code Act 1899* (Qld) sch 1 ('*Criminal Code* (Qld)') s 348(1).

53 Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) [5.38]–[5.77].

54 Law Reform Commission of Ireland, *Knowledge or Belief Concerning Consent in Rape Law* (Report No 122, 8 November 2019) [3.93]–[3.102] <[https://www.lawreform.ie/\\_fileupload/Reports/LRC%20122-2019%20Knowledge%20or%20Belief%20Concerning%20Consent%20in%20Rape%20Law.pdf](https://www.lawreform.ie/_fileupload/Reports/LRC%20122-2019%20Knowledge%20or%20Belief%20Concerning%20Consent%20in%20Rape%20Law.pdf)>; see, eg, *Sexual Offences Act 2003* (UK) s 1(2).

55 *Criminal Code*, RSC 1985, c C-46, s 273.2(b).

56 *Criminal Code Act 1924* (Tas) sch 1 ('*Criminal Code* (Tas)') s 14A.

57 Department of Justice and Regulation (Vic), *Victoria's New Sexual Offence Laws: An Introduction* (Report, Criminal Law Review, June 2015) 13 <<https://www.justice.vic.gov.au/victorias-new-sexual-offence-laws-an-introduction>>.

58 Victorian Law Reform Commission, *Defining Sexual Offences* (Issues Paper C, October 2020) Question 2.

59 Submission 7 (Dr Bianca Fileborn, Dr Rachel Loney-Howes, Dr Tully O'Neill and Sophie Hindes).

60 Submission 17 (Sexual Assault Services Victoria).

- 14.33 Bravehearts supported including a model of affirmative consent in the law, and emphasised that consent should apply only to the time it was given, not to any future sexual activity.<sup>61</sup>
- 14.34 Dr Steven Tudor said that there should be no consent if the person 'does not *continue* saying or doing something to indicate *ongoing* consent to the sexual act'. This would cover situations where there is no positively communicated withdrawal because, for example, someone 'freezes' and finds themselves unable to say or do anything to withdraw consent. This could be achieved by adding a note to the existing provision that a person does not consent to an act if 'the person does not say or do anything to indicate consent to the act'.<sup>62</sup>
- 14.35 We also heard that the language of 'withdrawing' consent undermines the model of communicative consent. Rape & Sexual Assault Research & Advocacy (RASARA) told us that in this model, 'the onus is on the initiator of sex to actively seek ongoing consent', and that there should be 'no requirement on a person to demonstrate non-consent at any time'.<sup>63</sup>

### The definition of consent could adapt to the sex industry

- 14.36 Project Respect told us that consent should be defined in a way that made it clear how this applied to people providing sexual services, and also to those affected by the use of substances in the context of work. It told us that clients wrongly believe 'they have the power to do whatever they like with the women during the bookings given they paid for it'.<sup>64</sup>
- 14.37 Women working in the sex industry told us they experience high levels of sexual violence and that this could partly be because a client felt entitled to sexual activity. They explained that people 'pay sex workers for things that they cannot do in other places or in their private lives. Workers are not seen as people by nature of this exchange'.<sup>65</sup>
- 14.38 Sex Work Law Reform Victoria suggested changing the law to include a section similar to that in New Zealand that clarified the role of consent in the sex industry.<sup>66</sup> This states 'the fact that a person has entered into a contract to provide commercial sexual services does not of itself constitute consent for the purposes of the criminal law if he or she does not consent, or withdraws his or her consent, to providing a commercial sexual service'.<sup>67</sup>

### Proving consent can be challenging

- 14.39 Victoria Police told us that there were challenges with how consent laws are interpreted and operate in practice, and that victim survivors are still often required to demonstrate they did not consent through 'active resistance'. This was reflected both in the decisions to continue investigations and in court processes, especially cross-examination.<sup>68</sup>

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61 Submission 38 (Bravehearts).  
62 Submission 25 (Dr Steven Tudor).  
63 Submission 34 (Rape & Sexual Assault Research & Advocacy).  
64 Submission 50 (Project Respect).  
65 Consultation 34 (Project Respect Women's Advisory Group).  
66 Consultation 45 (Sex Work Law Reform Victoria).  
67 *Prostitution Reform Act 2003* (NZ) s 17(2).  
68 Submission 68 (Victoria Police).

## There were concerns about how 'no reasonable belief in consent' was applied

- 14.40 Several researchers told us that the research showed that the way an accused interpreted everyday behaviour was used to establish a 'reasonable belief' in consent in ways that reinforced 'problematic understandings of gender and consent'. For example, an accused could use the clothing or tone of voice of a victim survivor to argue that he had a 'reasonable' belief.<sup>69</sup>
- 14.41 Victoria Police stated that the fault element of 'reasonable belief' in consent is 'often problematic for police to overcome' and 'is a common reason and contributing factor for police in determining whether to authorise charges'.<sup>70</sup>
- 14.42 The Office of Public Prosecutions highlighted a 'troubling' recent case heard on appeal (see box). It told us that the way the law was applied in this case set a 'low bar' for communicating consent that would make it very difficult to prosecute similar cases, and one that was 'arguably not in the spirit' of the legislation.<sup>71</sup>

### ***Hubbard v the Queen***<sup>72</sup>

The complainant had fallen asleep at the house of a casual friend, John Hubbard, after having gone out clubbing and drinking the night before with a group of friends. In her account, she woke to find John penetrating her with his finger. For a few minutes, she thought he was her partner, but when she realised where and who she was with, she stopped him.

Hubbard was convicted by a jury of rape. On appeal, there was no dispute that she had not given consent. Rather, the question was whether there was a reasonable possibility that John thought the complainant was awake and responding to his advances, so that he reasonably believed there was consent.

Three judges of the Court of Appeal allowed the appeal because the jury verdict was unreasonable and could not be supported on the evidence. After evaluating the evidence, they considered there was a reasonable possibility that the complainant had slowly emerged from her sleep, and had physically responded in a way that John interpreted as her being awake and consenting. They considered that the complainant could have participated in pre-penetration activities without remembering she had done so, and this could give the impression of consent.

## Should there be a requirement for a person to 'take steps'?

- 14.43 There were mixed views on whether the 'taking steps' part of the definition of the fault element should be strengthened by requiring a person to take steps to find out if there was consent.
- 14.44 A requirement for a person to take steps is thought to strengthen the model of 'affirmative consent'. Affirmative consent is the standard used by colleges and universities in some places in the United States to respond to sexual assault on campus.<sup>73</sup>

69 Submissions 7 (Dr Bianca Fileborn, Dr Rachel Loney-Howes, Dr Tully O'Neill and Sophie Hindes), 34 (Rape & Sexual Assault Research & Advocacy); Consultation 5 (Associate Professors Anastasia Powell and Asher Flynn).

70 Submission 68 (Victoria Police).

71 Submission 63 (Office of Public Prosecutions).

72 [2020] VSCA 303.

73 See, eg, Cal Education Code 2020 §67386(a).

- 14.45 As mentioned above, under this standard, people would have to take active and positive steps to find out if there is clear (or, in some versions, 'enthusiastic') consent before and during sexual activity. If someone acts ambiguously or inconsistently about their consent, then the person initiating the sexual activity should make further inquiries to find out if there is consent.<sup>74</sup>

### What we heard about the advantages of requiring someone to 'take steps'

- 14.46 RASARA, SAS Victoria, Rape & Domestic Violence Services and several researchers supported requiring a person to demonstrate the steps they had taken to obtain consent during the encounter.<sup>75</sup> Some stakeholders supported the Tasmanian approach, in which a belief in consent is not honest nor reasonable if the accused 'did not take reasonable steps in the circumstances' to ensure the other person was consenting.<sup>76</sup>
- 14.47 Requiring people to take steps to find out if the other person consented can shift our understanding of what consent involves before and during sexual activity. It puts a stronger burden on the person who initiates sexual activity to obtain consent and strengthens the affirmative consent model. This is viewed as a progressive step towards behavioural and cultural change.<sup>77</sup>
- 14.48 We heard that it remained too common for trials to focus on the conduct of the complainant and whether they fought back or said 'no' (see box).<sup>78</sup> A requirement to 'take steps' could help to shift this focus on to the conduct of the accused.<sup>79</sup>
- 14.49 It could also reduce defence arguments based on narratives of 'implied consent', where ordinary behaviour is misinterpreted as consent to sexual activity. RASARA provided examples of behaviours such as sitting on the arm of the accused's chair and touching the accused's knees that had been used to support an argument that there was 'reasonable belief' in consent.<sup>80</sup>

### What we heard about the disadvantages of requiring someone to 'take steps'

- 14.50 The Judicial College of Victoria (JCV) and some experts told us the law on 'taking steps' did not need to be changed.<sup>81</sup> The JCV told us that the law already requires the jury to pay attention to whether the accused took steps. This is achieved by considering the circumstances, which include any steps taken. There is also a jury direction to consider 'what the community would reasonably expect of the accused in the circumstances in forming a reasonable belief in consent'.<sup>82</sup>
- 14.51 Dr Steven Tudor told us that, while the idea of including such a provision might sound appealing, it would make the law more complicated and lead to more appeals (see Chapter 19). Nor would it make the task of the jury easier or increase the chances of a conviction. Further, even though a 'normally decent' person should take steps to find out if the other person consented, the criminal law was not a code for good behaviour and attempts to insert good behaviour in laws designed to define criminal behaviour was 'fraught with difficulty'.<sup>83</sup>

74 Eithne Dowds, 'Rethinking Affirmative Consent' in Rachel Killeen, Eithne Dowds and Anne-Marie McAlinden (eds), *Sexual Violence on Trial: Local and Comparative Perspectives* (Routledge, 2021) 169.

75 Submissions 7 (Dr Bianca Fileborn, Dr Rachel Loney-Howes, Dr Tully O'Neill and Sophie Hindes), 17 (Sexual Assault Services Victoria), 34 (Rape & Sexual Assault Research & Advocacy), 39 (Rape & Domestic Violence Services Australia).

76 Submissions 7 (Dr Bianca Fileborn, Dr Rachel Loney-Howes, Dr Tully O'Neill and Sophie Hindes), 39 (Rape & Domestic Violence Services Australia).

77 Submission 39 (Rape & Domestic Violence Services Australia). See also the discussion in John Gillen, *Gillen Review: Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (Report, 9 May 2019) [11.48]–[11.51] <<https://www.justice-ni.gov.uk/sites/default/files/publications/justice/gillen-report-may-2019.pdf>>.

78 Submissions 7 (Dr Bianca Fileborn, Dr Rachel Loney-Howes, Dr Tully O'Neill and Sophie Hindes), 44 (Dr Patrick Tidmarsh and Dr Gemma Hamilton); Consultation 5 (Associate Professors Anastasia Powell and Asher Flynn).

79 Wendy Larcombe et al, 'Reforming the Legal Definition of Rape in Victoria—What Do Stakeholders Think?' (2015) 15(2) *QUT Law Review* 30, 45.

80 Submission 34 (Rape & Sexual Assault Research & Advocacy).

81 Submission 25 (Dr Steven Tudor); Consultations 4 (Judicial College of Victoria), 26 (Greg Byrne PSM, Legal Policy Consultant, Greg Byrne Law). The Criminal Bar Association did not see any need to change the law on consent, although it did not refer specifically to 'taking steps'; Submission 47 (Criminal Bar Association).

82 Consultation 4 (Judicial College of Victoria); *Jury Directions Act 2015* (Vic) s 47(3)(d).

83 Submission 25 (Dr Steven Tudor).

- 14.52 Greg Byrne PSM argued that, while taking reasonable steps was relevant to whether a belief was reasonable, as is the law in Victoria, it should not be elevated to becoming an element of the offence. This would have the effect of making sexual activity only lawful once steps were taken, and criminalise someone who failed to take reasonable steps although they had a reasonable belief in consent.<sup>84</sup>
- 14.53 It has been argued that 'an affirmative consent provision' that requires a person to find out if there is 'explicit permission to have sex' could in effect make sexual offences 'absolute liability' offences, where the state of mind of the accused (the fault element) is not relevant.<sup>85</sup> This could operate unfairly, depending on the circumstances. Dyer gives the following example:
- ... take the accused with an intellectual disability, or with Asperger's Syndrome, who has non-consensual intercourse with another person, in circumstances where that person was silent because s/he was scared and the accused has not deliberately caused such fright—but also has failed to 'find out' whether the other person is consenting. Should such an accused be convicted of sexual assault? If an affirmative consent provision were in force, s/he would be. ... Because of such an accused's disability, however, it might not occur to him/her that there is a risk that the complainant is not consenting—or that there is any need to ask whether s/he is. It might be quite reasonable for him/her to believe that consent has been granted. Should we convict a person of a serious crime because s/he fell short of a standard that s/he was quite unable to reach?<sup>86</sup>
- 14.54 Other concerns have been raised elsewhere about requiring people to 'take steps'. For example, forcing people to take active steps may fail to reflect the nature of much consensual sexual activity.<sup>87</sup> While taking steps to find out if there is consent is something people should do, some do not see the role of the criminal law as promoting good behaviour. Rather, its role is to punish wrongs.<sup>88</sup>
- 14.55 On the other hand, some people may appear to agree through words or actions because they are afraid or being coerced. While the law recognises circumstances in which consent cannot be given, focusing on the words or actions of consent may draw the focus away from a victim survivor's state of mind and the broader context.<sup>89</sup>
- 14.56 It is also unclear if a requirement to take steps will shift practice. As noted earlier, Tasmania includes a requirement for steps, but in the context of a defence of mistaken belief.<sup>90</sup> Research from Tasmania indicates that this may not be changing outcomes in practice. For example, misconceptions about sexual violence that are at odds with affirmative consent continue to play a role in trials. Prosecutors may not present theories of what occurred to the jury (case theories) that align with the affirmative model of consent, and judges may not direct the jury to correct any misconceptions.<sup>91</sup>

84 Consultation 26 (Greg Byrne PSM, Legal Policy Consultant, Greg Byrne Law).

85 Andrew Dyer, 'Yes! To Communication about Consent; No! To Affirmative Consent: A Reply to Anna Kerr' (2019) 7(1) *Griffith Journal of Law and Human Dignity* 17, 26–7.

86 Ibid 28–9 (citations omitted). See also John Gillen, *Gillen Review: Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (Report, 9 May 2019) [11.60]–[11.61] <<https://www.justice-ni.gov.uk/sites/default/files/publications/justice/gillen-report-may-2019.pdf>>.

87 John Gillen, *Gillen Review: Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (Report, 9 May 2019) [11.52], [11.56] <<https://www.justice-ni.gov.uk/sites/default/files/publications/justice/gillen-report-may-2019.pdf>>.

88 Submission 25 (Dr Steven Tudor); Wendy Larcombe, 'Limits of the Criminal Law for Preventing Sexual Violence' in N Henry and A Powell (eds), *Preventing Sexual Violence* (Palgrave Macmillan, 2014) 64.

89 For example, see the discussion in Eithne Dowds, 'Rethinking Affirmative Consent' in Rachel Killeen, Eithne Dowds and Anne-Marie McAlinden (eds), *Sexual Violence on Trial: Local and Comparative Perspectives* (Routledge, 2021) 167–9.

90 *Criminal Code* (Tas) s 14A.

91 Helen Cockburn, 'The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmania Rape Trials' (PhD Thesis, University of Tasmania, 2012) 188–90, 200 <<http://eprints.utas.edu.au/14748>>; Wendy Larcombe et al, 'Reforming the Legal Definition of Rape in Victoria—What Do Stakeholders Think?' (2015) 15(2) *QUT Law Review* 30, 48.

- 14.57 The position is different where, as in Victoria, there is no defence. Requiring steps in that context may place a burden on the accused to show evidence of consent, reversing the usual burden of proof.<sup>92</sup> This would have implications for the right to a fair trial and will need careful consideration.<sup>93</sup>
- 14.58 Even with a requirement, jurors may still focus on the conduct of the complainant instead of what the accused did to find out if the other person was consenting.<sup>94</sup> This may occur when the accused exercises their right to silence and does not give evidence. Also, few cases may focus on the accused's reasonable belief in consent (see box below).
- 14.59 Finally, any change to the law could introduce more complexity and could result in more appeals.<sup>95</sup> Appeals have the potential to further traumatisé complainants and add to delays (see Chapter 19).

### How does 'taking steps' feature in rape trials in Victoria?

JUDGE: So nothing about the accused finding out steps [sic] to find out whether or not the complainant was consenting?

CROWN PROSECUTOR: No.

JUDGE: Well, nothing was put to him about that.

CROWN PROSECUTOR: No.<sup>96</sup>

An analysis of transcripts from rape trials after 2015 indicated that recent reforms have not shifted the focus of the trial from the complainant to the accused.

The move to a communicative model was not reflected by questioning in trials. Instead of questions about what the accused said or did to obtain consent, complainants continued to be questioned, for example, on whether they resisted verbally or physically by both prosecution and defence. In the rare cases where the accused gave evidence, the cross-examination did not feature questions about the steps they had taken to find out whether the complainant consented.

There is not much of a focus on 'steps taken' because cases rarely focused on the fault element. It was more common for the defence to argue the complainant had consented and was now lying about consenting. Therefore, the focus was directed at the complainant's actions and state of mind (on consent). This is a possible 'blurring' of the physical and fault elements.<sup>97</sup>

### What changes are happening in Australia and overseas?

- 14.60 Reviews in Ireland, Northern Ireland and in New South Wales have not recommended including a requirement for a person to show they took steps to find out if the other person consented (see box).

92 John Gillen, *Gillen Review: Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (Report, 9 May 2019) [11.59] <<https://www.justice-ni.gov.uk/sites/default/files/publications/justice/gillen-report-may-2019.pdf>>.

93 *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 7, 24.

94 Helen Cockburn, 'The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmania Rape Trials' (PhD Thesis, University of Tasmania, 2012) 206–7 <<http://eprints.utas.edu.au/14748>>.

95 Submission 25 (Dr Steven Tudor).

96 Julia Quilter and Luke McNamara, *Qualitative Analysis of County Court of Victoria Rape Trial Transcripts* (Report to the Victorian Law Reform Commission) (forthcoming).

97 Ibid.



### Requiring steps: the views of other law reform commissions

The Law Reform Commission in Ireland did not recommend a requirement to take steps. Instead, it agreed with the draft proposals of the New South Wales Law Reform Commission (see below), that the jury should have regard to any steps the accused took to find out if the other person was consenting. It said steps must be physical or verbal communication to ascertain consent.<sup>98</sup>

The Gillen Review in Northern Ireland did not recommend a requirement to take steps. Reasons include human rights concerns about placing an unreasonable burden on the accused; that it may be too difficult to prove in sexual encounters where communication is implicit; and that some people may have a reasonable belief in consent despite failing to take steps. But the review did recommend changing the law to draw the jury's attention to any failure to take steps. This is intended to shift the focus onto the accused.<sup>99</sup>

The New South Law Reform Commission did not recommend a requirement to take steps because of concerns about the rights of the accused. It said, however, that the term 'steps' was too vague and recommended replacing it with what the accused 'said' or 'did'. Words and acts that are most relevant are those at the time immediately before sexual activity.<sup>100</sup>

- 14.61 While the New South Wales Law Reform Commission did not recommend requiring steps, in May 2021 the New South Wales Government announced it will go further 'by clarifying that an accused person's belief in consent will not be reasonable in the circumstances unless they said or did something to ascertain consent'. This is intended to introduce an affirmative model of consent.<sup>101</sup>
- 14.62 This announcement has generally been received positively and commended for advancing an affirmative standard of consent.<sup>102</sup> On the other hand the New South Wales Bar Association stated the potential change could result in significant injustice.<sup>103</sup> At the time of writing, a Bill changing the law has not been introduced.
- 14.63 The positive responses to the New South Wales Government's announcements indicate that people are expecting more from the law.
- 14.64 Dowds notes:
- rather than rejecting the requirement that the [accused] take steps, or that they say or do something, to ascertain consent, we [should] revive and reformulate it so that it is central, rather than peripheral, to our evaluations of criminal and non-criminal sexual conduct.<sup>104</sup>

98 Law Reform Commission of Ireland, *Knowledge or Belief Concerning Consent in Rape Law* (Report No 122, 8 November 2019) Recommendation 3.07 <[https://www.lawreform.ie/\\_fileupload/Reports/LRC%20122-2019%20Knowledge%20or%20Belief%20Concerning%20Consent%20in%20Rape%20Law.pdf](https://www.lawreform.ie/_fileupload/Reports/LRC%20122-2019%20Knowledge%20or%20Belief%20Concerning%20Consent%20in%20Rape%20Law.pdf)>.

99 John Gillen, *Gillen Review: Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (Report, 9 May 2019) [11.45]–[11.77] <<https://www.justice-ni.gov.uk/sites/default/files/publications/justice/gillen-report-may-2019.pdf>>.

100 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [7.119] – [7.121], [7.160], [7.165]–[7.168].

101 Mark Speakman (Attorney-General for NSW), Sarah Mitchell (Minister for Education and Early Childhood Learning) and Bronnie Taylor (Minister for Mental Health, Regional Youth and Women), 'Consent Law Reform' (Media Release, 25 May 2021) <[https://www.dcj.nsw.gov.au/\\_data/assets/pdf\\_file/0007/811564/consent-law-reform.pdf](https://www.dcj.nsw.gov.au/_data/assets/pdf_file/0007/811564/consent-law-reform.pdf)>.

102 See, eg, Rachael Burgin, 'NSW Adopts Affirmative Consent in Sexual Assault Laws. What Does This Mean?', *The Conversation* (Web Page, 25 May 2021) <<http://theconversation.com/nsw-adopts-affirmative-consent-in-sexual-assault-laws-what-does-this-mean-161497>>; Medhora, Shalailah and Maddy King, 'We're Leading the Way': Affirmative Consent to Become Law in NSW as Part of Historic Reforms', *ABC Triple J Hack* (online, 25 May 2021) <<https://www.abc.net.au/triplej/programs/hack/affirmative-consent-to-become-law-in-nsw/13358840>>; Jennifer Scherer, 'Prominent Lawyers Sign Open Letter Supporting Sexual Consent Law Reforms in NSW', *SBS News* (online, 1 June 2021) <<https://www.sbs.com.au/news/prominent-lawyers-sign-open-letter-supporting-sexual-consent-law-reforms-in-nsw>>.

103 New South Wales Bar Association, 'Consent Proposals Could Result in Significant Injustice' (Media Release, 25 May 2021) <<https://inbrief.nswbar.asn.au/posts/08b347d11316f1372f3414b4c466afe4/attachment/25.5.21%20MR%20CONSENT.pdf>>.

104 Eithne Dowds, 'Rethinking Affirmative Consent' in Rachel Killeen, Eithne Dowds and Anne-Marie McAlinden (eds), *Sexual Violence on Trial: Local and Comparative Perspectives* (Routledge, 2021) 169.



- 14.65 In the Australian Capital Territory, a Bill has been introduced to amend the definition of consent and the fault element of sexual offences. Consultations on this Bill will take place in July 2021. Many of the proposed amendments mirror Victoria's current laws.
- 14.66 However, the exposure draft of the Bill proposes a different approach to taking steps that takes it beyond a consideration for the jury, so that:
- without limiting the grounds on which it may be established that an accused person's belief is not reasonable in the circumstances, the accused person's belief is taken not to be reasonable in the circumstances if the accused person did not say or do anything to ascertain whether the other person consented.<sup>105</sup>
- 14.67 In June 2021, the Australian Government announced a national initiative involving state and territory governments (see Chapter 1) that will include 'a national discussion about the definition of consent and circumstances where consent is not given'.<sup>106</sup>

## **We recommend moving towards a stronger affirmative model of consent**

- 14.68 Moving towards a stronger model of 'affirmative consent' could provide meaningful and effective change to the law of sexual offences. Sexual offending remains far too common in the community (see Chapter 2) and changing the law sends a powerful message. It is also clear from our transcript analysis that, too often, complainants are still the ones being put 'on trial' (see above box).
- 14.69 We have noted the largely positive reception of the proposed model in New South Wales and the shifting support towards an affirmative model of consent.
- 14.70 While we support a stronger model of affirmative consent in principle, we do not consider that it is appropriate to design how this should occur in this inquiry. There is a need for thorough consultation to assist with developing a model.
- 14.71 Consent to sexual activity is integral to a person's sexual autonomy. Consent affects everyone who chooses to engage in sexual activity. Changes to the law should involve broad and diverse consultation. For example, we were told that 'consent is contextual' and the law of consent was based on 'a model of sexual relations that failed to properly take into account queer sexual practices'.<sup>107</sup>
- 14.72 Timing is important regarding this issue. Public debate about consent has moved on quickly. It would be ideal to take into account and take advantage of both the state developments and national discussion about consent now underway.
- 14.73 We recommend in principle that the government should review the fault element of consent and other aspects of consent to move towards a stronger affirmative consent model. In reviewing the fault element, the government should consider how to introduce a requirement for a person to 'take steps' to find out if there is consent, and other aspects of consent relevant to this. We have set out all the issues stakeholders identified to inform this further review.

<sup>105</sup> Exposure Draft, Crimes (Consent) Amendment Bill 2021 (ACT) cl 7, inserting s 67(5).

<sup>106</sup> Attorney-General for Australia and Minister for Industrial Relations (Cth), 'Leading a National Approach to Justice for Victims and Survivors of Sexual Assault, Harassment and Coercive Control' (Media Release, 17 May 2021) <<https://www.attorneygeneral.gov.au/media/media-releases/leading-national-approach-justice-17-may-2021>>.

<sup>107</sup> Submission 29 (Victorian Pride Lobby).

- 14.74 We note, however, several issues that should be given more thought in the proposed review. The definition of consent is intertwined with the fault element of 'no reasonable belief in consent'. Both aspects will need to be reviewed to move towards a stronger affirmative consent model. The law may need to provide a level of clarity about what should count as a reasonable step to find out if there is consent without being prescriptive. This will involve thinking through the different and nuanced ways people find out if there is consent to sex. It will also involve crafting the law in a way that does not unfairly punish accused people such as those with cognitive disabilities.<sup>108</sup>
- 14.75 It is also important to integrate the law into community education to foster broad cultural change. People need to know what the law says about consent and sexual activity.
- 14.76 Any change to the law should be coupled with training and education for people working in the criminal justice system—changes are unlikely to be effective if people working in the criminal justice system, such as police or lawyers, do not make decisions or conduct trials in line with the aims of the law.

## Recommendation

- 50 The Victorian Government should review the definition of consent under section 36 of the *Crimes Act 1958* (Vic) and the fault element of 'no reasonable belief in consent' under section 36A of the same Act with the aim of moving towards a stronger model of affirmative consent. In doing so, it should:
- formulate a requirement for a person to 'take steps' to find out if there is consent
  - consult widely with members of communities and stakeholders
  - deliver training and education for people working in the criminal justice system on the reforms
  - deliver community education and programs on the reforms.

## Should 'stealthing' be criminalised?

### What is stealthing?

- 14.77 The law in Victoria does not make it clear that it is a crime to remove without consent a contraceptive device or a device to prevent sexually transmitted infections, such as a condom.<sup>109</sup> Such behaviour, commonly referred to as 'stealthing', has been described as a violation of consent.<sup>110</sup>
- 14.78 People have been charged for this behaviour under offences such as rape, sexual assault, and 'procuring a sexual activity by fraud'.<sup>111</sup> It can also be a form of 'birth control sabotage' (also known as 'contraceptive control' or 'reproductive coercion').<sup>112</sup>

<sup>108</sup> But note in these situations there is the defence of mental impairment. The law recognises that a person with a mental health condition or cognitive impairment will not have the capacity to be criminally responsible for their actions. For example, when they did not know what they were doing, or did not know their actions were wrong: see *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic).

<sup>109</sup> Brianna Chesser and April Zahra, 'Stealthing: A Criminal Offence?' (2019) 31(2) *Current Issues in Criminal Justice* 217, 219.

<sup>110</sup> Alexandra Brodsky, 'Rape-Adjacent': Imagining Legal Responses to Nonconsensual Condom Removal' (2017) 32(2) *Columbia Journal of Gender and Law* 183, 185. See also Brianna Chesser and April Zahra, 'Stealthing: A Criminal Offence?' (2019) 31(2) *Current Issues in Criminal Justice* 217.

<sup>111</sup> 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: *Medical Board of Australia v Liang Joo Leow* [2019] VSC 532 [4]. In another case, a person pleaded guilty to procuring sexual activity by fraud: *DPP (Vic) v Diren* [2020] VCC 61.

<sup>112</sup> Alexandra Brodsky, 'Rape-Adjacent': Imagining Legal Responses to Nonconsensual Condom Removal' (2017) 32(2) *Columbia Journal of Gender and Law* 183, 184.

- 14.79 This kind of behaviour is mostly perpetrated by men against women, as well as by men who have sex with men.<sup>113</sup> There is little research on how common this behaviour is.<sup>114</sup>
- 14.80 Some of the available research indicates that people who work in the sex industry may be more likely to experience this behaviour.<sup>115</sup> Project Respect, which works with women in the sex industry, told us that this 'form of sexual assault is increasing exponentially'.<sup>116</sup>
- 14.81 This kind of behaviour can cause significant harm and trauma. For example, infections and viruses may be transmitted, and it may cause an unintended pregnancy. The trauma and distress may be 'reinforced by the ambiguity regarding the legality of what has occurred'.<sup>117</sup>

## The law relating to stealthing could be clarified

- 14.82 There was broad support for making it clearer how the criminal law applied to this kind of behaviour.<sup>118</sup> Defining or recognising this behaviour as a sexual offence will help people to identify it as a criminal act and make it more likely that they will report it as a crime.<sup>119</sup>
- 14.83 For example, Project Respect told us:
- Women disclosed that they were not supported by management in these circumstances. They reported the client was often given their money back by management after making a complaint when the woman stopped the booking, or, the woman was forced back into the booking to complete, despite the assault that had transpired. Reports from women indicate that a majority of managers do not perceive the removal of a condom as sexual assault and due to this, it is highly underreported.<sup>120</sup>
- 14.84 There are several ways the law could recognise or clarify the nature of this behaviour:
- introducing a separate offence
  - clarifying that this conduct is a circumstance in which a person does not give consent<sup>121</sup>
  - clarifying that this conduct falls within the offence of 'procuring sexual activity by fraud'<sup>122</sup>
  - introducing a new tort.<sup>123</sup>

113 Brianna Chesser and April Zahra, 'Stealthing: A Criminal Offence?' (2019) 31(2) *Current Issues in Criminal Justice* 217, 218; Rosie Latimer et al, 'Non-Consensual Condom Removal, Reported by Patients at a Sexual Health Clinic in Melbourne, Australia' (2018) 13(12) *PLOS ONE* e0209779: 1–16, 16.

114 Rosie Latimer et al, 'Non-Consensual Condom Removal, Reported by Patients at a Sexual Health Clinic in Melbourne, Australia' (2018) 13(12) *PLOS ONE* e0209779: 1–16, 13 <<https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0209779>>. Latimer and colleagues 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.

115 Ibid 11–13.

116 Submission 50 (Project Respect). It told us that 14% of women Project Respect met during outreach in brothels in 2018–19 experienced the removal of a condom during a booking.

117 Brianna Chesser and April Zahra, 'Stealthing: A Criminal Offence?' (2019) 31(2) *Current Issues in Criminal Justice* 217, 218; Rosie Latimer et al, 'Non-Consensual Condom Removal, Reported by Patients at a Sexual Health Clinic in Melbourne, Australia' (2018) 13(12) *PLOS ONE* e0209779: 1–16, 7 <<https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0209779>>.

118 Submissions 25 (Dr Steven Tudor), 28 (Dr Natalia Antolak-Saper), 34 (Rape & Sexual Assault Research & Advocacy), 50 (Project Respect), 59 (County Court of Victoria); Consultations 4 (Judicial College of Victoria), 26 (Greg Byrne PSM, Legal Policy Consultant, Greg Byrne Law), 46 (Safer Families Research Centre and Monash Social Inclusion Centre).

119 Submissions 34 (Rape & Sexual Assault Research & Advocacy), 50 (Project Respect), 59 (County Court of Victoria).

120 Submission 50 (Project Respect).

121 *Crimes Act 1958* (Vic) s 36(2).

122 *Crimes Act 1958* (Vic) s 45.

123 See generally Melissa Marie Blanco, 'Sex Trend or Sexual Assault: The Dangers of Stealthing 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; Brianna Chesser and April Zahra, 'Stealthing: A Criminal Offence?' (2019) 31(2) *Current Issues in Criminal Justice* 217; Andrew Dyer, 'Mistakes That Negate Apparent Consent' (2018) 43(3) *Criminal Law Journal* 159, 169–73.

- 14.85 We heard most support for listing this conduct as a circumstance in which consent is not given.<sup>124</sup> The County Court of Victoria supported a stand-alone offence.<sup>125</sup> Another suggestion was to clarify that this conduct amounted to the offence of 'procuring sexual activity by fraud'.<sup>126</sup>

### What is the law elsewhere?

- 14.86 This issue has been considered in New South Wales and Queensland.
- 14.87 The New South Wales Law Reform Commission recommended treating this behaviour as a circumstance in which consent cannot be given for the offence of rape:
- The [New South Wales] Crimes Act should provide that a person who consents to a particular sexual activity is not, by reason only of that fact, to be taken to consent to any other sexual activity.
- For example, a person who consents to sexual activity using a condom is not to be taken, by reason only of that fact, to consent to sexual activity without using a condom.<sup>127</sup>
- 14.88 The Queensland Law Reform Commission found that there 'may well be merit in considering whether this practice should be specifically dealt with as an offence in its own right'. It did not recommend including the practice in the list of circumstances in which consent was not taken to have been freely and voluntarily given.<sup>128</sup>
- 14.89 In the Australian Capital Territory a Bill has been introduced to address this behaviour. The Bill inserts the following as a circumstance where there is no consent by law, if any consent to sexual intercourse or an act of indecency was caused:
- by an intentional misrepresentation by the other person about the use of a condom.<sup>129</sup>

### The law should make clear there is no consent

- 14.90 We recommend a similar approach to that proposed by the New South Wales Law Reform Commission. When someone consents to sexual activity, that consent includes the circumstances in which consent is given. This includes whether someone is using a contraceptive device or device to prevent sexually transmitted infections (STIs). If that circumstance for which consent is given changes, there is no longer consent.
- 14.91 This is consistent with the communicative model of consent. As Dr Natalia Antolak-Saper explained:
- for the purpose of criminalisation the focus ought to be primarily on the autonomy of an individual consenting to sexual activity with the use of a condom. The central element in sexual offences is the element of consent which transforms what would otherwise be lawful conduct into a criminal offence.<sup>130</sup>
- 14.92 There may be advantages to a separate offence. Some people may consider this a different type of harm to rape and sexual assault. People who experience this form of sexual violence could find labels of 'rape' or 'sexual assault' stigmatising. Standard sentencing requirements for rape and sexual assault would limit sentencing options.<sup>131</sup>

124 Submissions 25 (Dr Steven Tudor), 28 (Dr Natalia Antolak-Saper), 34 (Rape & Sexual Assault Research & Advocacy); Consultations 4 (Judicial College of Victoria), 26 (Greg Byrne PSM, Legal Policy Consultant, Greg Byrne Law).

125 Submission 59 (County Court of Victoria). This was also supported as an alternative by Submission 28 (Dr Natalia Antolak-Saper).

126 Submission 28 (Dr Natalia Antolak-Saper).

127 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) Recommendation 5.5.

128 Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) [6.143].

129 Crimes (Stealthing) Amendment Bill 2021 (ACT) cl 4, inserting s 67(1)(ga).

130 Submission 28 (Dr Natalia Antolak-Saper).

131 For example, rape is a Category 1 offence, which means that a court must impose a custodial sentence for that offence and, if committed on or after 1 February 2018, will receive a standard sentence of 10 years: *Sentencing Act 1991* (Vic) pt 3, div 2.

- 14.93 However, there are disadvantages to a separate offence. Creating a separate offence can suggest that this behaviour is less serious than rape or sexual assault and fails to properly recognise what consent means. Further, we are conscious of the challenges associated with creating new sexual offences, including issues with interpretation and possible appeals.
- 14.94 We therefore recommend introducing a new circumstance that makes clear consent cannot be present where a person:
- having obtained consent from another person to engage in sexual activity with an STI-prevention or contraceptive device
  - does not use, disrupts or removes this device without the other person's consent.<sup>132</sup>
- 14.95 This will clarify what behaviour is criminalised. The language should be inclusive of the different devices people use to protect themselves during sexual activities. People may use condoms to prevent STIs, not just for contraception. People may also use other protective devices such as dental dams.<sup>133</sup>
- 14.96 The language should be confined so that there is a clear link between consent and these devices, so that it does not open up questions about broader conditions that may be placed on consent (for example, representations about the religious beliefs of the other person).<sup>134</sup>
- 14.97 It is important to increase community awareness and education about this change, so that the law translates into practice. People need to know that stealthing is a crime. We make recommendations for community education about sexual offences, with a focus on consent, in Chapter 3.

## Recommendation

- 51 Section 36(2) of the *Crimes Act 1958* (Vic) should be amended to include a new circumstance in which consent is not given by a person where, having consented to sexual activity with a device to prevent sexually transmitted infections or contraceptive device, the other person does not use, disrupts or removes the device without the person's consent.

## How can the law on technology-facilitated sexual offences be improved?

- 14.98 In our issues paper, we asked how well the law of technology-facilitated sexual offences is working, and if any improvements are needed.<sup>135</sup>

<sup>132</sup> This should be introduced as a new circumstance in *Crimes Act 1958* (Vic) s 36(2).

<sup>133</sup> These are protective sheets used during oral sex: Queensland Government, 'Oral Sex and STIs – What You Need to Know', *Queensland Health* (Web Page, 24 June 2019) <<https://www.health.qld.gov.au/news-events/news/oral-sex-STI-protection-condom-dental-dam>>.

<sup>134</sup> Submission 25 (Dr Steven Tudor).

<sup>135</sup> Victorian Law Reform Commission, *Defining Sexual Offences* (Issues Paper C, October 2020) Question 3.

- 14.99 'Technology-facilitated' offending is a term capturing a broad spectrum of sexual violence, including:
- technology-enabled sexual aggression, harassment or stalking
  - the use of technology to commit contact-based offences such as rape or sexual assault
  - taking or sharing of, or threats to share, nude or sexual images without consent (also known as 'image-based sexual abuse')
  - unwanted or unwelcome online conduct that is sexual in nature, such as online requests for sex, image-based harassment (for example, receiving unwanted sexually explicit images), and rape threats
  - online child sex offences, such as grooming in a virtual environment, and offences for producing, possessing and distributing child exploitation material.<sup>136</sup>
- 14.100 The widespread use of technology means that it is easier than ever to commit sexual offences.<sup>137</sup> Although anyone can be affected by image-based sexual abuse, women are affected more.<sup>138</sup> People who work in the sex industry are also affected by technology-facilitated offending.<sup>139</sup>
- 14.101 In this section we recommend making image-based sexual abuse offences indictable. We also note other issues about technology-facilitated sexual offences.

## What are image-based sexual abuse offences?

- 14.102 Image-based sexual abuse involves sharing and distributing intimate images without consent. Image-based abuse comes in forms commonly described as:
- revenge pornography<sup>140</sup>
  - upskirting—taking photos of the genital area when a person thinks it is hidden<sup>141</sup>
  - deepfakes—making or distributing digitally altered intimate images.<sup>142</sup>
- 14.103 These forms of image-based sexual abuse can occur in contexts such as family violence, sexual harassment, cyber-bullying, sextortion and coercive control.<sup>143</sup> More than half of the cases in Victoria have been linked to family violence, and upskirting offences were commonly sentenced alongside sexual offences against children, often related to child pornography.<sup>144</sup>

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136 Asher Flynn, Anastasia Powell and Sophie Hindes, *Technology-Facilitated Abuse: A Survey of Support Services Stakeholders* (Research Report Issue 2, ANROWS Australia's National Research Organisation for Women's Safety, July 2021) 9–14 <<https://www.anrows.org.au/project/technology-facilitated-abuse-extent-nature-and-responses-in-the-australian-community/>>; Antonia Quadara et al, *Conceptualising the Prevention of Child Sexual Abuse* (Research Report No 33, Australian Institute of Family Studies (Cth), June 2015) 15 <<https://aifs.gov.au/publications/conceptualising-prevention-child-sexual-abuse>>.

137 Nicole Bluett-Boyd et al, *The Role of Emerging Communication Technologies in Experiences of Sexual Violence: A New Legal Frontier?* (Research Report No 23, Australian Institute of Family Studies (Cth), February 2013) chs 4–5 <<https://aifs.gov.au/publications/role-emerging-communication-technologies-experience>>.

138 Asher Flynn, Anastasia Powell and Sophie Hindes, *Technology-Facilitated Abuse: A Survey of Support Services Stakeholders* (Research Report Issue 2, ANROWS Australia's National Research Organisation for Women's Safety, July 2021) 38 <<https://www.anrows.org.au/project/technology-facilitated-abuse-extent-nature-and-responses-in-the-australian-community/>>.

139 Submission 50 (Project Respect).

140 The term 'revenge pornography' has been critiqued for several reasons, including because it focuses on the content of the image rather than the abusive action: Nicola Henry, Asher Flynn and Anastasia Powell, *Responding to 'Revenge Pornography': Prevalence, Nature and Impacts* (Report CRG 08/15-16, Criminology Research Advisory Council, March 2019) 12–13 <[https://research.mgt.monash.edu/ws/portalfiles/portal/264678641/08\\_1516\\_FinalReport.pdf](https://research.mgt.monash.edu/ws/portalfiles/portal/264678641/08_1516_FinalReport.pdf)>.

141 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.

142 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.

143 Sextortion refers to a form of blackmail that involves threats to share intimate images online: 'Sextortion Trends and Challenges—Position Statement', *eSafety Commissioner* (Web Page) <<https://www.esafety.gov.au/about-us/tech-trends-and-challenges/sextortion>>. See generally Hadeel AL-Alosi, 'Cyber-Violence: Digital Abuse in the Context of Domestic Violence' (2017) 40(4) *UNSW Law Journal* 1573, 1573–80; Office of the eSafety Commissioner (Cth), *Image-Based Abuse National Survey* (Summary Report, 2017) 5–6 <<https://www.esafety.gov.au/sites/default/files/2019-07/Image-based-abuse-national-survey-summary-report-2017.pdf>>.

144 Sentencing Advisory Council (Vic), *Sentencing Image-Based Sexual Abuse Offences in Victoria* (Report, October 2020) xi.



14.104 In Victoria, image-based sexual offences are summary offences (see Table 15).

**Table 15: Image-based sexual offences in Victoria**

Offences	Summary Offences Act 1966 (Vic)
Intentionally using a device to observe another person's genital or anal region when that person would reasonably expect that this region could not be observed	Section 41A
Intentionally visually capturing another person's genital or anal region when that person would reasonably expect that that region could not be observed	Section 41B
Intentionally distributing an image of a genital or anal region if the person has visually captured the image	Section 41C
Intentionally distributing, without consent, intimate images of a person to another person, where that distribution is contrary to community standards of acceptable conduct <sup>145</sup>	Section 41DA
Threatening to distribute intimate images, with the intention that another person will believe, or believing that another person will probably believe, that they will carry out the threat	Section 41DB

14.105 There are also relevant Commonwealth crimes. It is a crime under Commonwealth law to use a carriage service (for example, the internet) to menace, harass or cause offence, or to make available or disseminate 'private sexual material' through a carriage service.<sup>146</sup>

14.106 The Australian Government regulates online behaviour through the Office of the eSafety Commissioner. The eSafety Commissioner can order the removal of intimate images posted online without consent, or fine someone for posting or threatening to post intimate images online without consent.<sup>147</sup> If it happens repeatedly, this can also be an offence.<sup>148</sup>

14.107 In New South Wales, similar offences have been created as indictable offences. The offences are also committed if a person is 'reckless' as to whether a person consented to the recording or distribution of the intimate image.<sup>149</sup> They also make it an offence to record, and not just distribute, intimate images without consent. The laws give the court power to order the person who committed the offence to remove or destroy the intimate image.<sup>150</sup>

14.108 A fault element of recklessness was recommended in a Commonwealth review,<sup>151</sup> and in a National Statement of Principles relating to the Criminalisation of the Non-Consensual Sharing of Intimate Images.<sup>152</sup>

<sup>145</sup> Factors relevant to those standards, such as the age or intellectual capacity of the person depicted, are listed in *Summary Offences Act 1966* (Vic) s 40 (definition of 'community standards of acceptable conduct').

<sup>146</sup> *Criminal Code* (Cth) s 474.17A(1), which is an aggravated version of s 474.17(1). See also s 473.1 (definition of 'private sexual material').

<sup>147</sup> *Enhancing Online Safety Act 2015* (Cth) pt 5A.

<sup>148</sup> *Criminal Code* (Cth) s 474.17A(4).

<sup>149</sup> Most crimes require a person to have a specified state of mind to be found guilty, called the 'fault element' or sometimes the 'mental element' or *mens rea*. Intention and recklessness are common forms of 'fault element'.

<sup>150</sup> *Crimes Act 1900* (NSW) pt 3 div 15C.

<sup>151</sup> Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Phenomenon Colloquially Referred to as 'Revenge Porn'* (Report, 25 February 2016) [5.14], Recommendation 2 <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Revenge\\_porn/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Revenge_porn/Report)>.

<sup>152</sup> Law, Crime and Community Safety Council, *National Statement of Principles Relating to the Criminalisation of the Non-Consensual Sharing of Intimate Images* (Council Document, May 2017) 3, [14] <<https://www.homeaffairs.gov.au/criminal-justice/files/criminalisation-non-consensual-sharing-intimate-images.pdf>>.



## Should image-based sexual abuse offences be indictable?

### Image-based sexual abuse should be taken seriously

14.109 Rape & Domestic Violence Services Australia (RDVSA) and experts in technology-facilitated offences told us that image-based sexual abuse causes serious harm which is not reflected in the summary nature of Victoria's offences. Victoria was one of the first states in Australia to make image-based sexual abuse a crime, but its law has not kept up with the research and knowledge about this kind of violence.<sup>153</sup>

14.110 Image-based sexual abuse is common although widely underreported.<sup>154</sup> RDVSA explained:

Image-based sexual abuse is a serious crime with many of the same devastating, recurring, and lifelong consequences endured by others who experience sexual violence. It has been described as 'a pernicious and gendered form of sexual abuse, the prevalence of which has increased exponentially with the ubiquity of the smart phone.' It is commonly used within the context of domestic and family violence and forms a continuum with other forms of sexual violence. Apart from resulting in complex trauma impacts, the sharing of intimate images may also lead to adverse consequences for the victim-survivor in relation to their reputation, employment and relationships. When perpetrated within the context of an abusive relationship, a threat to distribute intimate images may create a significant barrier for the victim-survivor to escape violence and seek support. The seriousness of image-based sexual abuse has historically been minimised in public discourse, law and policy.<sup>155</sup>

14.111 Project Respect reported that people who work in the sex industry can experience:

threats to out and/or expose women by clients who have images, filming during bookings without consent, advertising/posting services and phone numbers online without consent and taking images of women and then using this as a form of power and control in situations of trafficking.<sup>156</sup>

14.112 We heard that the definition of 'intimate images' should be updated to include digitally altered intimate images ('deepfakes').<sup>157</sup> We also heard that it could be more inclusive of diverse genders.<sup>158</sup> For example, the New South Wales definition of intimate images also includes the breasts of a 'transgender or intersex person identifying as female' and altered images.<sup>159</sup>

14.113 Victoria Police and RDVSA supported increasing the maximum penalties and removing the limits that apply to summary offences.<sup>160</sup> RDVSA noted, for example, that prosecutions for summary offences generally had to be commenced within 12 months, unlike indictable offences, including those which may proceed summarily.<sup>161</sup>

14.114 Victoria Police told us that the fact these offences were summary limited its search and arrest powers, and its ability to gather evidence.<sup>162</sup> A Sentencing Advisory Council report explains:

This creates some limitations on investigation and enforcement. In particular, police can, at any time and without warrant, apprehend any person who they believe on reasonable grounds has committed an indictable offence in Victoria. Arrests for summary offences, on the other hand, are restricted to circumstances closer to the actual commission of the offence. Given that warrantless search and seizure powers apply when executing an arrest, this inevitably limits the circumstances in which

153 Submission 39 (Rape & Domestic Violence Services Australia); Consultations 5 (Associate Professors Anastasia Powell and Asher Flynn), 7 (Associate Professor Nicola Henry). See also Sentencing Advisory Council (Vic), *Sentencing Image-Based Sexual Abuse Offences in Victoria* (Report, October 2020) [6.1].

154 Sentencing Advisory Council (Vic), *Sentencing Image-Based Sexual Abuse Offences in Victoria* (Report, October 2020) x.

155 Submission 39 (Rape & Domestic Violence Services Australia).

156 Submission 50 (Project Respect).

157 Submissions 10 (Carolyn Worth AM and Mary Lancaster), 59 (County Court of Victoria); Consultation 7 (Associate Professor Nicola Henry).

158 Consultation 7 (Associate Professor Nicola Henry).

159 *Crimes Act 1900* (NSW) s 91N (definitions of 'intimate image', 'private parts').

160 Submissions 39 (Rape & Domestic Violence Services Australia), 68 (Victoria Police).

161 *Criminal Procedure Act 2009* (Vic) s 7. The accused can consent to commencing proceedings beyond this time limit, or the law can otherwise specify that the time limit does not apply.

162 Submission 68 (Victoria Police).

these powers can be employed. Additionally, although the Summary Offences Act 1966 (Vic) contains a specific power to issue search warrants in respect of IBSA [image-based sexual abuse] offences, it does not replicate the powers available in respect of indictable offences to access and search computer systems.<sup>163</sup>

- 14.115 Victoria Legal Aid told us that it did not support creating new offences to address image-based sexual abuse, as the criminal justice system already provided a response. Instead, it supported increasing community understanding and awareness to increase reporting and reduce offending.<sup>164</sup>

### Image-based sexual abuse offences should become indictable

- 14.116 We agree that the image-based sexual offences should become indictable crimes triable summarily. This means that they can be heard in the Magistrates' Court of Victoria.<sup>165</sup> Making these crimes indictable would recognise the serious nature of these actions.

- 14.117 This will also resolve some issues identified by Victoria Police, such as the limits on police powers to investigate.

- 14.118 We exclude from this the offence of observing a person's genital or anal region with a device ('upskirting'). This offence is not technology-facilitated abuse (see above), as a 'device' can mean anything that can be used to observe a person's genital or anal region such as a mirror.<sup>166</sup> It is different from image-based sexual abuse offences because it does not involve the risk of intimate images being recorded and distributed without consent. We believe it is appropriate for this offence to remain a summary offence.

- 14.119 We also recommend the following changes in line with those in New South Wales:

- making it an offence to take as well as distribute intimate images without consent because, even where there is no threat or distribution, because people can suffer harm knowing that somebody has these images and may distribute them
- introducing a fault element of 'recklessness' as to consent for the taking and distribution of intimate images to capture, for example, a person who is probably aware that the other person did not consent to the image being taken or distributed
- defining 'intimate' to include people of all genders, including transgender people, and intersex people, and altered intimate images
- give courts the power to order the destruction of the intimate images.<sup>167</sup>

- 14.120 We do not make recommendations to amend maximum sentences for these offences. But we do note that in New South Wales, the maximum penalty is three years imprisonment for taking, distributing and making threats to distribute.<sup>168</sup> The Sentencing Advisory Council recently commented in its report:

In addition to the low rate of reporting, the attrition between recorded and sentenced offences is high, and sentences imposed for IBSA offending are low relative to the harms involved in more serious cases. Moreover, Victoria's IBSA offences are contained in the *Summary Offences Act 1966* (Vic) and have the lowest maximum penalties in the country for this type of offending. This most likely contributes to perceptions that IBSA is relatively minor offending compared to other criminal offences.<sup>169</sup>

<sup>163</sup> Sentencing Advisory Council (Vic), *Sentencing Image-Based Sexual Abuse Offences in Victoria* (Report, October 2020) [3.14] (citations omitted).

<sup>164</sup> Submission 27 (Victoria Legal Aid).

<sup>165</sup> Or before a jury in the County Court, depending on the circumstances.

<sup>166</sup> *Summary Offences Act 1966* (Vic) ss 40 (definition of 'device'), 41A.

<sup>167</sup> *Crimes Act 1900* (NSW) s 91N–S.

<sup>168</sup> *Ibid* s 91P–R.

<sup>169</sup> Sentencing Advisory Council (Vic), *Sentencing Image-Based Sexual Abuse Offences in Victoria* (Report, October 2020) [6.6].

### What are some of the sentencing trends?

From 2015–16 to 2018–19:

- Almost all of offenders sentenced were male (91 per cent).
- There has been a gradual increase in the number of cases sentenced each year.
- Since they were introduced in 2014, the most commonly sentenced offences have been the offences of distributing or threatening to distribute an intimate image.
- More than half the cases sentenced involved family violence (54 per cent), with the most common offences sentenced alongside these offences a breach of family violence orders and stalking.
- Almost all cases were sentenced in the Magistrates' Court of Victoria (85 per cent).
- The most common sentencing outcomes were community correction orders, imprisonment and fines.<sup>170</sup>

14.121 We recognise that there are risks in treating these offences more seriously than is currently the case. For example, we heard that children and young people use technology more often so these offences may be more likely to criminalise their behaviour.<sup>171</sup> The Gatehouse Centre, which works with children, told us:

The development of healthy and responsible sexual identities is a complex process, often involving mistakes and misunderstandings. It becomes even more challenging when that development is occurring online. While it is vital that we protect all Victorians from online sexual harassment and image-based abuse, it is also important that we avoid unnecessarily criminalizing the mistakes of adolescent development.<sup>172</sup>

14.122 On balance, we consider the risks can be reduced by improving community awareness and education. We make recommendations about raising community awareness and education about all sexual offences in Chapter 3.

14.123 In Chapter 13 we recommend an individualised and discretionary approach to registration of sex offenders and further protection for children and young people.

14.124 We recommend that police should continue to exercise discretion to caution children who commit these crimes, so that no criminal proceedings are brought. Formal cautions can be issued to children (10–17 years old) who commit crimes. The parent or guardian of the child must be present during the caution. Cautions for sexual and related offences are granted in exceptional circumstances.<sup>173</sup> We recommend that Victoria Police's procedures should allow cautions to be issued for image-based sexual abuse offences committed by children and young people without the requirement for exceptional circumstances.

14.125 We also note that children and young people are tried in the Children's Court of Victoria, which takes a more tailored approach to accused people. The sentencing of children and young people in the Children's Court is different to the sentencing of adults. Sentencing focuses on rehabilitation and reducing stigma, while holding a child or young person accountable for their actions in a way that is suited to their age and capacity.<sup>174</sup>

<sup>170</sup> Ibid [6.2].

<sup>171</sup> Submissions 14 (Gatehouse Centre, Royal Children's Hospital), 17 (Sexual Assault Services Victoria).

<sup>172</sup> Submission 14 (Gatehouse Centre, Royal Children's Hospital).

<sup>173</sup> Kimberley Shirley, *The Cautious Approach: Police Cautions and the Impact on Youth Reoffending* (In Brief No 9, Crime Statistics Agency (Vic), September 2017) 3.

<sup>174</sup> *Children, Youth and Families Act 2005* (Vic) ss 360, 362.

- 14.126 In New South Wales, perpetrators of image-based sexual abuse who are under 16 cannot be prosecuted without the Director of Public Prosecution's approval.<sup>175</sup> We recommend this approach as an additional safeguard in Victoria against the overcriminalisation of children who may commit these crimes.
- 14.127 We also recommend that the investigation of these offences should be handled by police who specialise in sexual offences (SOCITs). Victoria Police is supportive of this approach.<sup>176</sup> To improve investigation, we note Victoria Police's suggestion for a mechanism that would allow intimate images to be stored for future retrieval by law enforcement if the victim survivor wanted to report the crime. Even though the removal of these images is necessary, it can place victim survivors at a disadvantage if they want to pursue charges later on because of the loss of digital evidence.<sup>177</sup>
- 14.128 These offences should be included within the definition of sexual offences in the *Crimes Act 1958* (Vic). This will ensure that when matters go to trial, complainants are granted the protections available for sexual offences, such as providing evidence from a remote location via audio-visual link. We also recommend that they should have the right to have their identities suppressed.<sup>178</sup> These protections would reduce re-traumatisation at trial.<sup>179</sup>
- 14.129 Other arrangements for giving evidence, including pre-recorded evidence, should apply to these offences (see Chapter 21).

## Recommendations

- 52 The image-based sexual offences in sections 41B, 41C, 41DA, 41DB of the *Summary Offences Act 1966* (Vic) should be relocated to the *Crimes Act 1958* (Vic) as indictable sexual offences and amended to:
- include the taking of intimate images without consent or being 'reckless' as to consent
  - expand the offence of distributing intimate images to include being 'reckless' as to consent
  - define 'intimate image' so that it applies to people of diverse genders, including transgender people and intersex people, and include altered intimate images
  - give courts power to order the destruction of the intimate images.
- 53 The definition of 'sexual offences' in the *Crimes Act 1958* (Vic) should be amended to include these image-based sexual abuse offences to extend the protections for giving evidence and suppressing identities.
- 54 To reduce the risks of overcriminalising children and young people who commit image-based sexual abuse offences:
- the *Crimes Act 1958* (Vic) should specify that prosecution of perpetrators under the age of 16 should require approval from the Director of Public Prosecutions
  - Victoria Police should use its discretion to issue formal cautions for image-based sexual abuse offences, without the requirement for 'exceptional circumstances'.
- 55 Victoria Police should ensure that image-based sexual abuse is investigated by the Sexual Offences and Child Sexual Abuse Investigation Teams.

<sup>175</sup> *Crimes Act 1900* (NSW) s 91P(2), Q(2), R(6).

<sup>176</sup> Consultation 70 (Victoria Police (No 1)).

<sup>177</sup> Submission 68 (Victoria Police).

<sup>178</sup> *Open Courts Act 2013* (Vic) ss 3 (definition of 'sexual offences'), 18(1)(d). See also Victorian Law Reform Commission, *Committals* (Report No 41, March 2020) Recommendations 99–102.

<sup>179</sup> Consultation 7 (Associate Professor Nicola Henry).

## Transitional provisions should be introduced

- 14.130 Recent changes to sexual offences did not include provisions that spell out how the laws are to apply to offences committed before the laws came into effect on 1 July 2017 ('transitional provisions').<sup>180</sup>
- 14.131 The Office of Public Prosecutions told us this had caused 'immense difficulties'. There are problems when prosecutors have to identify incidents and dates that spanned months or years around 1 July 2017. This had led to cases being discontinued, or charges not being filed. It called this a 'serious defect' and called for transitional provisions to be introduced 'as a matter of urgency'.<sup>181</sup>
- 14.132 The courts had previously clarified the position when previous amendments did not include transitional provisions,<sup>182</sup> but this has not happened for the most recent changes. One approach to address this would be to clarify that, if an offence is alleged to have been committed between two dates, charges could be brought under the old laws if the alleged facts would be an offence under both sets of laws. The Office of Public Prosecutions preferred this approach.<sup>183</sup>
- 14.133 It is unacceptable that this technical gap in the law has led to such dramatic outcomes. This clearly needs urgent reform, so that people do not fall through the gaps of the laws designed to protect them. The law should be changed as a priority to introduce transitional provisions. The Victorian Government should consult with the Office of Public Prosecutions on the form of the amendment.

## Recommendation

- 56 The *Crimes Act 1958* (Vic) should be amended to include transitional provisions for changes to sexual offences made by the *Crimes Amendment (Sexual Offences) Act 2016* (Vic).

## The Royal Commission recommendations on child sexual abuse should be implemented

- 14.134 The recent reforms to sexual offences introduced a 'course of conduct' charge.<sup>184</sup> This is a single charge for a single offence, covering multiple incidents of the same offence committed on more than one occasion over a specified period.<sup>185</sup> The aim of this new charge was to make it easier to prosecute repeated and systematic sexual abuse, especially child sexual abuse.<sup>186</sup>
- 14.135 There is a similar offence of 'persistent sexual abuse of a child under the age of 16'.<sup>187</sup> This requires proof that, on at least three occasions when the child was under 16, the accused committed acts of the relevant kind, but the offences do not have to be similar.<sup>188</sup> The acts also do not need to be proved 'with the same degree of specificity as to date, time, place, circumstances or occasion'.<sup>189</sup>

<sup>180</sup> *Crimes Amendment (Sexual Offences) Act 2016* (Vic): repealing and replacing the sexual offences in the *Crimes Act 1958* (Vic).

<sup>181</sup> Submission 63 (Office of Public Prosecutions).

<sup>182</sup> See *Dibbs v The Queen* [2012] VSCA 224; (2012) 225 A Crim R 195.

<sup>183</sup> Consultation 94 (Office of Public Prosecutions (No 2)).

<sup>184</sup> *Criminal Procedure Act 2009* (Vic) sch 1 cl 4A.

<sup>185</sup> Judicial College Victoria, '7.1.5 Course of Conduct Charges', *Criminal Charge Book* (Online Manual, 2 October 2018) [2] <<https://www.judicialcollege.vic.edu.au/eManuals/CCB/54857.htm>>.

<sup>186</sup> Department of Justice and Regulation (Vic), *Victoria's New Sexual Offence Laws: An Introduction* (Report, Criminal Law Review, June 2015) 22–3 <<https://www.justice.vic.gov.au/victorias-new-sexual-offence-laws-an-introduction>>.

<sup>187</sup> *Crimes Act 1958* (Vic) s 49J.

<sup>188</sup> Judicial College Victoria, '7.3.22 Persistent Sexual Abuse of a Child' (from 1 July 2017), *Criminal Charge Book* (Online Manual, 30 November 2017) [21]–[22] <<https://www.judicialcollege.vic.edu.au/eManuals/CCB/64929.htm>>.

<sup>189</sup> *Crimes Act 1958* (Vic) s 49J(4).

- 14.136 The Royal Commission into Institutional Responses to Child Sexual Abuse reviewed these two measures (see box). We heard similar concerns on the effectiveness of these measures, including:
- The course of conduct charge is difficult to apply when the offending and relationships vary,<sup>190</sup> or where the abuse spans many years covering different legal schemes.<sup>191</sup>
  - The charge is not widely used.<sup>192</sup>
  - Requiring proof of a minimum number of sexual acts is a barrier, because people who have experienced ongoing sexual abuse have trouble distinguishing between incidents.<sup>193</sup>
- 14.137 Liberty Victoria strongly opposed the use of the course of conduct charge. It explained that, as a jury does not have to be unanimous about which events occurred, it is harder to identify inconsistent or irrational decision making by the jury, and this 'will inevitably conceal injustice in some cases' and cause 'acute difficulties' in deciding which events should be considered in sentencing.<sup>194</sup>
- 14.138 These concerns were considered by the Royal Commission. Its recommendations also address the concerns about the effectiveness of these measures.

### **The Royal Commission into Institutional Responses to Child Sexual Abuse on the 'course of conduct' charge and the offence of 'persistent sexual abuse'**

The Royal Commission into Institutional Responses to Child Sexual Abuse recommended amending the offence of persistent sexual abuse on the model of Queensland's offence of 'unlawful relationship with a child', with further improvements. The offence would focus on the existence of an unlawful relationship rather than individual occasions of abuse. This would apply where there was more than one unlawful sexual act and would apply retrospectively.<sup>195</sup> The Victorian Government has accepted this recommendation.<sup>196</sup>

It also recommended that the two or more unlawful acts particularised for an offence of maintaining an 'unlawful relationship with a child' could also be used for a course of conduct charge.<sup>197</sup> The Victorian Government is further considering this recommendation.<sup>198</sup>

## **Recommendation**

- 57 The Victorian Government should implement previous recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse in relation to the 'course of conduct' charge and the offence of 'persistent sexual abuse of a child under the age of 16'.

190 Submission 22 (knowmore legal service); Consultation 26 (Greg Byrne PSM, Legal Policy Consultant, Greg Byrne Law).  
 191 Submission 59 (County Court of Victoria).  
 192 Consultation 4 (Judicial College of Victoria).  
 193 Submission 18 (In Good Faith Foundation).  
 194 Submission 53 (Liberty Victoria).  
 195 Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice* (Report, August 2017) Recommendation 21 <<https://www.childabuseroyalcommission.gov.au/criminal-justice>>.  
 196 Victorian Government, 'Victorian Government Response to the Royal Commission into Institutional Child Sexual Abuse', VIC. GOV.AU (Web Page, 20 July 2021) <<https://www.vic.gov.au/victorian-government-response-royal-commission-institutional-responses-child-sexual-abuse>>.  
 197 Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice* (Report, August 2017) Recommendation 24 <<https://www.childabuseroyalcommission.gov.au/criminal-justice>>. Recommendation 23 also related to course of conduct charges, but this recommendation did not apply to Victoria as it already had legislation to authorise course of conduct charges.  
 198 Victorian Government, 'Victorian Government Response to the Royal Commission into Institutional Child Sexual Abuse', VIC. GOV.AU (Web Page, 20 July 2021) <<https://www.vic.gov.au/victorian-government-response-royal-commission-institutional-responses-child-sexual-abuse>>.



## Other issues with offences

- 14.139 In the timeframe provided for this inquiry, we have been unable to fully consider all the issues with sexual offences people told us about. We have focused on those that appeared most significant, but for completeness we list here other issues for the benefit of future law reform.

## Grooming

- 14.140 The current offence of grooming a child applies only to children under 16 years old.<sup>199</sup> We heard this should be extended to cover other contexts, such as when children are groomed but are sexually assaulted after they have become adults,<sup>200</sup> or have reached the age of consent (16 years old).<sup>201</sup>
- 14.141 The Victorian Institute of Teaching also proposed extending the grooming offence to cases when a child is 16 years or over and the person is in a position of care, supervision or authority. This would recognise the power imbalance between a child and (for example) a teacher, and be consistent with existing sexual offences that protect children aged 16 or 17 years old from conduct committed by someone who provides care, supervision and authority.<sup>202</sup>

## Other issues involving children

- 14.142 Professor Jeremy Gans identified issues with the definition of 'sexual penetration'.<sup>203</sup> This is an element of several sexual offences, including against children. He argued that this definition, by creating a boundary between sexual penetration and sexual touching, could lead to 'confusing, arbitrary and intrusive' questioning at trials. He identified several possible ways to reform this, including by replacing the element of sexual penetration.<sup>204</sup>
- 14.143 Knowmore legal service supported extending the offence of failure by a person in authority to protect a child from a sexual offence,<sup>205</sup> so that it protected children who are 16 or 17 years old from sexual abuse by people who hold positions of authority over them.<sup>206</sup> This extension was recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse, and the Victorian Government has accepted this recommendation in principle.<sup>207</sup>

## Other issues with technology

- 14.144 Child Protection suggested there was a need to improve legislation and national responses to child sexual exploitation, including online child sexual exploitation. This is a growing trend that became much worse during the coronavirus (COVID-19) pandemic as people spent more time online.<sup>208</sup>

199 *Crimes Act 1958* (Vic) s 49M.

200 Submissions 18 (In Good Faith Foundation), 70 (Victorian Institute of Teaching).

201 Consultation 57 (Department of Health and Human Services).

202 Submission 70 (Victorian Institute of Teaching); Consultation 57 (Department of Health and Human Services).

203 *Crimes Act 1958* (Vic) s 35A.

204 Submission 31 (Professor Jeremy Gans).

205 *Crimes Act 1958* (Vic) s 49O.

206 Submission 22 (knowmore legal service).

207 Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice* (Report, August 2017) Recommendation 36 <<https://www.childabuseroyalcommission.gov.au/criminal-justice>>; Victorian Government, 'Victorian Government Response to the Royal Commission into Institutional Child Sexual Abuse', *VIC.GOV.AU* (Web Page, 20 July 2021) <<https://www.vic.gov.au/victorian-government-response-royal-commission-institutional-responses-child-sexual-abuse>>.

208 Consultation 57 (Department of Health and Human Services).



- 14.145 Victoria's two forensic medical services told us that there was a trend towards people meeting online, often through dating apps, and then being sexually assaulted at the first face-to-face meeting.<sup>209</sup> Two experts on technology-facilitated abuse also suggested creating a new offence focused on technology-facilitated sexual violence, and making 'grooming' over social media or dating apps an aggravating factor for sentencing.<sup>210</sup> We note developments in this area such as online platforms assisting police with investigations.<sup>211</sup>

## Administration of intoxicating substances

- 14.146 The Law Institute of Victoria suggested that a definition of 'administers' should be inserted to clarify the scope of the offence of administration of an intoxicating substance for a sexual purpose. For example, as the offence did not include any consideration of consent, it was unclear if the offence included situations such as a person buying another person a drink at the bar with the hope that this may encourage someone to take part in a sexual act, which was presumably not the intention of the Act.<sup>212</sup>

## Online harassment

- 14.147 Experts in technology-facilitated abuse told us of issues with persistent online harassment that amounts to stalking.<sup>213</sup> This is likely to be considered as part of the Commission's current inquiry into stalking, harassment and similar conduct.<sup>214</sup>

## Forced marriage and human trafficking

- 14.148 We heard of challenges in adequately protecting young people subject to forced marriage (a Commonwealth offence) when child protection authorities do not intervene. Individuals over the age of 16 years are often considered independent and are therefore rarely prioritised by child protection authorities, depending on the state or territory. Child protection systems are generally more responsive to children younger in age, whereas the risk of forced marriage in minors generally increases with age, with those aged 16 and 17 years old at high risk as they approach adulthood.
- 14.149 We also heard that, despite recent efforts by the Australian Federal Police to raise awareness with state and territory police agencies, indicators of human trafficking and forced marriage can be missed by state police because, as they are considered Commonwealth crimes, they are less familiar with these offences, and there is an absence of standardised mandatory training for state police on these issues.<sup>215</sup>

## Sexual exposure in sex industry venues

- 14.150 Sex Work Law Reform Victoria explained that people who work in strip clubs can experience sexual exposure from clients.<sup>216</sup> It queried whether this amounted to an offence,<sup>217</sup> and told us that it should be acknowledged that sexual exposure can occur in public and private places, and that it is unacceptable in sex industry venues.<sup>218</sup>

209 Submissions 61 (Victorian Institute of Forensic Medicine), 71 (Victorian Institute of Forensic Medicine and Victorian Forensic Paediatric Medical Service). See also Janine Rowse, Caroline Bolt and Sanjeev Gaya, 'Swipe Right: The Emergence of Dating-App Facilitated Sexual Assault. A Descriptive Retrospective Audit of Forensic Examination Caseload in an Australian Metropolitan Service' (2020) 16(1) *Forensic Science, Medicine, and Pathology* 71. Their suggestion of an interest group is discussed in ch 4.

210 Consultation 5 (Associate Professors Anastasia Powell and Asher Flynn).

211 'Match Group & Tinder Respond to Australian Broadcasting Corporation Report on Safety in Dating Industry', *Tinder* (Web Page, 12 October 2020) <<https://blog.gotinder.com/match-group-tinder-respond-to-australian-broadcasting-corporation-report-on-safety-in-dating-industry/>>.

212 Submission 40 (Law Institute of Victoria); the offence is in the *Crimes Act 1958* (Vic) s 46.

213 Consultation 5 (Associate Professors Anastasia Powell and Asher Flynn). For the offence of stalking, see *Crimes Act 1958* (Vic) s 21A.

214 Victorian Law Reform Commission, *Stalking* (Consultation Paper, June 2021) [8.1]–[8.29]. Cyberstalking is stalking that can be perpetrated using technology. Cyberstalking is regulated through criminal laws and civil laws, which are a combination of state and Commonwealth laws.

215 Consultation 44 (Red Cross Support for Trafficked Persons Program).

216 Consultation 45 (Sex Work Law Reform Victoria).

217 The offence of sexual exposure in a 'public place' includes premises that are licensed or authorised under the *Liquor Control Reform Act 1998* (Vic): *Summary Offences Act 1966* (Vic) ss 3 (definition of 'public place'), 19.

218 Consultation 45 (Sex Work Law Reform Victoria).

# Expanding access to justice for victim survivors of sexual violence

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# 15. Expanding access to justice for victim survivors of sexual violence

## Overview

- The justice system should support everyone's different communication needs. The existing programs need to be strengthened.
- Intermediaries provide valuable support to children and people with communication difficulties. More people should be able to access them.
- Independent third persons provide valuable support in police interviews to people with cognitive disabilities. This service should have enough funding and a referral function, and should be promoted.
- Funding for language services should be increased, because many people use them to disclose and report sexual violence. Investing in specialised training is also a priority.

## Everyone has the right to be heard and understood

- 15.1 Everyone in the Victorian community should have equal access to the justice system. All victim survivors should be able to report sexual offences to the police and tell their story in court. When they do so, they should be heard and understood. This is especially important in sexual offences, when so much turns on the evidence of the person who experienced sexual violence.
- 15.2 Victim survivors should also be communicated with in a way that enables them to understand how the justice system works. This is important to meet victim survivors' justice needs, such as the need for information. We discuss these justice needs in Chapter 2.
- 15.3 People accused of sexual offences should be able to understand the charges and evidence against them and how the justice system works. In Victoria, the *Charter of Human Rights and Responsibilities Act 2006* (Vic) requires that people accused of criminal offences are provided with information in a form they can understand. They are entitled to interpreters and appropriate communication aids.<sup>1</sup> People's right to be free from discrimination and receive reasonable adjustments is also protected in legislation.<sup>2</sup>
- 15.4 However, people who experience sexual violence often turn to a justice system that cannot understand or communicate with them. Someone charged with sexual offences can face a similar situation. Clear communication is crucial for justice processes to be fair. But people's communication needs are sometimes not identified or met.

What is evidence? Non-verbal not standing a chance in this as it is all verbal based. Alternative communication tools are missing as well as support people who understand disability.—Consultation on the experience of people with disability<sup>3</sup>

In many cases, police have taken statements from people who clearly can't communicate freely in English. —Sexual Assault Services Victoria.<sup>4</sup>

- 15.5 Ideally, our justice system would be accessible to everyone, without the need for special supports.<sup>5</sup> This principle of 'universal design' recognises that barriers to justice arise when systems only accommodate the needs of some.<sup>6</sup>
- 15.6 At this stage, special supports are still needed for people to have real access to justice. They enable people to access and participate in the justice system, who would otherwise be prevented. With support, everyone can be heard, and understand the process and their rights.
- 15.7 In this report we make recommendations to improve special supports. We propose a program of victim advocates with a focus on people with disability (Chapter 12). We call for Victoria Police to be more accessible (Chapter 17) and for better access to reporting for people living in residential environments (Chapter 7). We also suggest reforms to improve access to information, support and reporting for people with diverse needs and experiences (Chapters 3 and 8).
- 15.8 This chapter discusses another three key initiatives:
- intermediaries,
  - independent third persons
  - language services.

## What is the Intermediary Pilot Program?

- 15.9 For too long, the justice system in Victoria failed to address the communication difficulties of some witnesses, especially children and people with disability. We recognised this in our 2016 inquiry into the Role of Victims of Crime in the Criminal Trial Process (Victims of Crime). We recommended a legislative scheme that made intermediaries available for 'child victims and victims who have a disability ... that is likely to diminish the quality of their evidence'.<sup>7</sup>
- 15.10 Intermediaries are 'language specialists who help ensure that the questioning of witnesses with communication difficulties is conducted in a way that is developmentally appropriate, respectful and most likely to produce reliable evidence'.<sup>8</sup> Intermediaries assist with communication in police interviews and in court. Details of how they may assist in court are discussed in 'ground rules hearings'.<sup>9</sup> (We explain what ground rules hearings are in Chapter 21.)

3 Consultation 11 (Family violence and sexual assault practitioners focusing on disability inclusion).

4 Consultation 14 (Sexual Assault Services Victoria); Submission 17 (Sexual Assault Services Victoria).

5 Consultation 19 (Dr Frank Lambrick); United Nations Human Rights Special Procedures, *International Principles and Guidelines on Access to Justice for Persons with Disabilities* (Report, 2020) 14.

6 Universal design requires that 'systems, programs and services should be designed so that all people, regardless of capability, background, and age can make use of them, without the need for additional support': Jesuit Social Services and RMIT Centre for Innovative Justice, *Recognition Respect and Support: Enabling Justice for People with Acquired Brain Injuries* (Report, 21 September 2017) 7 <<https://jss.org.au/recognition-respect-and-support-enabling-justice-for-people-with-acquired-brain-injuries/>>. See also *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 2, art 4(1)(f). On social barriers, see generally 'Social Model of Disability', *Australian Federation of Disability Organisations* (Web Page, 21 June 2018) <<https://www.afdo.org.au/social-model-of-disability/>>.

7 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 174, Recommendation 30.

8 Natalia Antolak-Saper and Hannah MacPherson, 'Vulnerable Witnesses and Victoria's Intermediary Pilot Program' (2019) 43 *Criminal Law Journal* 325, 325.

9 During ground rules hearings, the court can issue directions on how a witness must be questioned to ensure that the court proceeding remains 'fair and efficient': *Criminal Procedure Act 2009* (Vic) s 389B(3).

- 15.11 Overall, intermediaries help to reduce the stress felt by the witnesses they work with and they make trials more efficient.<sup>10</sup> They are impartial officers of the court.<sup>11</sup>
- 15.12 In 2018, the Victorian Government amended the *Criminal Procedure Act 2009* (Vic) to allow for the use of intermediaries. The law now makes intermediaries available in criminal proceedings to all witnesses (excluding the accused) who are under 18 or have a 'cognitive impairment'.<sup>12</sup> The Act explains that a cognitive impairment includes 'impairment because of mental illness, intellectual disability, dementia or brain injury'.<sup>13</sup>
- 15.13 The Victorian Government set up the Intermediary Pilot Program in July 2018. The program operates on a narrower basis than the law allows. Program intermediaries are only available to 'vulnerable' witnesses in homicide matters or 'vulnerable' complainants in sexual offence matters. 'Vulnerable' witnesses or complainants are those who are under 18 or have a cognitive impairment.<sup>14</sup> The program is also limited geographically—it is available only in courts and some police locations across Melbourne, as well as in a smaller number of courts and police stations regionally.<sup>15</sup>

### The intermediary scheme provides 'much, much better access to justice'

- 15.14 Even with these limitations, the intermediary scheme in Victoria has been widely acknowledged as a successful and much-needed reform. It has been praised for increasing access to justice and for driving positive change in the practice and attitudes of police, lawyers and judges.
- 15.15 The County Court of Victoria said the program provides eligible witnesses with 'much, much better access to justice'.<sup>16</sup> Without the program, many cases would not have even made it to court.<sup>17</sup> The Magistrates' Court of Victoria also expressed strong support for the program.<sup>18</sup>
- 15.16 Intermediaries noted a significant and encouraging change—after some initial caution—in stakeholder attitudes towards the program. They say it is now 'positively received'.<sup>19</sup> They noticed a 'huge shift' in relation to the police.<sup>20</sup> Victoria Police, for its part, said that police officers regard the program positively.<sup>21</sup>
- 15.17 While there were isolated reports of some judicial officers being reluctant to engage with the program,<sup>22</sup> these were in a context of strong support for it. Overall, it is clear that people view the intermediary scheme as being very positive.<sup>23</sup>

### The intermediary scheme could be improved

- 15.18 The 2021/22 Victorian Budget provided an additional year of funding for the Intermediary Pilot Program.<sup>24</sup> This is a positive development. But it is our view that the intermediary scheme must be expanded to a broader class of people and more courts.

10 Victoria, *Parliamentary Debates*, Legislative Assembly, 13 December 2017, 4359 (Martin Pakula, Attorney-General).

11 *Criminal Procedure Act 2009* (Vic) s 389(2); *ibid*.

12 *Criminal Procedure Act 2009* (Vic) s 389F(1)(a).

13 *Ibid* s 3.

14 County Court of Victoria, *Multi-Jurisdictional Court Guide for the Intermediary Pilot Program: Intermediaries and Ground Rules Hearings* (Guide No 2/2021, 22 March 2021) 5 <<https://www.judicialcollege.vic.edu.au/sites/default/files/2021-04/Multi-jurisdictional%20Court%20Guide%20for%20IPP%20-%20-%20final%2020321.pdf>>.

15 *Ibid*; 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) 3 <[https://www.judicialcollege.vic.edu.au/sites/default/files/2019-07/Multi%20jurisdictional%20Court%20Guide%20for%20the%20IPP\\_0.pdf](https://www.judicialcollege.vic.edu.au/sites/default/files/2019-07/Multi%20jurisdictional%20Court%20Guide%20for%20the%20IPP_0.pdf)>.

16 Consultation 24 (County Court of Victoria).

17 *Ibid*.

18 Consultation 71 (Magistrates' Court of Victoria (No 1)).

19 Consultation 13 (Intermediary Pilot Program, Department of Justice and Community Safety).

20 *Ibid*.

21 Submission 68 (Victoria Police).

22 Consultation 61 (Children's Court of Victoria).

23 See, eg, Consultations 14 (Sexual Assault Services Victoria), 15 (Child Witness Service), 17 (Roundtable consultation focused on the experience of women with disability), 19 (Dr Frank Lambrick); Submissions 14 (Gatehouse Centre, Royal Children's Hospital), 22 (knowmore legal service), 40 (Law Institute of Victoria), 44 (Dr Patrick Tidmarsh and Dr Gemma Hamilton), 55 (Springvale Monash Legal Service), 63 (Office of Public Prosecutions).

24 Premier of Victoria, 'Better Outcomes for Victims and Young People' (Media Release, 20 May 2021) <<http://www.premier.vic.gov.au/better-outcomes-victims-and-young-people>>.

## The intermediary scheme should extend to the accused

- 15.19 The legislative scheme currently applies to witnesses 'other than the accused'.<sup>25</sup> This is problematic. One recent commentary describes the exclusion of accused individuals as '[p]erhaps the greatest flaw' of the program, and a denial of fair trial rights under the Charter of Human Rights and Responsibilities Act.<sup>26</sup>
- 15.20 The intermediary scheme is clearly intended to increase access to justice for people with diverse needs. So it is difficult to see why accused persons with communication difficulties should be excluded. Intermediaries are available to the accused in criminal proceedings in the Australian Capital Territory.<sup>27</sup>
- 15.21 We heard support for the intermediary scheme to be extended in this way. The County Court of Victoria and the Law Institute of Victoria pointed to the intermediary system in England and Wales, where intermediaries are available to accused people.<sup>28</sup>
- 15.22 Victoria Legal Aid echoed this point. It said that the court process can 'be extremely distressing and confusing' for an accused person who is a child or has a cognitive impairment.<sup>29</sup> It also noted that intermediaries may assist the accused to enter guilty pleas where appropriate.<sup>30</sup>
- 15.23 In 2016, we offered in-principle support for expanding the intermediary program to accused people because it would promote equal access to justice.<sup>31</sup> We now repeat this call.

## The intermediary scheme should extend to people with communication difficulties

- 15.24 The Criminal Procedure Act makes intermediaries available where the witness is under 18 years of age or has a cognitive impairment.
- 15.25 Some people have a physical disability that affects their ability to communicate. Not having a 'cognitive impairment', they might find themselves outside the scope of the legislative scheme. Even though they have communication difficulties that might affect the quality of their evidence, they are denied the support they need. This is a troubling gap in the system, which denies some people access to justice.
- 15.26 Intermediaries suggested to us that the definition of cognitive impairment should be broadened to include people with physical disabilities.<sup>32</sup> For example, they told us that people living with cerebral palsy are not technically covered by the current definition.<sup>33</sup>
- 15.27 Other people we heard from also suggested expanding the intermediary scheme to 'other witnesses with communication difficulties'.<sup>34</sup> In our *Committals* report we recommended making intermediaries available to all witnesses with communication difficulties.<sup>35</sup>
- 15.28 The Australian Capital Territory takes a comprehensive approach. There, intermediaries may be appointed for any witness who has a communication difficulty.<sup>36</sup>
- 15.29 Our recommendations in *The Role of Victims of Crime in the Criminal Trial Process* report (Victims of Crime report) and the *Committals* report were broad. In the Victims of Crime report we suggested that victims 'with a disability ... that is likely to diminish the quality of their evidence' should be eligible for intermediaries.<sup>37</sup> In the *Committals* report we recommended that intermediaries assist all witnesses with communication difficulties.<sup>38</sup>

25 *Criminal Procedure Act 2009* (Vic) s 389F(1)(a).

26 Natalia Antolak-Saper and Hannah MacPherson, 'Vulnerable Witnesses and Victoria's Intermediary Pilot Program' (2019) 43 *Criminal Law Journal* 325, 336.

27 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) ss 4AA, 4AJ(1).

28 Submission 40 (Law Institute of Victoria); Consultation 24 (County Court of Victoria).

29 Submission 27 (Victoria Legal Aid).

30 Consultation 49 (Victoria Legal Aid).

31 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 173.

32 Consultation 13 (Intermediary Pilot Program, Department of Justice and Community Safety).

33 *Ibid.*

34 Consultation 71 (Magistrates' Court of Victoria (No 1)). See also Submission 22 (knowmore legal service).

35 Victorian Law Reform Commission, *Committals* (Report No 41, March 2020) [11.114], Recommendation 47.

36 'ACT Intermediary Program', *ACT Law Society* (Web Page, 12 March 2020) <<https://www.actlawsociety.asn.au/article/act-intermediary-program>>.

37 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 174.

38 *Committals* (Report No 41, March 2020) Recommendation 31.

Some physical disabilities are likely to diminish the quality of a witness's evidence. Allowing courts to appoint intermediaries where witnesses have communication difficulties would ensure that these witnesses are included.

### The intermediary scheme should have a wider geographical reach

- 15.30 The Intermediary Pilot Program is only available in some court locations. Most people living in regional Victoria do not get this assistance if they need it. This reduces their access to justice.
- 15.31 Sexual Assault Services Victoria highlighted the 'high financial costs' and 'loss of emotional and personal supports' often experienced by witnesses who must travel to Melbourne for intermediary support.<sup>39</sup>
- 15.32 To fix this situation, and to build on the clear successes of the intermediary scheme, we recommend expanding it to all County Court of Victoria locations. Given most sexual offence trials happen in the County Court of Victoria, this reform would extend support to a significant number of witnesses.
- 15.33 The County Court of Victoria supports such a change.<sup>40</sup> The Magistrates' Court of Victoria supports 'embedding the intermediary scheme permanently in all court venues as a high priority'.<sup>41</sup> The intermediaries we spoke to also highlighted the need to roll out the program to cover the whole state.<sup>42</sup>
- 15.34 We acknowledge the scheme's expansion would require further resources. But given how effective it is in increasing the quality of evidence from witnesses with communication difficulties,<sup>43</sup> we see this expansion as necessary to support equal access to justice.

## Recommendation

- 58 The Victorian Government should expand the availability and accessibility of the Intermediary Pilot Program by:
- amending the *Criminal Procedure Act 2009* (Vic) to ensure that all witnesses and accused persons with communication difficulties have access to the intermediary scheme
  - expanding its availability to all venues of the County Court of Victoria, including providing the funding and resources to support an expansion.

<sup>39</sup> Submission 17 (Sexual Assault Services Victoria).

<sup>40</sup> Submission 59 (County Court of Victoria).

<sup>41</sup> Consultation 71 (Magistrates' Court of Victoria (No 1)).

<sup>42</sup> Consultation 13 (Intermediary Pilot Program, Department of Justice and Community Safety).

<sup>43</sup> For a positive evaluation of the similar scheme in England and Wales: see generally Emily Henderson, "A Very Valuable Tool": Judges, Advocates and Intermediaries Discuss the Intermediary System in England and Wales' (2015) 19(3) *International Journal of Evidence and Proof* 154.



## Who are independent third persons?

Being interviewed by Police can be frightening and confusing for anyone wanting to report a sexual assault, given the trauma they've experienced. For people with disabilities the level of fear and confusion can be magnified.—Sexual Assault Services Victoria<sup>44</sup>

- 15.35 Independent third persons (ITPs) provide support at the police stage for people with a cognitive disability.<sup>45</sup> They assist people being interviewed by police or giving a formal statement.
- 15.36 The role of ITPs is to
- help people understand the justice process—including their rights and what they are being asked to do
  - assist communication between a person and the police—for example, an ITP can ask the police to ask a question in a different way or can help people to give Video Audio Recorded Evidence (VARE) (see Chapter 21).<sup>46</sup>
- 15.37 An ITP is an independent and objective support person. They can help someone contact a lawyer or request a break for the person being interviewed. The Office of the Public Advocate trains ITP volunteers.<sup>47</sup>
- 15.38 ITPs ensure that people with cognitive disabilities are not disadvantaged by processes that were not designed to meet their communication needs.
- Police interviews often require people to comprehend complex issues and information quickly, understand their legal rights, and be able to communicate with people in positions of authority.<sup>48</sup>
- 15.39 ITPs operate alongside other crucial supports for people in police custody, such as the youth referral and independent person program.<sup>49</sup>
- 15.40 ITPs play a 'vital role in our justice system'.<sup>50</sup> They enable access to justice and help ensure fair treatment.<sup>51</sup>
- 15.41 Reviews note resourcing issues, some variability in the quality of ITPs, and inconsistent police referrals, but endorse the program.<sup>52</sup> Like us, the reviews support reforms to ensure ITPs are made more consistently available to those who need them.<sup>53</sup>

44 Submission 17 (Sexual Assault Services Victoria).

45 The Office of the Public Advocate explains that this can include people with an intellectual disability, a mental illness, or an acquired brain injury: Submission 41 (Office of the Public Advocate).

46 'Independent Third Persons', *Office of the Public Advocate* (Web Page, 2021) <<https://www.publicadvocate.vic.gov.au/opa-volunteers/independent-third-persons>>.

47 Submission 41 (Office of the Public Advocate); 'Independent Third Persons', *Office of the Public Advocate* (Web Page, 2021) <<https://www.publicadvocate.vic.gov.au/opa-volunteers/independent-third-persons>>.

48 Justice and Community Safety (Vic), *Manual of Procedures: Victim Services, Support and Reform—Intermediary Program* (Manual, August 2019) 14–15. See also Submission 41 (Office of the Public Advocate).

49 Similar to the independent third person program, the youth referral and independent person program provides trained volunteers to support young people in police interviews, when their parent or guardian cannot do so: 'About Us', *YRIPP* (Web Page, 2019) <<https://www.cmy.net.au/yripp/about-us/>>.

50 Victorian Equal Opportunity and Human Rights Commission, *Beyond Doubt: The Experiences of People with Disabilities Reporting Crime—Research Findings* (Report, 2014) 65 <<https://www.humanrights.vic.gov.au/resources/beyond-doubt-the-experiences-of-people-with-disabilities-reporting-crime-jul-2014/>>.

51 Submission 41 (Office of the Public Advocate). See also Jesuit Social Services and RMIT Centre for Innovative Justice, *Recognition Respect and Support: Enabling Justice for People with Acquired Brain Injuries* (Report, 21 September 2017) 78 <<https://jss.org.au/recognition-respect-and-support-enabling-justice-for-people-with-acquired-brain-injuries/>>.

52 Jesuit Social Services and RMIT Centre for Innovative Justice, *Recognition Respect and Support: Enabling Justice for People with Acquired Brain Injuries* (Report, 21 September 2017) 78–80 <<https://jss.org.au/recognition-respect-and-support-enabling-justice-for-people-with-acquired-brain-injuries/>>; Victorian Equal Opportunity and Human Rights Commission, *Beyond Doubt: The Experiences of People with Disabilities Reporting Crime—Research Findings* (Report, 2014) 65–7, 111 <<https://www.humanrights.vic.gov.au/resources/beyond-doubt-the-experiences-of-people-with-disabilities-reporting-crime-jul-2014/>>.

53 See also Victoria Legal Aid's support for expanding the use of ITPs: Consultation 78 (Roundtable on reporting).

## The ITP program should be strengthened

- 15.42 We recommend that the ITP program be better funded and promoted, and given a referral function.

### ITPs will continue to provide crucial support alongside other programs

- 15.43 ITPs and intermediaries provide complementary but different support. ITPs assist a wider range of people than intermediaries, including people with cognitive disabilities who have witnessed, experienced or are accused of a sexual offence, and people on the Register of Sex Offenders. Victim survivors of sexual offences make up the majority (61 per cent) of the victims supported by ITPs.<sup>54</sup>
- 15.44 ITPs are also more available than intermediaries. They are available 24 hours a day to attend any police station in Victoria, and do not have to be booked in advance. In 2019–20, 183 ITPs assisted in 3718 police interviews.<sup>55</sup> During a similar timeframe (2018–19), there were 41 intermediaries who met 177 police requests for assistance.<sup>56</sup>
- 15.45 To date, in sexual offence cases, intermediaries have mainly supported children (in around 71 per cent of the sexual offence cases they were involved with).<sup>57</sup> As officers of the court, intermediaries focus on ensuring that communication with witnesses is as 'complete, coherent and accurate as possible'.<sup>58</sup> They largely provide support to prepare for and during court proceedings, and assist with VAREs.<sup>59</sup> ITPs are not officers of the court but independent support people, who are present as early as practicable at the police stage, to make sure people with cognitive disabilities understand the justice process and know their rights. As many reports of sexual offences do not proceed to prosecution (see Chapter 1), supporting people at the police stage is crucial.
- 15.46 If our other recommendations were adopted, ITPs would continue to have a role alongside an expanded intermediary program and victim advocates for people with disabilities (see Chapter 12). They would assist a wider range of people than these other programs (including witnesses and people on the Register of Sex Offenders). As intermediaries require tertiary or other qualifications,<sup>60</sup> ITPs are likely to remain more available.
- 15.47 In relation to victim advocates, ITPs would continue to provide support if the victim advocate program did not have statewide, 24-hour coverage. Below we propose that ITPs are given a referral function, enabling them to refer people to victim advocates.
- 15.48 In practice, the two programs can work together. A pilot advocate program for people with a cognitive disability, Making Rights Reality, involved sexual assault counsellor advocates being trained as ITPs.<sup>61</sup>

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54 Submission 41 (Office of the Public Advocate).

55 These figures relate to the program as a whole, not just sexual violence: *ibid*.

56 These figures relate to the program as a whole, not just sexual violence. As well as responding to police requests, the intermediary pilot program met 134 requests for intermediaries in court matters: Victorian Government, *Annual Report 2019—Royal Commission into Institutional Responses to Child Sexual Abuse* (Report, December 2019) 16 <<http://www.vic.gov.au/victorian-government-annual-report-2019-royal-commission-institutional-responses-child-sexual-abuse/redress-civil-litigation-report-2015>>.

57 Consultation 13 (Intermediary Pilot Program, Department of Justice and Community Safety).

58 Justice and Community Safety (Vic), *Manual of Procedures: Victim Services, Support and Reform—Intermediary Program* (Manual, August 2019) 16.

59 The programs have a memorandum of understanding guiding their cooperation regarding VAREs: *ibid* 15.

60 See *Criminal Procedure Act 2009* (Vic) 389H(2).

61 Patsie Frawley and La Trobe University, *Making Rights Reality: Final Evaluation Report* (Report, La Trobe University, 2014) 6–7, 27–8.

## The growing demand for ITP services needs to be supported

- 15.49 Demand for the ITP program has grown over the last three years. However, we heard that the ITP program is not funded to meet this demand.<sup>62</sup> This means that the Office of the Public Advocate is not always able to provide an ITP when someone requests one.<sup>63</sup>

There have been recent examples of SOCIT officers interviewing children and vulnerable adults without an independent third party. This has been said to be because there is a lack of ITPs, or it takes too long to get hold of one.<sup>64</sup>

- 15.50 A joint report by Jesuit Social Services and the Centre for Innovative Justice (Enabling Justice report) states that an interview or statement should not be relied on if an ITP was not used when needed.<sup>65</sup> If the starting point is that someone with a cognitive disability requires support when they are giving a statement to the police, not having this support in place casts doubt over the fairness and quality of evidence given.<sup>66</sup> A lack of support might also mean that someone did not understand the questions they were asked or was distressed.<sup>67</sup>
- 15.51 We were told that 'if a program is important in ensuring access to justice, it should be funded'.<sup>68</sup> The ITP program is important to making justice accessible. We agree with the recommendations of recent research, and the Office of the Public Advocate, that the program should be funded to meet demand, including with enough resources to train all volunteers.<sup>69</sup>

## Everyone should know about ITPs

- 15.52 ITPs are not always used in interviews when they could be.<sup>70</sup> This can be because someone's communication difficulties have not been identified by the police.<sup>71</sup> This concern has been raised by successive reviews.<sup>72</sup>

62 Submission 41 (Office of the Public Advocate).

63 Submissions 17 (Sexual Assault Services Victoria), 41 (Office of the Public Advocate). This comprised around 10% of requests before the COVID pandemic. Following the pandemic, phone support is now offered, but this is recognised to have limitations: *ibid*; Consultation 17 (Roundtable consultation focused on the experience of women with disability).

64 Consultation 25 (CASA senior counsellor/advocates).

65 Jesuit Social Services and RMIT Centre for Innovative Justice, *Recognition Respect and Support: Enabling Justice for People with Acquired Brain Injuries* (Report, 21 September 2017) 78, n 3 <<https://jss.org.au/recognition-respect-and-support-enabling-justice-for-people-with-acquired-brain-injuries/>>; Magdalena McGuire, *Breaking the Cycle Using Advocacy-Based Referrals to Assist People with Disabilities in the Criminal Justice System* (Report, Office of the Public Advocate, 2012) 19.

66 Magdalena McGuire, *Breaking the Cycle Using Advocacy-Based Referrals to Assist People with Disabilities in the Criminal Justice System* (Report, Office of the Public Advocate, 2012) 19. See also Victorian Law Reform Commission, *Sexual Offences* (Report No 5, July 2004) 326.

67 Goodfellow, J. and M Camilleri, *Beyond Belief—Beyond Justice: The Difficulties for Victim/Survivors with Disabilities When Reporting Sexual Assault and Seeking Justice* (Report, Disability Discrimination Legal Service, 2003) 60.

68 Consultation 17 (Roundtable consultation focused on the experience of women with disability).

69 Submission 41 (Office of the Public Advocate). See also Jesuit Social Services and RMIT Centre for Innovative Justice, *Recognition Respect and Support: Enabling Justice for People with Acquired Brain Injuries* (Report, 21 September 2017) Recommendation 13 <<https://jss.org.au/recognition-respect-and-support-enabling-justice-for-people-with-acquired-brain-injuries/>>.

70 Consultation 17 (Roundtable consultation focused on the experience of women with disability).

71 Submission 41 (Office of the Public Advocate); Consultation 40 (Roundtable consultation with Transgender Victoria, Bisexual Alliance and Drummond Street Services); Victorian Equal Opportunity and Human Rights Commission, *Beyond Doubt: The Experiences of People with Disabilities Reporting Crime—Research Findings* (Report, 2014) 66 <<https://www.humanrights.vic.gov.au/resources/beyond-doubt-the-experiences-of-people-with-disabilities-reporting-crime-jul-2014/>>.

72 *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016) vol 5, 196 <<http://rcfv.archive.royalcommission.vic.gov.au/Report-Recommendations.html>>; Victorian Equal Opportunity and Human Rights Commission, *Beyond Doubt: The Experiences of People with Disabilities Reporting Crime—Research Findings* (Report, 2014) 104 <<https://www.humanrights.vic.gov.au/resources/beyond-doubt-the-experiences-of-people-with-disabilities-reporting-crime-jul-2014/>>; Jesuit Social Services and RMIT Centre for Innovative Justice, *Recognition Respect and Support: Enabling Justice for People with Acquired Brain Injuries* (Report, 21 September 2017) 77–8 <<https://jss.org.au/recognition-respect-and-support-enabling-justice-for-people-with-acquired-brain-injuries/>>.

- 15.53 The Victoria Police Manual includes guidance on how to identify if someone has a cognitive disability.<sup>73</sup> It links to a 'Ready Reckoner' document to help with this assessment. Victoria Police updated the 'Ready Reckoner' following a recommendation in a report by the Victorian Equal Opportunity and Human Rights Commission.<sup>74</sup> The report also suggested regular online training for police on the ITP program:<sup>75</sup>
- While police cannot be expected to be experts in disability, they must be trained to recognise when someone might need support and facilitate this to occur.<sup>76</sup>
- 15.54 The Enabling Justice report suggested 'mainstreaming' accessible communication. This means using plain-language and flexible approaches in all situations, even if a communication need has not been identified. It also recommended that Victoria Police should tell everyone about the option to have an ITP. Everyone could be told about the scheme (similarly to everyone being told about their rights) or given a pamphlet, or ITPs could be rostered at stations.<sup>77</sup> Other people suggested that multi-disciplinary centres could have people to assist with communication.<sup>78</sup>
- 15.55 The Office of the Public Advocate called for the program to be legislatively mandated so that an ITP must be at any interview of someone with an 'apparent cognitive impairment or mental illness'.<sup>79</sup> While other independent advocate supports are legislated, ITPs are only required in the Victoria Police Manual.<sup>80</sup>
- 15.56 In its report, the Victorian Equal Opportunity and Human Rights Commission recognised that legislation requiring ITPs could improve their consistent use.<sup>81</sup> Victoria Police told us it had concerns about mandating an external or volunteer-based program whose availability it could not ensure.<sup>82</sup>
- 15.57 Since late 2019, the *Victims' Charter Act 2006* (Vic) has required criminal justice agencies to 'be responsive' to factors that might affect someone's ability to understand them.<sup>83</sup> As discussed earlier, the Charter of Human Rights and Responsibilities Act also provides some protection for an accused's rights to communication assistants or tools in criminal proceedings.<sup>84</sup>
- 15.58 We endorse the recommendation of the Enabling Justice report that Victoria Police should tell each person about the option to have an ITP. Given our terms of reference, we suggest this should happen in sexual offence cases, although we note that it could apply to other cases. Telling each person about the ITP program gives them the opportunity to confirm their eligibility and makes it more likely that a person's communication needs are identified and met.
- 15.59 We also suggest that the Victorian Government consider if existing legislative rights to communication are working in practice or need strengthening.<sup>85</sup> In Chapter 4 we also recommend the Victims of Crime Commissioner has stronger oversight of the operation of these rights.

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73 Victoria Police, 'Interviews and Statements' in *Victoria Police Manual* (2018) 12.  
74 Consultation 91 (Victoria Police (No 3)); Victorian Equal Opportunity and Human Rights Commission, *Beyond Doubt: The Experiences of People with Disabilities Reporting Crime—Research Findings* (Report, 2014) 111 <<https://www.humanrights.vic.gov.au/resources/beyond-doubt-the-experiences-of-people-with-disabilities-reporting-crime-jul-2014/>>.  
75 Victorian Equal Opportunity and Human Rights Commission, *Beyond Doubt: The Experiences of People with Disabilities Reporting Crime—Research Findings* (Report, 2014) 111 <<https://www.humanrights.vic.gov.au/resources/beyond-doubt-the-experiences-of-people-with-disabilities-reporting-crime-jul-2014/>>.  
76 Jesuit Social Services and RMIT Centre for Innovative Justice, *Recognition Respect and Support: Enabling Justice for People with Acquired Brain Injuries* (Report, 21 September 2017) 115 <<https://jss.org.au/recognition-respect-and-support-enabling-justice-for-people-with-acquired-brain-injuries/>>.  
77 Ibid 66, 79, Recommendation 12.  
78 Consultation 11 (Family violence and sexual assault practitioners focusing on disability inclusion). This could be a complementary reform to expanding ITPs or be part of an expanded ITP role.  
79 Submission 41 (Office of the Public Advocate).  
80 Victoria Police, 'Interviews and Statements' in *Victoria Police Manual* (2018) 13. For example, the *Crimes Act 1958* (Vic) requires children and young people to have an independent person present at a police interview (with some exceptions): s 464E(1). See also Submission 41 (Office of the Public Advocate).  
81 Victorian Equal Opportunity and Human Rights Commission, *Beyond Doubt: The Experiences of People with Disabilities Reporting Crime—Research Findings* (Report, 2014) 111 <<https://www.humanrights.vic.gov.au/resources/beyond-doubt-the-experiences-of-people-with-disabilities-reporting-crime-jul-2014/>>.  
82 Consultation 91 (Victoria Police (No 3)).  
83 *Victims' Charter Act 2006* (Vic) s 7B(c).  
84 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(2)(a), (i), (j).  
85 For example, Scottish legislation includes a right 'to be understood' as well as 'to understand': *Victims and Witnesses (Scotland) Act 2014* (Scot) s 3E. In Victoria, there is also a legislative requirement (with some exceptions) for children and young people to have an independent person present at a police interview: *Crimes Act 1958* (Vic) s 464E(1).

## ITPs should be able to refer people to support services

- 15.60 The ITP program is only one support service among many that a person may need. Even though ITPs may become aware of a person's other needs, they have no role in connecting them with services that could help ('referrals').
- 15.61 ITPs support people in their early engagement with the justice system so they are well placed to 'bridge the gap in the support and advocacy service system'.<sup>86</sup> Recent program data shows that ITP clients (almost 20 per cent) can be seen multiple times.<sup>87</sup> An earlier report noted that sexual assault victims were the majority (69 per cent) of victims with a cognitive disability seen by ITPs more than once.<sup>88</sup> Repeated contact with their clients makes them well placed to refer people on to other services.
- 15.62 In other situations, someone may receive ITP support as a victim before needing an ITP for an offence they allegedly committed. Their repeated contact with the police may indicate that their support needs were not met the first time.<sup>89</sup> Again, repeated contact with the ITP program creates an opportunity to be referred to services:
- A young man with Autism Spectrum Disorder (ASD) was supported by an ITP in an interview as the victim of rape. He received little support at the time to deal with the trauma experienced. Eighteen months later, he was again supported by an ITP but as an alleged offender for a sexual assault.<sup>90</sup>
- 15.63 The Office of the Public Advocate suggested that ITPs should be able to play a referral function. We agree, in line with our focus on making sure systems work together to respond to sexual violence (see Chapter 5).<sup>91</sup> Their referral function could operate alongside the Victoria Police VPeR (Victoria Police e-referral) program. But an ITP referral system may also have the value of being independent from the justice system. This could be important for people with less trust in police (see Chapter 8).<sup>92</sup>
- 15.64 ITPs could link victim survivors with our proposed victim advocates for people with disability, as well as existing sexual assault services for people with cognitive disabilities (see Chapter 12). In this way, they can help meet people's need for support (see Chapter 2).
- 15.65 In Chapter 4, we recommend a multi-agency protocol that could support formal referral arrangements between organisations. The ITP referral function should be supported through this protocol.

## ITP training needs must be met

- 15.66 The Office of the Public Advocate recommended that ITPs who attend VAREs receive specialist government-funded training. This is in addition to funding for enough training for all volunteers, which we discuss above. Given the critical role they play in supporting access to justice, it is important that ITPs have the right training.<sup>93</sup>
- 15.67 If the intermediary scheme is expanded to a wider range of people as we recommend, it will result in fewer ITPs supporting people in VAREs. Any role they continue to have in VAREs should receive funding and enough training.

86 Jesuit Social Services and RMIT Centre for Innovative Justice, *Recognition Respect and Support: Enabling Justice for People with Acquired Brain Injuries* (Report, 21 September 2017) 79 <<https://jss.org.au/recognition-respect-and-support-enabling-justice-for-people-with-acquired-brain-injuries/>>. See also Magdalena McGuire, *Breaking the Cycle Using Advocacy-Based Referrals to Assist People with Disabilities in the Criminal Justice System* (Report, Office of the Public Advocate, 2012) 7; Submission 41 (Office of the Public Advocate).

87 Submission 41 (Office of the Public Advocate).

88 Victorian Equal Opportunity and Human Rights Commission, *Beyond Doubt: The Experiences of People with Disabilities Reporting Crime—Research Findings* (Report, 2014) 28 <<https://www.humanrights.vic.gov.au/resources/beyond-doubt-the-experiences-of-people-with-disabilities-reporting-crime-jul-2014/>>.

89 Magdalena McGuire, *Breaking the Cycle Using Advocacy-Based Referrals to Assist People with Disabilities in the Criminal Justice System* (Report, Office of the Public Advocate, 2012) 111, 10.

90 Submission 41 (Office of the Public Advocate).

91 In our 2016 report, we also state that people providing communication assistance should be in a position to refer victims with disability to the support and advocacy they need for the criminal trial process: Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) [6.134].

92 Magdalena McGuire, *Breaking the Cycle Using Advocacy-Based Referrals to Assist People with Disabilities in the Criminal Justice System* (Report, Office of the Public Advocate, 2012) 7. See also Submission 41 (Office of the Public Advocate).

93 Our earlier *Sexual Offences* inquiry, for example, highlighted the need that existed then for specialist sexual assault training for ITPs: Victorian Law Reform Commission, *Sexual Offences* (Report No 5, July 2004) Recommendation 154.



## Recommendations

- 59 Victoria Police should set up processes to ensure any victim, witness, offender, accused or suspect in a sexual offence case is notified of the independent third person program and given the opportunity to confirm their eligibility.
- 60 The Victorian Government should resource the independent third person program to meet current and future demand and program training needs.

## What are language services?

- 15.68 Everyone is entitled to access the services and justice they need.<sup>94</sup> This includes people who need or prefer to communicate in a language other than English or in sign language. Language services are crucial to ensuring access to justice.
- 15.69 Language services enable communication with people who 'have limited English, are Deaf or hard of hearing'. They include services where people interpret one language to another, translate written information into a language other than English, and from written English into Auslan or audio.<sup>95</sup>
- 15.70 Language services are especially important in the context of sexual violence. As Chapter 2 discusses, sexual violence affects some groups more than others, including people who use language services. Language services also play an important role because of the importance of context and nuance when talking about such a personal experience.

There is also a need to ensure that people with disability have the language or words to describe what has occurred to them, and what they wanted or didn't want to occur. Not knowing the correct anatomical language can undermine how their report is received.—Roundtable consultation focused on the experience of women with disability<sup>96</sup>

- 15.71 Victorian Government guidelines set out key principles for the appropriate use of language services. The guidelines recommend that all government departments and agencies should have their own policies and procedures on language services.<sup>97</sup> The law also requires government department and agencies to report on their use of language services.<sup>98</sup>
- 15.72 The Victorian Government has recognised the need for investing in language services, including in a family violence context. It is reviewing how effectively language services are procured.<sup>99</sup> The recent Victorian budget provided funding to 'build the capacity of the [family violence and sexual assault] service system to respond to culturally and linguistically diverse communities and faith communities'.<sup>100</sup>

94 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8; *Equal Opportunity Act 2010* (Vic) s 3, pts 2 & 4; *Multicultural Victoria Act 2011* (Vic) preamble (3), s 4(3).

95 Victorian Government, 'Understanding Language Services', *VIC.GOV.AU* (Web Page, 28 October 2019) <<http://www.vic.gov.au/guidelines-using-interpreting-services/understanding-language-services>>.

96 Consultation 17 (Roundtable consultation focused on the experience of women with disability).

97 Department of Premier and Cabinet (Vic), *Using Interpreting Services—Victorian Government Guidelines on Policy and Procedures* (Report, August 2019) 8 <<https://www.vic.gov.au/guidelines-using-interpreting-services>>.

98 *Multicultural Victoria Act 2011* (Vic) s 26.

99 Victorian Government, *Multicultural Policy Statement* (Report, 2017) 34 <<http://www.vic.gov.au/multicultural-policy-statement>>.

100 Victorian Government, *Service Delivery* (Budget Paper No 3, 2020) 51 <<http://www.budget.vic.gov.au/budget-papers>>.

## We heard concerns about language services

- 15.73 While laws and policies set out the principles and guidance clearly, we heard that in practice the use of language services was not always appropriate or skilled enough. We also heard that there were gaps in access and the availability of appropriate language services for dealing with sexual violence.

### Language services are not always used appropriately

- 15.74 Participants in a consultation focusing on disability inclusion told us that police frequently neglect to use interpreters, including Auslan interpreters. They told us this was 'likely due to both a failure to appropriately recognise a victim-survivor's communication needs and an unwillingness to respond to them'.<sup>101</sup> In some cases, police used the victim survivor's abusive partner or child as an interpreter.<sup>102</sup>
- 15.75 Sexual Assault Services Victoria said there was no 'systematic process for how police respond when someone wants to report and they need an interpreter'.<sup>103</sup> They described examples of police refusing to provide Auslan interpreters, police using friends of victim survivors to interpret, and police taking statements from people with limited English language skills.<sup>104</sup>

### Access and availability of language services is limited

- 15.76 There was strong consensus about the barriers people faced in using language services:
- People were concerned about their privacy in discussing sexual violence with interpreters, especially over the phone.
  - In small communities, there were not enough interpreters, or interpreters of a preferred gender, for people to feel safe in using them to disclose sexual violence.
  - Some interpreters were not comfortable working with LGBTIQ+ people.
  - Some languages lack appropriate words to describe sexual violence.<sup>105</sup>
- 15.77 Participants in the Refugee Health Network and Refugee Health suggested sourcing interstate interpreters to address concerns about privacy.<sup>106</sup> The Victorian Multicultural Commission identified a lack of readily available resources and support materials in languages other than English.<sup>107</sup>

### Language services have capability gaps

- 15.78 We were told that some interpreters were not skilled in interpreting information in the context of family or sexual violence.<sup>108</sup> We also heard there was a lack of support, debriefing and training for interpreters.<sup>109</sup>
- 15.79 Several organisations, such as InTouch Multicultural Centre against Family Violence and the Refugee Health Network, told us of the need for more specialist training to deal with family and sexual violence.<sup>110</sup>

101 Consultation 11 (Family violence and sexual assault practitioners focusing on disability inclusion).

102 Ibid.

103 Submission 17 (Sexual Assault Services Victoria).

104 Ibid.

105 See, eg. Submissions 17 (Sexual Assault Services Victoria), 49 (InTouch Multicultural Centre Against Family Violence), 54 (Victorian Multicultural Commission); Consultations 47 (Refugee Health Network and Refugee Health Program) 66 (Consultation focused on people who have a lived experience of states of mental and emotional distress commonly labelled as 'mental health challenges'), 72 (Asylum Seeker Resource Centre (ASRC)).

106 Consultation 47 (Refugee Health Network and Refugee Health Program).

107 Submission 54 (Victorian Multicultural Commission).

108 Consultations 47 (Refugee Health Network and Refugee Health Program), 66 (Consultation focused on people who have a lived experience of states of mental and emotional distress commonly labelled as 'mental health challenges'), 72 (Asylum Seeker Resource Centre (ASRC)); Submissions 49 (InTouch Multicultural Centre Against Family Violence), 54 (Victorian Multicultural Commission).

109 Consultation 72 (Asylum Seeker Resource Centre).

110 Submission 49 (InTouch Multicultural Centre Against Family Violence); Consultation 47 (Refugee Health Network and Refugee Health Program).



- 15.80 The Gatehouse Centre, which works with children, expressed concern about how translators interpret questions in interviews involving children. The centre stressed a need for literacy in trauma, child development, and (where relevant) disability.<sup>111</sup>

## Language services should be strengthened

- 15.81 The system responding to sexual violence is falling short of its obligation to ensure equal access to people who prefer or need language services. These are serious barriers to improving reporting, especially among people who already find it difficult to access justice.
- 15.82 We are concerned to hear that police practices are not meeting their obligations. We note that, following the recommendations of the Royal Commission into Family Violence, a practice note was developed for the use of interpreters, and that this guidance is in the Victoria Police Code of Practice for family violence.<sup>112</sup> Similar guidance is included in the Code of Practice for sexual crime.<sup>113</sup>
- 15.83 We also note that education about the appropriate use of interpreters is being provided to police, with more training underway.<sup>114</sup> We recommend in Chapter 17 that Victoria Police should encourage specialised police to take part in the training programs that are developed.
- 15.84 In Chapter 4, we also recommend extending or introducing some rights under the Victims' Charter Act. Similar legislation in Scotland sets out the right to interpretation and translation.<sup>115</sup> We consider that this is a crucial right, and should be set out clearly in the legislation (see Chapter 4).
- 15.85 We recognise there are significant challenges to privacy in small communities. Addressing these requires broader reform and investment in improving language services. For example, reforms could increase the number of people who can provide accredited language services and the use of bilingual workers could be increased.<sup>116</sup> These may be addressed in the current review of procurement processes.
- 15.86 We also encourage addressing this through other reforms, such as the development of the next National Plan to reduce violence against women and their children. For example, if interstate interpreters are used, strengthening language services in gender-based violence across Australia could increase the supply of language services for small communities.
- 15.87 In the meantime, there may be opportunities to address these gaps through cooperative arrangements with other states. For example, Queensland has an Immigrant Women's Support Service which combines both family and sexual violence services. It runs regular sessions to train interpreters on how to interpret in a family violence or sexual violence context. These sessions are offered to any interpreter who wants to work in the field.
- 15.88 This service provides a useful model for encouraging and supporting training in these critical contexts. We recommend funding services such as InTouch Multicultural Centre against Family Violence, and other women's health services working with migrant and refugee women, to provide this kind of ongoing training within Victoria. It should be extended to other language services, including Auslan interpreters.

<sup>111</sup> Submission 14 (Gatehouse Centre, Royal Children's Hospital).

<sup>112</sup> The practice note informs police of the need for a professional interpreter, of the risk of emotional trauma if children or people known to the affected family member are used, of the possibility someone may hesitate to provide information for certain reasons, and that all reasonable steps must be taken to ensure the interpreter is not associated with the victim or their immediate cultural community: Victoria Police, *Code of Practice for the Investigation of Family Violence* (Interim Version, Police) [9.2] <<http://www.police.vic.gov.au/code-practice-investigation-family-violence>>; Royal Commission into Family Violence: *Report and Recommendations* (Final Report, March 2016) Recommendation 159 <<http://rcfv.archive.royalcommission.vic.gov.au/Report-Recommendations.html>>.

<sup>113</sup> 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>>.

<sup>114</sup> Victorian Government, 'Victoria Police Amend the Code of Practice around the Use of Interpreters', *VIC.GOV.AU* (Web Page, 18 May 2020) <<http://www.vic.gov.au/family-violence-recommendations/victoria-police-amend-code-practice-around-use-interpreters>>.

<sup>115</sup> *Victims and Witnesses (Scotland) Act 2014* (Scot) s 3F.

<sup>116</sup> Federation of Ethnic Communities' Councils of Australia (FECCA), *Australia's Growing Linguistic Diversity* (Report, 2016) 34–43 <<http://fecca.org.au/publications/australias-growing-linguistic-diversity/>>.

- 15.89 The Victorian Government should consider the need for incentives and access arrangements to attract people to this kind of work. For example, the Victorian Government already offers scholarships and bursaries for interpreter training.<sup>117</sup> This could be enhanced for interpreters interested in these roles.
- 15.90 In Chapter 7, we recommend improving information and guidance for all people experiencing sexual violence, including a central website. This should include translated versions, as is already done with the Orange Door website. Such resources should be promoted widely through existing networks, organisations and services.

## Recommendation

- 61 The Victorian Government should review arrangements to improve access to safe language services. This should include investing in training for language services in family and sexual violence and extending the pool of trained interpreters, including through:
- funding and encouraging training through relevant community services
  - identifying ways to extend the pool of trained interpreters across Australia to address privacy concerns.



# CHAPTER 16

## Forensic medical examinations

336 Overview

336 Forensic medical exams are an important part of sexual offence cases

341 People told us about their experiences of forensic medical examinations

344 Access to and the experience of forensic examinations need to be improved

## 16. Forensic medical examinations

### Overview

- Forensic medical examinations can play a part in improving evidence in the criminal justice system.
- There is an urgent need to invest in more access to forensic medical examinations, especially in rural and regional areas and for children and young people.
- This should be a priority for the Sexual Assault Strategy.
- Nurses should be used to conduct examinations more than they are now, to expand access to forensic medical examinations.
- People should be able to request the gender of the forensic medical officer.
- There should be more access to 'just in case' forensic medical examinations, which do not require reporting to police, as is common elsewhere in Australia and across the world.

### Forensic medical examinations are an important part of sexual offence cases

- 16.1 The private nature of most sexual offending means there is often not much physical evidence. However, in cases of recent sexual assault, there may be evidence from the body or clothing of the person assaulted (for example, body fluids, fibres, and physical injuries).<sup>1</sup>
- 16.2 A forensic medical examination can be used to collect this evidence. Examinations have two purposes: providing appropriate medical care (for example, to deal with injuries) and collecting forensic medical evidence.<sup>2</sup>
- 16.3 In some cases, an early evidence kit can be used instead, followed by an examination. This is a kit that a victim survivor can use themselves to capture samples so that they can do things such as showering or drinking before a full examination, but it is not an alternative to a full examination.<sup>3</sup>

<sup>1</sup> Antonia Quadara, Bianca Fileborn and Debra Parkinson, *The Role of Forensic Medical Evidence in the Prosecution of Adult Sexual Assault* (ACSSA Issues No 15, Australian Institute of Family Studies (Cth), 2013) 3–4 <<http://www.aifs.gov.au/acssa/pubs/issue/i15/index.html>>.

<sup>2</sup> Submission 61 (Victorian Institute of Forensic Medicine).

<sup>3</sup> Victoria Police, *Code of Practice for the Investigation of Sexual Crime* (Policy, 2016) 23 <<https://content.police.vic.gov.au/sites/default/files/2019-01/Code-of-Practice-for-the-Investigation-of-Sexual-Crime-%282016%29.pdf>>.

- 16.4 The experience of an examination can be distressing. However, it can also play a therapeutic role by, for example, enabling people to feel that they have done something to get justice, or that they are believed, and their decisions respected.<sup>4</sup> Some research indicates that people believe undergoing such examinations will make it easier to get justice, although it is unclear how much this influences their decision making.<sup>5</sup>
- 16.5 Getting a forensic medical examination does not always mean that someone will get the justice they deserve. It is not a choice that everyone can or will make. Yet, for too many people, it is a choice that they cannot make, because these examinations are not accessible to everyone who may benefit. Even for those who can make that choice, the experience of an examination can sometimes be traumatic rather than therapeutic.

## How do forensic medical examinations work?

- 16.6 In Victoria, forensic medical examinations of adults are conducted by the Clinical Forensic Medicine team within the Victorian Institute of Forensic Medicine (VIFM). The VIFM is an independent authority,<sup>6</sup> and its examinations are conducted under an agreement for services with Victoria Police.<sup>7</sup> (We discuss its governance in Chapters 4 and 5.)
- 16.7 The Clinical Forensic Medicine team includes doctors (Forensic Medical Officers) and nurses (Forensic Nurse Examiners). The VIFM also has specialists to provide specialist clinical advice. In 2018–19, 69 per cent of forensic medical examinations were conducted by female staff.<sup>8</sup>
- 16.8 Seventeen per cent of forensic medical examinations were conducted by registered nurses (mostly in regional areas). The VIFM told us that it was 'actively reviewing' how to increase the use of forensic nurses in sexual assault examination services.<sup>9</sup> Sexual assault nurse examiners have been used in the United States for three decades, and have long been used in New South Wales.<sup>10</sup> They have been a key focus for improving access in other countries by expanding the pool of people who can conduct examinations, especially in regional areas.<sup>11</sup>
- 16.9 Under the agreement between the VIFM and Victoria Police, set out in the Code of Practice, Victoria Police typically requests an examination in cases of recent sexual assaults (within 72 hours of the assault).<sup>12</sup>
- 16.10 The VIFM practitioners are also involved in medical investigations of sexual assaults that result in death. It provides services in relation to alleged offenders who are children. The VIFM provides opinion reports to police, including on how to interpret injuries, and may give expert evidence in trials.<sup>13</sup>
- 16.11 Forensic medical examinations of adults take place at 20 examination sites across Victoria, including crisis care units (CCUs) and multi-disciplinary centres (MDCs, discussed in Chapter 5). CCUs are located at hospitals, while MDCs are specialist centres for sexual assault that also include police and sexual assault counsellors.

4 Rebecca Campbell et al, 'A Participatory Evaluation Project to Measure SANE Nursing Practice and Adult Sexual Assault Patients' Psychological Well-Being' (2008) 4(1) *Journal of Forensic Nursing* 19; see, eg, Janice Du Mont, Deborah White and Margaret J McGregor, 'Investigating the Medical Forensic Examination from the Perspectives of Sexually Assaulted Women' (2009) 68(4) *Social Science & Medicine* 774.

5 Antonia Quadara, Bianca Fileborn and Debra Parkinson, *The Role of Forensic Medical Evidence in the Prosecution of Adult Sexual Assault* (ACSSA Issues No 15, Australian Institute of Family Studies, 2013) 15–16 <<http://www.aifs.gov.au/acssa/pubs/issue/i15/index.html>>.

6 It is established by the *Victorian Institute of Forensic Medicine Act 1985* (Vic).

7 Submission 61 (Victorian Institute of Forensic Medicine).

8 Ibid.

9 Ibid.

10 'Nurses to Train as Sex Assault Experts', *The Sydney Morning Herald* (online, 12 December 2004) <<https://www.smh.com.au/national/nurses-to-train-as-sex-assault-experts-20041212-gdkas6.html>>.

11 See, eg, Thaddeus Schmitt, Theodore P Cross and Megan Alderden, 'Qualitative Analysis of Prosecutors' Perspectives on Sexual Assault Nurse Examiners and the Criminal Justice Response to Sexual Assault' (2017) 13(2) *Journal of Forensic Nursing* 62; Clare Toon and Kurinchi Gurusamy, 'Forensic Nurse Examiners versus Doctors for the Forensic Examination of Rape and Sexual Assault Complainants: A Systematic Review' (2014) 10(5) *Campbell Systematic Reviews* <<https://www.proquest.com/docview/1773941880/abstract/C38F4AD67384239PQ/50>>.

12 Victoria Police, *Code of Practice for the Investigation of Sexual Crime* (Policy, 2016) 13 <<https://content.police.vic.gov.au/sites/default/files/2019-01/Code-of-Practice-for-the-Investigation-of-Sexual-Crime-%282016%29.pdf>>.

13 Submission 61 (Victorian Institute of Forensic Medicine).

Table 16 lists the places where examinations took place in 2018–19.<sup>14</sup>

- 16.12 During coronavirus (COVID-19) restrictions, the VIFM changed the availability of its services. Forensic medical examinations were limited to three metropolitan locations from 8am to 10pm. Some people were required to travel across Melbourne for examinations. 'Just in case' examinations ceased.<sup>15</sup>
- 16.13 The Victorian Forensic Paediatric Medical Service is responsible for forensic medical examinations of children and adolescents.<sup>16</sup> The service is managed by the Royal Children's Hospital. Examinations of children are not conducted at MDCs.<sup>17</sup> In Melbourne, they are conducted in the Royal Children's or Monash Children's Hospital.

**Table 16: Forensic medical examinations in Victoria, 2018–19<sup>18</sup>**

Place	Location	Number	% of total
Melbourne	Five CCUs (Monash Medical Centre, Royal Women's Hospital, Sunshine Hospital, Austin Hospital, Maroondah Hospital)	422	65.9%
	Emergency department of hospital	12	1.9%
	Dandenong MDC	23	3.6%
	Other sites (VIFM, police station, prison, private residence or residential care facility)	28	4.4%
<b>Total Melbourne</b>		<b>485</b>	<b>75.8%</b>
Regional	Regional CCUs	98	15.3%
	MDCs (Morwell, Bendigo and Mildura)	57	8.9%
<b>Total Vic</b>		<b>640</b>	<b>100%</b>

- 16.14 In regional and rural areas, children may be examined in a hospital by a trained paediatrician. However, if there is no suitably qualified doctor, children must travel to hospitals in Melbourne.<sup>19</sup>

## What are 'just in case' examinations?

- 16.15 The VIFM practitioners conduct examinations without a police report ('just in case' examinations) on a trial basis at the Monash Medical Centre.<sup>20</sup>
- 16.16 These examinations give people the option of deferring a decision on whether to report the sexual offence to the police. Sexual Assault Services Victoria told us:
- there is so much pressure and trauma on the day someone has been harmed ... we need to give victim survivors as many options as possible. 'Just in case' examinations are so crucial in terms of offering victim survivors options at a really overwhelming time. When someone is in crisis and overwhelmed – they don't want to make a decision.<sup>21</sup>

<sup>14</sup> This was provided as an example of a more 'standard' year than 2019–20, which was affected by the COVID-19 pandemic.  
<sup>15</sup> Submissions 11 (Associate Professor John AM Gall), 17 (Sexual Assault Services Victoria).  
<sup>16</sup> 'Victorian Forensic Paediatric Medical Service', *The Royal Children's Hospital Melbourne* (Web Page) <<https://www.rch.org.au/vfpms/>>.  
<sup>17</sup> There are no forensic paediatricians at MDCs: Submission 14 (Gatehouse Centre, Royal Children's Hospital).  
<sup>18</sup> Submission 61 (Victorian Institute of Forensic Medicine). Table 16 lists the percentages of the total for Victoria, while the submission provides some figures for the percentage of the total in Melbourne.  
<sup>19</sup> Submissions 11 (Associate Professor John AM Gall), 17 (Sexual Assault Services Victoria).  
<sup>20</sup> Submissions 17 (Sexual Assault Services Victoria), 61 (Victorian Institute of Forensic Medicine).  
<sup>21</sup> Submission 17 (Sexual Assault Services Victoria).



- 16.17 'Just in case' examinations are offered in every state or territory in Australia (see Table 17). They are commonly offered in other countries without requiring a police report, such as England,<sup>22</sup> Ireland<sup>23</sup> and New Zealand.<sup>24</sup>

**Table 17: State and territory forensic medical examinations without report to police**

State	Description
Australian Capital Territory	Offers forensic medical examinations with evidence stored for a minimum of 3 months. <sup>25</sup>
New South Wales	State guidelines provide that health services should respect the wishes of an adult or young person who is not at risk of significant harm as to whether they proceed with a formal police report, or choose an alternative reporting option. Evidence is stored for a minimum of 3 months, after which contact is made to assess the wishes of the patient. <sup>26</sup>
Northern Territory	Offers forensic medical examinations without a police report. Evidence is stored for 6 months. <sup>27</sup>
Queensland	All hospitals and health services are now required under a directive to provide forensic medical examinations regardless of whether victims decide to report the matter to the police or defer a decision. Evidence is stored for 12 months. <sup>28</sup> This reform was implemented in 2019, with a \$1.3 million commitment to increase access. <sup>29</sup>
South Australia	Offered at Yarrow Place in Adelaide and at some general hospitals in regional areas. Evidence is stored for 12 months. <sup>30</sup> However, accessing services outside Adelaide remains challenging. <sup>31</sup>
Tasmania	Forensic medical examinations are offered without requiring a report to the police. <sup>32</sup>
Western Australia	Offers forensic medical examinations without a report to the police. Evidence is stored for a minimum of 6 months, after which the patient is contacted about their wishes. <sup>33</sup>

- 22 NHS England, *Commissioning Framework for Adult and Paediatric Sexual Assault Referral Centres (SARC) Services* (Report, 10 August 2015) <<https://www.england.nhs.uk/commissioning/wp-content/uploads/sites/12/2013/05/SARCs-service-spec-contract-template-and-paed-framework.pdf>>.
- 23 National SART Guidelines Development Group (Ireland), *National Guidelines on Referral and Forensic Clinical Examination Following Rape and Sexual Assault (Ireland)* (Guidelines, 4th ed, Sexual Assault Response Team, 2018) <<https://www.hse.ie/eng/services/publications/healthprotection/sexual-assault-response-team-national-guidelines.pdf>>.
- 24 Nikki Macdonald, 'Hundreds of Rape Evidence Kits Never Get Tested—Should We Be Alarmed?', *Stuff.co.nz* (online, 14 August 2018) <<https://www.stuff.co.nz/national/crime/105933366/hundreds-of-rape-evidence-kits-never-get-tested--should-we-be-alarmed>>.
- 25 Canberra Rape Crisis Centre, *Sexual Assault Does Happen: A Booklet for People Who Have Experienced Sexual Assault and Their Supporters* (Booklet, 2013) 12 <[https://health.act.gov.au/sites/default/files/2018-09/CRCC\\_SexualAssaultHappens.pdf](https://health.act.gov.au/sites/default/files/2018-09/CRCC_SexualAssaultHappens.pdf)>.
- 26 NSW Government, *Responding to Sexual Assault (Adult and Child) Policy and Procedures* (Policy Directive No PD2020\_006, 7 February 2020) 39–40, 140.
- 27 Debra Parkinson, *Supporting Victims through the Legal Process: The Role of Sexual Assault Service Providers* (ACSSA Wrap No 8, Australian Institute of Family Studies (Cth), 2010) 9 <<http://www.aifs.gov.au/acssa/pubs/wrap/wrap8/index.html>>.
- 28 Queensland Government, *Caring for People Disclosing Sexual Assault* (Health Service Directive QH-HSD-051, Health Support Queensland, 22 July 2019) <<https://www.health.qld.gov.au/sexualassault>>.
- 29 Daniele Bird, *Delivering Forensic Services* (Report No 21 2018–19, Queensland Audit Office, 27 June 2019) 25.
- 30 'Forensic Medical Examination After a Sexual Assault', *Women's and Children's Health Network* (Web Page) <<https://www.wchn.sa.gov.au/our-network/yarrow-place/rape-and-sexual-assault-topics/forensic-medical-examination-after-a-sexual-assault>>.
- 31 Samantha Jonscher, 'Sexual Assault Survivors Suffering Long Trips to Distant Hospitals for Examinations', ABC News (online, 26 March 2019) <<https://www.abc.net.au/news/2019-03-27/sexual-assault-exams-not-always-available-in-the-regions/10781756>>.
- 32 Sexual Assault Support Service (Tas), *'It's Happened to Me'—Information for Adults Who Have Been Sexually Assaulted* (Fact Sheet, 2016) <[https://www.sass.org.au/sites/default/files/resources/its-happened-me-information-adults-who-have-been-sexually-assaulted\\_version-current-april-2020.pdf](https://www.sass.org.au/sites/default/files/resources/its-happened-me-information-adults-who-have-been-sexually-assaulted_version-current-april-2020.pdf)>.
- 33 'Have You Been Sexually Assaulted or Sexually Abused?' *Government of Western Australia* (Web Page) <<https://wnhs.health.wa.gov.au/our-services/service-directory/sarc/sexual-assault-abuse>>.

- 16.18 Queensland most recently expanded access to forensic medical examinations, including 'just in case' examinations. This included investing \$1.39 million in specialised training for nurses and doctors.<sup>34</sup>
- 16.19 Scotland recently expanded access to forensic medical examinations. Health boards are now required by law to provide examinations without requiring a person to report to police. The law regulates how the health board is to destroy evidence or transfer evidence to the police as needed.<sup>35</sup>
- 16.20 This followed a period of reform. A taskforce transferred the responsibility for forensic medical examinations from police to the health system. Significantly more money has been invested in examination facilities across Scotland.<sup>36</sup>
- 16.21 In Ireland, an analysis of forensic medical examinations found that about 10 per cent of those attending the Dublin centre did so without reporting to police. Of these, 20 per cent subsequently reported the incident to police. Most of those who subsequently reported (60 per cent) did so within seven days, and 80 per cent within a month. This is similar to the rates in other jurisdictions.<sup>37</sup>

## How are forensic medical examinations used in the criminal justice system?

- 16.22 Forensic medical examinations can:
- help identify the person who committed the crime
  - support the account of the victim survivor
  - determine that there was recent sexual activity
  - establish if force was used or if someone resisted.<sup>38</sup>
- 16.23 Research suggests that forensic medical evidence can influence the decisions of police and prosecutors.<sup>39</sup>
- 16.24 However, a review of empirical research found no clear association between the use of forensic medical evidence and the outcomes in criminal cases. It suggests that there is a 'disjunction between the expectations of forensic medical evidence ... and what is required to prove adult sexual offences'. For example, DNA evidence cannot reveal anything about the key issue of consent.<sup>40</sup>
- 16.25 There is a risk that forensic evidence can compound misconceptions about sexual violence. For example, its focus on physical penetration can undermine efforts to broaden our understanding of sexual assault beyond rape. If a person has recently had sex with other people, this forensic evidence can be used to undermine the character and credibility of victim survivors. Its absence may undermine the accounts of those who do not have forensic evidence.<sup>41</sup>

34 Caldwell, Felicity and Lydia Lynch, 'Victims to Be Offered Rape Kits before Deciding on Police Complaint', *Brisbane Times* (online, 11 February 2019) <<https://www.brisbanetimes.com.au/politics/queensland/kit-20190211-p50x2k.html>>.

35 *Forensic Medical Services (Victims of Sexual Offences) (Scotland) Act 2021* (Scot).

36 Her Majesty's Inspectorate of Constabulary in Scotland, *Strategic Overview of Provision of Forensic Medical Services to Victims of Sexual Crime* (Report, March 2017) <<https://www.hmics.scot/sites/default/files/publications/HMICS%20Strategic%20Overview%20of%20Provision%20of%20Forensic%20Medical%20Services%20to%20Victims%20of%20Sexual%20Crime.pdf>>; Scottish Government, 'Forensic Medical Services Bill Passes Unanimously' (Media Release, 10 December 2020) <<https://www.gov.scot/news/forensic-medical-services-bill-passes-unanimously/>>; Scottish Government, *Equally Safe Consultation: Analysis of Responses* (Report, 29 August 2019) <<https://www.gov.scot/publications/analysis-responses-equally-safe-consultation-legislation-improve-forensic-medical-services-victims-rape-sexual-assault/pages/2/>>; 'Taskforce for the Improvement of Services for Adults and Children Who Have Experienced Rape and Sexual Assault', *Scottish Government* (Web Page, 2021) <<https://www.gov.scot/groups/taskforce-to-improve-services-for-rape-and-sexual-assault-victims/>>.

37 Daniel Kane et al, 'Collection and Storage of Forensic Evidence to Enable Subsequent Reporting of a Sexual Crime to the Police "Option 3"—an Irish Experience' [2021] *Irish Journal of Medical Science* 33439414:1–6 <<http://dx.doi.org/10.1007/s11845-020-02491-1>>.

38 Antonia Quadara, Bianca Fileborn and Debra Parkinson, *The Role of Forensic Medical Evidence in the Prosecution of Adult Sexual Assault* (ACSSA Issues No 15, Australian Institute of Family Studies (Cth), 2013) 9 <<http://www.aifs.gov.au/acssa/pubs/issue/i15/index.html>>.

39 Ibid 16–19.

40 Ibid 3.

41 Ibid 26–7.

- 16.26 There remains very little research on how forensic evidence is used in court, or how it influences the progress of cases.<sup>42</sup> Forensic officers receive little feedback about the use of forensic evidence (see Chapter 5).<sup>43</sup>

## People told us about their experiences of forensic medical examinations

### There is limited access and availability

- 16.27 The experience of having a forensic medical examination is often extremely difficult. For too many people, this experience was made more distressing by the lack of timely access to examinations (see box).

#### What people told us about forensic medical examinations

One woman spoke of how she had been turned away by one hospital because they said, incorrectly, that they did not deal with sexual assault. She then had to wait for six hours in the middle of the night at the next hospital in a public waiting room while she was bleeding.

The hospital staff kept 'insulting' her by asking publicly whether she was sure that she didn't have her period. She was forced to sit in her 'blood-soaked clothes' for hours, and even after that she ended up having to leave without seeing a doctor.

Twelve hours later, she received a call telling her she could see a specialised forensic doctor. In the meantime, she was unable to shower and 'had to sleep covered in my own blood'. She also wasn't informed about the need to keep her clothing in a paper bag for evidence.<sup>44</sup>

Another person said she waited for eight hours after a traumatic trip for a visit from a forensic medical doctor. By that time, they said it was too late to know if she had been drugged.<sup>45</sup>

Another person said they were at the hospital 'for 3.5 hours and most of it was waiting'. The person reported that the doctor was 'amazing but so overworked' and had to leave to assist someone else.<sup>46</sup>

A parent reported her daughter had to wait 20 hours during the coronavirus (COVID-19) pandemic without washing herself because of the limited number of forensic medical officers available.<sup>47</sup>

One person had a simple and specific suggestion: When they took my underwear as evidence, the underwear they gave me were both too small and ... well, they were black and lacey. It felt very inappropriate but I laugh about it now, in a dark humour sort of way. I think speaking frankly about what victims tangibly need after going through a kit or reporting would be more helpful, so people don't donate weirdly sexy underwear to a rape crisis centre.<sup>48</sup>

42 Ibid 22–3.

43 Sally F Kelty, Roberta D Julian and Alastair Ross, 'Dismantling the Justice Silos: Avoiding the Pitfalls and Reaping the Benefits of Information-Sharing between Forensic Science, Medicine and Law' (2013) 230(1–3) *Forensic Science International* 8.

44 Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021).

45 Ibid.

46 Consultation 63 (A victim survivor of sexual assault, name withheld).

47 Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021).

48 Ibid.

- 16.28 Sexual Assault Services Victoria told us that there was a need for an 'urgent review' of the availability of examinations. It told us that the number of doctors available was 'patently inadequate'. Waiting for a forensic medical officer for more than 10 hours could be re-traumatising and make people not want to continue with a report.<sup>49</sup>
- 16.29 Children in rural or regional areas faced the extra stress of travelling to Melbourne hospitals.<sup>50</sup> Associate Professor John Gall recommended:
- more effort in recruiting, training and retaining forensic services for children in rural and regional areas
  - training nurses to work under the supervision of trained paediatricians or physicians in regional centres.<sup>51</sup>
- 16.30 We heard that in rural and regional areas forensic examinations were not accessible, and people were transported in police vehicles to examinations without support.<sup>52</sup>
- 16.31 Victoria Police highlighted the importance of increasing access to forensic medical officers, which would better support successful criminal prosecutions.<sup>53</sup>

### The gender of a forensic medical examiner matters

- 16.32 We heard concerns about having a choice about the gender of forensic medical examiners. Sexual Assault Services Victoria told us:
- Other recent changes to VIFM services have involved the increased recruitment of male FMOs. Given the strongly gendered nature of sexual assault, our members report that clients are being adversely impacted by this practice.<sup>54</sup>

#### What people told us about the gender of a forensic medical officer

Alison told us that her daughter had to wait '20 hours, with sperm on her face and chest, to be examined' because the only person available earlier was a 65-year-old man. She said that her 'daughter's first sexual experience had just happened and now she was going to have to get naked in front of a male stranger. I told them that that was not ok.'

They were told that if they wanted a woman, they would have to wait until the next morning, and they were not offered other options.<sup>55</sup>

Another person told us that a 'relative ended up showering after 2 days without being examined by a forensic female doctor (because only males were available) and this meant she could not get the evidence needed to prosecute her rapist (who was a stranger)'.<sup>56</sup>

- 16.33 The VIFM told us that in 2018–19, 69 per cent of examinations were conducted by female practitioners, and that appropriate chaperones (such as a doctor or nurse) were also used.<sup>57</sup> It also recruited for diversity.
- 16.34 The VIFM told us that its practice was to try to meet any requests for a specific gender or propose alternatives, such as arranging a different time or location for the examination. However, it would be 'very difficult' to always meet these requests.<sup>58</sup>

49 Submission 17 (Sexual Assault Services Victoria). Its concerns about the need for a more collaborative process of decision making are discussed in ch 4.

50 Ibid.

51 Submission 11 (Associate Professor John AM Gall).

52 Consultation 20 (Members of Barwon South West RAJAC and Barwon South West Dhekl Dja Action Group).

53 Consultation 70 (Victoria Police (No 1)).

54 Submission 17 (Sexual Assault Services Victoria).

55 Consultation 99 (Alison, the mother of a rape survivor).

56 Consultation 32 (Anonymous member, Victim Survivors' Advisory Council).

57 Submission 61 (Victorian Institute of Forensic Medicine).

58 Email from Victorian Institute of Forensic Medicine to Victorian Law Reform Commission, 21 May 2021.

## We heard concerns about the security and quality of facilities

- 16.35 The forensic examination facilities in some MDCs are not used often. Victoria Police told us that increased access to forensic medical practitioners would reduce the need for victim survivors to travel to hospitals, and 'would be consistent with the spirit in which MDCs were intended'.<sup>59</sup> The VIFM told us it is necessary to conduct examinations of victims of sexual assault at hospitals, which have the appropriate specialist medical services to support the health and welfare of the victims. It believed these services could not be provided at MDCs. Associate Professor John Gall pointed to the medical risks of providing acute medical care within MDCs and recommended that these services should be provided at hospitals.<sup>60</sup>
- 16.36 We also heard concerns about the safety and quality of the hospital facilities:
- waiting rooms were not secure or private<sup>61</sup>
  - hygiene—one client reported that she was unable to go through with the examination because the waiting room was dirtier than the place where she had been sexually assaulted<sup>62</sup>
  - hospitals were unsafe for people with disability, including those whose immunity was compromised.<sup>63</sup>

## We heard about the need for 'just in case' medical examinations

- 16.37 Sexual Assault Services Victoria recommended that everyone who experiences sexual assault should be offered an examination 'as a matter of course' and not require a police referral.<sup>64</sup> In its view, this would 'change the experience for victim survivors enormously'.<sup>65</sup> Offering them in only one site, forcing some people to travel for hours, was not a real choice.<sup>66</sup>

A friend of mine called West CASA for me the day after I was raped. They told her I would need to go to Sunshine Hospital [in Melbourne's west]. I decided to go to Monash Medical Centre [in the east] on my own the next day instead, for a just in case forensic examination.<sup>67</sup>

- 16.38 The VIFM did not support the expansion of the current model of 'just in case' forensic medical examinations. It expressed concern that this model could 'reduce a victim's future justice options' because:
- Failure to interact with police in the early stages after an assault might limit additional evidence collection ... When issues at court revolve around consent, it is often these other pieces of evidence that become significant. On this basis, the ['just in case'] process can actually impede positive justice outcomes for victims as other evidentiary options are not activated at the time of the report.<sup>68</sup>
- 16.39 The VIFM said it would be beneficial if a person was told that they could report to police with the understanding that they could decide not to proceed later. This would mean the victim receives the 'necessary medical attention and has a forensic medical examination, and enables the preliminary collection of other evidence by police'.<sup>69</sup>

59 Submission 68 (Victoria Police).

60 Submission 11 (Associate Professor John AM Gall).

61 Consultation 32 (Anonymous member, Victim Survivors' Advisory Council).

62 Consultation 53 (Elizabeth Morgan House and a victim survivor of sexual assault).

63 Consultation 32 (Anonymous member, Victim Survivors' Advisory Council).

64 Submission 17 (Sexual Assault Services Victoria).

65 Consultation 14 (Sexual Assault Services Victoria).

66 Ibid.

67 Consultation 63 (A victim survivor of sexual assault, name withheld).

68 Email from Victorian Institute of Forensic Medicine to Victorian Law Reform Commission, 21 May 2021.

69 Ibid.

- 16.40 Since the VIFM commenced the trial of 'just in case' examinations in 2014, there have only been 61 'just in case' examinations, and only four of these cases went on to report to police.<sup>70</sup>
- 16.41 Victoria Police explained that it would prefer evidence to be obtained rather than lost. However, it noted problems with 'just in case' examinations, including issues of where the evidence was stored and who had access to it, which could ultimately impact the success of a case.<sup>71</sup>

## Access to and the experience of forensic examinations need to be improved

### Access to forensic medical examinations should be expanded

- 16.42 A forensic medical examination may be the first or one of the first encounters a person has with the criminal justice system. This comes at a traumatic time, when someone may be overwhelmed by what has just happened to them.
- 16.43 It is therefore critical that the examination is timely, safe and supported. The main concern, in Victoria as elsewhere in Australia, is enabling fair access to examinations across the state. We are especially concerned about the lack of access for children and adolescents in rural and regional areas.
- 16.44 Other places, such as Queensland and Ireland, can show us the way. In Chapter 4, we recommend a review of the governance of the VIFM. There are advantages to a health-based model, as is common elsewhere in Australia and overseas. This could help expand access through the health system.
- 16.45 We support the VIFM's efforts to expand access through increased use of nurses. This would be useful in addressing shortages in rural and regional areas. It may also help in increasing choices about the gender of the forensic medical officer in areas with shortages.

### Access to choice should be expanded

- 16.46 We recognise that the VIFM is already trying to meet requests for the gender of a forensic medical officer or to propose alternatives. As with the similar issue of the gender of a police officer (see Chapter 17), the policy already supports choice and control. The challenge is a practical one of having enough female examiners.
- 16.47 What we have heard is that the gender of the examiner remains an important barrier for people. As the examples show, it can make the experience traumatic rather than therapeutic.
- 16.48 In Chapter 4, we recommend extending or enhancing the rights in the *Victim Charter's Act 2006* (Vic) to set clear expectations about the treatment of people experiencing sexual violence, and to ensure that partners within the sexual assault system are held accountable for that treatment. We recommend in that chapter that one of these rights should be the right to specify the gender of a forensic medical examiner.
- 16.49 This right is set out in similar legislation in Scotland.<sup>72</sup> It is different to the similar right to specify the gender of the police officer in an interview, which does require someone to grant the request unless, for example, it is not reasonably practical to comply.<sup>73</sup> Instead, the legislation requires the police officer to inform the medical examiner of the request, but does not require that this request is fulfilled.

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<sup>70</sup> Ibid.

<sup>71</sup> Consultation 70 (Victoria Police (No 1)); email from Victorian Institute of Forensic Medicine to Victorian Law Reform Commission, 21 May 2021.

<sup>72</sup> *Victims and Witnesses (Scotland) Act 2014* (Scot) s 9. However, this provision has not yet come into operation because it is not yet feasible to implement it. Given the percentage of examinations already conducted by female examiners, this appears not to be a constraint in Victoria.

<sup>73</sup> Ibid s 8. The police are required to grant the request unless it would be likely to prejudice a criminal investigation or it is not reasonably practical to comply.



- 16.50 This would not work if, as we recommend below, there is no police officer involved. We note that around 70 per cent of examinations are already conducted by female examiners and, without further evidence, do not see any reason why a forensic service could not be required to grant the request, unless it is not reasonably practical to comply.

### **The Sexual Assault Strategy should make this work a priority**

- 16.51 More investment and effort are needed to enable everyone to have access to timely and safe forensic medical examinations. It will also need multi-agency leadership, as there is clearly a difference of view between key partners as to where examinations can take place, and the balance between access and ensuring specialisation.
- 16.52 As Associate Professor John Gall noted, the challenges here are not unique to forensic medical examinations but common challenges in our health system. These are mainly challenges of recruitment, training and retention.
- 16.53 We therefore recommend that this is an issue that is dealt with as part of the Sexual Assault Strategy. Key partners involved in developing measures should support a shared aim of increasing access to examinations.

### **Access to just in case examinations should be expanded**

- 16.54 The Victorian Government should extend the availability of 'just in case' forensic medical examinations. This would help meet the goal of giving victim survivors choices and control.
- 16.55 We acknowledge the VIFM's concerns about the risk that a late decision to report may affect the collection of other evidence. This is recognised in the Irish model, which notes that involving police 'from the outset provides the greatest potential for gathering the best possible evidence' for a prosecution.<sup>74</sup>
- 16.56 However, the guide explains that, despite this, the traumatic nature of such incidents means that people may need time to consider what to do. They should have the option of not reporting.<sup>75</sup>
- 16.57 We consider that these concerns should be addressed in a similar way to the Irish model, so that during the procedure for consent, people are advised that prompt reporting is encouraged so that an investigation can begin, and that reporting to police presents the best opportunity for detecting sexual crime and potentially prosecuting it. Those who went on to report to police in the Irish model did so within the first month.<sup>76</sup> This also reduces the risks of delay to a police investigation.
- 16.58 Offering examinations without requiring a police report is common practice elsewhere in Australia and overseas. In our view, this indicates that such a model is workable and may even increase reporting rates a little. We are not convinced the low uptake of the current trial indicates low demand, because the model was only available at one site and was not widely promoted.
- 16.59 It is unclear that the success of the model should be judged only by the number of people who report to police later. It is possible that, for some people, making the choice can be therapeutic and provide them with a sense of choice and control, even if they end up not reporting.
- 16.60 Implementing this option fully will take time, especially outside Melbourne. However, it should be developed as part of the Sexual Assault Strategy, together with broader measures to enhance access to forensic medical examinations.

74 National SART Guidelines Development Group (Ireland), *National Guidelines on Referral and Forensic Clinical Examination Following Rape and Sexual Assault (Ireland)* (Guidelines, 4th ed, Sexual Assault Response Team, 2018) 104 <<https://www.hse.ie/eng/services/publications/healthprotection/sexual-assault-response-team-national-guidelines.pdf>>.

75 Ibid.

76 Daniel Kane et al, 'Collection and Storage of Forensic Evidence to Enable Subsequent Reporting of a Sexual Crime to the Police "Option 3"—an Irish Experience' [2021] *Irish Journal of Medical Science* 33439414:1–6, 4 <<http://dx.doi.org/10.1007/s11845-020-02491-1>>.



## Recommendation

- 62 The Victorian Government should, as part of the Sexual Assault Strategy, develop measures:
- a. to extend access to forensic medical examinations across Victoria, including by the increased use of forensic nurses
  - b. to give victim survivors the option of a forensic medical examination, without requiring a report to the police.

# Police to prosecution in sexual violence cases

## 348 Overview

348 The police and prosecution are a key part of the response to sexual offences

349 The police response to sexual offences has been an area for reform

350 Access to reporting is an area of priority

352 How can the experience of police responses be improved?

364 How can information and evidence gathering for children be improved?

369 What opportunities are there to improve police training?

374 How can decision making be improved?

375 Should there be an independent review function?

# 17. Police to prosecution in sexual violence cases

## Overview

- The police and prosecution are the gateway to the criminal justice system.
- People need to feel confident that police will respond appropriately to their diverse needs and experiences before reporting. This requires many measures, including improving the accessibility of police stations and improving police training.
- While there has been progress in improving the responses of police and the prosecution, still more can be done to improve the consistency of practice in key areas.
- There should also be a focus on improving the quality of police interviews with children and young people and other aspects of police responses through training and resources.
- We need to understand more about why police and prosecution cases do not progress and introduce more independence and accountability into decision making by police and prosecution.

## The police and prosecution are a key part of the response to sexual offences

- 17.1 The police are the entry point into the criminal justice system. For many people, this is itself a barrier to reporting, as we discuss in Chapter 2. To improve access to justice, people need to feel confident that police will respond appropriately to their diverse needs and experiences.
- 17.2 For most people who report sexual offences, the experience of the criminal justice system is largely an experience of how the police respond, and to a lesser extent, how the prosecution responds. Most cases involving sexual offences do not end up in court. The police lay charges in about a quarter of all cases reported to them, and in about half of the cases reported where an offender is identified.<sup>1</sup> Of these, a further 10 per cent of incidents reported to police drop out of the criminal justice system at the prosecution stage.<sup>2</sup>
- 17.3 This chapter looks at ways to improve these responses. We discuss other aspects of prosecution, including training, in Chapter 18.
- 17.4 We recognise that the law and policy in this area are already pointing in the right direction. There have been many reforms and significant cultural change within Victoria Police. However, more can be done to ensure consistent practice.

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<sup>1</sup> In cases from 2015–16 and 2016–17: S Bright et al, *Attrition of Sexual Offence Incidents through the Victorian Criminal Justice System: 2021 Update* (Report, Crime Statistics Agency, 2021). Charges were laid in 23% of the cases reported to police, and in 51% of the cases where an offender was identified. An offender is 'identified' where police have formally recorded an alleged offender against an offence. Where an offender has been recorded, police must record an outcome for how they dealt with that offender.

<sup>2</sup> Ibid.

- 17.5 There are underlying challenges, including a need for more funding of police (see Chapter 4). There has been a significant increase in the number of cases being reported to police, and sexual offending is often more difficult to investigate and prove than other types of offence (see Chapter 19). We also make recommendations in Chapter 14 that give police more powers to investigate image-based sexual abuse.
- 17.6 Moreover, there are challenges associated with expecting police to act both as investigators and as a source of support through the criminal justice system. To do both requires time and resources, and also distinct skills and attitudes.
- 17.7 For this reason, we recommend funding a model of continuous and dedicated victim support (see Chapter 12) and improving the capacity of community-based organisations to support people (see Chapter 8).
- 17.8 Most relevantly, in Chapter 4 we recommend extending rights under the *Victims' Charter Act 2006* (Vic) and developing a new multi-agency protocol. Together, these measures aim to embed procedures and improve the consistency of practice across agencies, and to ensure accountability for compliance with those standards.

## The police response to sexual offences has been an area for reform

- 17.9 There have been many reforms to police since we last inquired into sexual offences in 2004.<sup>3</sup> The police response is specialised, with investigators in Sexual Offence and Child Abuse Investigation Teams (SOCITs) who receive specialised training.<sup>4</sup> The SANO task force was also established to specialise in historical sexual assault and child abuse.
- 17.10 As discussed in Chapter 5, the new multi-disciplinary centres (MDCs) provide a more collaborative approach to responding to sexual assault. These centres co-locate a range of services together with police, including counselling services provided by centres against sexual assault (CASAs), and Child Protection.<sup>5</sup>
- 17.11 Other recent reforms include:
- Victoria Police's strategy for family violence, sexual offences and child abuse<sup>6</sup>
  - a new booklet on reporting sexual offences to police, published in 20 languages<sup>7</sup>
  - a review of police training for members responsible for investigating sexual offences and child abuse, comprehensive guidelines for initial reports to police, and guidelines for first responders to the scene of a sexual crime<sup>8</sup>
  - an audit on sexual harassment within Victoria Police.<sup>9</sup>
- 17.12 We discuss other relevant reforms in this chapter.

3 Victorian Law Reform Commission, *Sexual Offences* (Report No 5, July 2004).

4 See 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, 333–4.

5 Ibid 334.

6 Victoria Police, *Policing Harm, Upholding the Right: Victoria Police Strategy for Family Violence, Sexual Offences and Child Abuse 2018-2023* (Policy, 2017) <<https://www.police.vic.gov.au/sites/default/files/2019-03/Policing-Harm-Upholding-The-Right.pdf>>. This implemented Recommendation 46 of *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016) <<http://rcfv.archive.royalcommission.vic.gov.au/Report-Recommendations.html>>.

7 Victoria Police, *Reporting Sexual Assault* (Booklet, 2020) <<https://www.police.vic.gov.au/resources-and-fact-sheets-0>>.

8 Victorian Government, *Annual Report 2020—Royal Commission into Institutional Responses to Child Sexual Abuse* (Report, December 2020) 21 <<https://content.vic.gov.au/sites/default/files/2020-12/RCIIR%20to%20Child%20Sexual%20Abuse%20Annual%20Report20.pdf>>.

9 Victorian Equal Opportunity and Human Rights Commission, *Independent Review into Sex Discrimination and Sexual Harassment, Including Predatory Behaviour, in Victoria Police: Phase 3 Audit and Review* (Report, August 2019) <<https://www.humanrights.vic.gov.au/resources/independent-review-victoria-police-phase-3/>>.

## Access to reporting is an area of priority

- 17.13 In Chapter 15, we discuss the importance of access to justice for everyone, including:
- being treated as equal before the law
  - not experiencing discrimination
  - having the assistance to communicate.<sup>10</sup>
- 17.14 A key part of access to justice is access to police, including reporting to police. Victoria Police already recognises this.

## Victoria Police is committed to increasing accessibility

- 17.15 For many police forces, improving police–community relations is a priority.<sup>11</sup> Police–community relations can be improved in a range of ways. Officers in specific roles can receive specialised training to enable them to be more responsive to the needs of all people in the community. There are measures to increase workforce diversity. Community liaison officers work to improve relationships between police and the community. Police-led community forums bring people together.<sup>12</sup>
- 17.16 Victoria Police already adopts similar measures. It is committed to improving its service to 'priority communities', meaning communities who are 'both over and underrepresented in terms of police interactions'.<sup>13</sup>
- 17.17 This commitment is reflected in:
- a human rights framework that guides staff training and operations so that all police officers are responsive to diversity and individual needs<sup>14</sup>
  - portfolio reference groups, which are forums for engaging with community stakeholders from its priority communities<sup>15</sup>
  - community liaison positions, such as Aboriginal community liaison officers and lesbian, gay, bisexual, transgender, intersex and queer liaison officers.<sup>16</sup>
- 17.18 In its 2018–23 Strategy for Family Violence, Sexual Offences and Child Abuse, Victoria Police confirms its commitment to improving its workforce diversity and responsiveness to priority communities.<sup>17</sup> It has an action plan that sets out its activities to increase access to justice for people with disability, including the development of hubs that are accessible physically and have tools to assist communication (are 'communication accessible') in all police regions.<sup>18</sup>

10 *Equal Opportunity Act 2010* (Vic) ss 15, 44–45; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8.  
11 See, eg, Isabelle Bartkowiak-Théron and Anna Corbo Crehan, 'A New Movement in Community Policing? From Community Policing to Vulnerable People Policing' in Judy Putt (ed), *Community Policing in Australia* (Australian Institute of Criminology (Cth), Research and Public Policy Series 111, 2010) 16.  
12 See generally Judy Putt (ed), *Community Policing in Australia* (Australian Institute of Criminology (Cth), Research and Public Policy Series 111, 2010).  
13 Consultation 80 (Victoria Police (No 2)).  
14 Ibid.  
15 Victoria Police has seven Portfolio Reference Groups: Aboriginal, Disability, LGBTIQ, Mental Health, Multicultural, Seniors and Youth, as well as the Human Rights Strategic Advisory Committee. See also 'Reference Groups', *Victoria Police* (Web Page, 5 July 2021) <<https://www.police.vic.gov.au/reference-groups>>.  
16 See 'Community Liaison Officers', *Victoria Police* (Web Page, 23 June 2021) <<https://www.police.vic.gov.au/community-liaison-officers>>.  
17 Victoria Police, *Policing Harm, Upholding the Right: Victoria Police Strategy for Family Violence, Sexual Offences and Child Abuse 2018–2023* (Policy, 2017) 15, 24 <<https://www.police.vic.gov.au/sites/default/files/2019-03/Policing-Harm-Upholding-The-Right.pdf>>.  
18 Victoria Police, *Accessibility Action Plan 2021–2023* (Action Plan, April 2021) 11 <<https://www.police.vic.gov.au/sites/default/files/2021-06/Accessibility%20Action%20Plan%2021-23.pdf>>.

## Some communities still face barriers to reporting to police

- 17.19 We heard that people still face police barriers to reporting. For example, people told us:
- Aboriginal women experience discrimination when they report, particularly when the alleged perpetrator is not Aboriginal.<sup>19</sup>
  - Women with disability, especially those with communication difficulties, are not believed or enabled to tell their story.<sup>20</sup>
  - People with lived experience of mental illness or psychological distress are discounted as 'serial reporters', even though they may have experienced sexual violence on multiple occasions, and can even be charged with making a false report.<sup>21</sup>
  - Care leavers do not have their reports taken seriously.<sup>22</sup>
  - Children and young people are not believed.<sup>23</sup>
  - Children and young people in out-of-home care are not taken seriously and treated more like potential offenders.<sup>24</sup>
  - Women already in contact with the justice system (see Chapter 8) are arrested in relation to outstanding matters (like fines) when they report, or are not believed.<sup>25</sup>
  - Police do not come to take statements from people living in institutional contexts (like prison or mental health in-patient units).<sup>26</sup>

## A program of reforms should increase access to justice

- 17.20 We address these issues in recommendations throughout our report. In Chapter 8, we recommend the development of community pathways to reporting. Specialist police (SOCIT) teams would engage with community organisations and institutions (including prisons) in their regions and develop arrangements for people to report to police. These would be based on existing successful police engagement models, like the SANO Taskforce, and would enable flexible approaches to taking reports and statements (discussed below).
- 17.21 In Chapter 15, we discuss the importance of making justice processes accessible to all, through the use of independent third persons, interpreters and intermediaries. These support people would work with police.
- 17.22 A key priority is to ensure that police stations can communicate with people in a range of ways and are 'communication accessible'. For example, staff could be trained to use different methods of communication, such as using gestures or pointing to objects.<sup>27</sup>
- 17.23 We understand progress is underway on a previous recommendation for all police stations to be accredited by Scope, a disability support provider.<sup>28</sup> This accreditation guarantees that a service is communication accessible. We welcome other accessibility measures, including the plan for accessible hubs noted earlier.<sup>29</sup>

19 Consultation 30 (Djirra).

20 Consultations 11 (Family violence and sexual assault practitioners focusing on disability inclusion), 17 (Roundtable consultation focused on the experience of women with disability).

21 Consultation 66 (Consultation focused on people who have a lived experience of states of mental and emotional distress commonly labelled as 'mental health challenges').

22 Consultation 98 (Care Leavers Australasia Network).

23 Consultation 68 (Youthlaw).

24 Consultation 85 (Roundtable on the experience of children and young people).

25 Submission 58 (Law and Advocacy Centre for Women Ltd); Consultation 30 (Djirra).

26 Consultation 66 (Consultation focused on people who have a lived experience of states of mental and emotional distress commonly labelled as 'mental health challenges').

27 Scope, *Communication Access for All: Introducing the Communication Access Symbol* (Booklet, 2015) 20 <<https://www.scopeaust.org.au/wp-content/uploads/2014/12/A4-Communication-Access-for-All-Booklet-2015-web1.pdf>>.

28 Consultation 70 (Victoria Police (No 1)); Victorian Equal Opportunity and Human Rights Commission, *Beyond Doubt: The Experiences of People with Disabilities Reporting Crime—Research Findings* (Report, July 2014) Recommendation 5 <<https://www.humanrights.vic.gov.au/resources/beyond-doubt-the-experiences-of-people-with-disabilities-reporting-crime-jul-2014/>>.

29 Other recent initiatives include the development of an Easy English guide to reporting sexual offences and established arrangements between police and disability service providers to respond to allegations of abuse: see Victoria Police, *How to Report a Sexual Offence* (Booklet, 2020) <<https://www.police.vic.gov.au/resources-and-fact-sheets-o->> Consultation 91 (Victoria Police (No 3)). On the accessibility hubs, see Victoria Police, *Accessibility Action Plan 2021–2023* (Action Plan, April 2021) <<https://www.police.vic.gov.au/sites/default/files/2021-06/Accessibility%20Action%20Plan%2021-23.pdf>>.

- 17.24 While Scope accreditation for all police stations is crucial, given the focus of this inquiry we emphasise the need to accredit police stations that specialise in sexual offences, such as in MDCs. As Victoria Police's action plan identifies, an estimated 90 per cent of women with intellectual disabilities experience sexual violence.<sup>30</sup> In the meantime, a priority should be to ensure that necessary communication support programs are available and adequately funded (see Chapter 15).<sup>31</sup>
- 17.25 In Chapter 18, we propose a specialised approach to training throughout the criminal justice system, including to understand and respond to people from diverse communities. Later in this chapter, we address the need for further training of police.

## Recommendation

- 63 Victoria Police should complete implementation of Recommendation 5 of the Victorian Equal Opportunity and Human Rights Commission's *Beyond Doubt* report to gain and maintain communication access accreditation based on the advice of Scope, the disability support provider.
- Police stations that specialise in sexual offences should be accredited as a matter of high priority.

## How can the experience of police responses be improved?

### People told us about the first response

- 17.26 The first response of police to a report of sexual violence is crucial to a victim survivor's experience of the justice system. It may be the first time someone has disclosed their experience of sexual violence. A supportive response can often be the difference between someone choosing to engage with the criminal justice system or walking away.
- 17.27 We heard from many people who reported positive experiences with police (see box).

30 Victoria Police, *Accessibility Action Plan 2021–2023* (Action Plan, April 2021) 7 <<https://www.police.vic.gov.au/sites/default/files/2021-06/Accessibility%20Action%20Plan%2021-23.pdf>>.

31 Another proposal that we heard was regularly rostering communication assistants at multi-disciplinary centres: see Consultation 11 (Family violence and sexual assault practitioners focusing on disability inclusion).



### Positive reports of police

'I was very well supported by the Victorian Police. I had the one officer make initial contact in 2014 and stay with me through thick and thin. This was important to me to have the same contact ... I have not had a lot of experience with the Police, so I was surprised at the role he played. He was an expert on all things police and court processes but also very much a support person.'<sup>32</sup>

'The SOCIT police were thorough, they explained the process of reporting, charging and going to court in full; nothing was rushed, and I didn't feel pressured to make a decision ... I was able to contact them at any time, including outside work hours, which is very important. This initial contact and relationship building all happened over the phone and there was no pressure for me to come into the station. I continue to feel blessed and grateful for who I have had to support me in reporting this harm.'<sup>33</sup>

One person spoke positively of dealing with two female SOCIT officers after calling a support helpline. The officers had 'made [her] feel heard and believed, even when asking tough questions'.<sup>34</sup>

The (SANO) police team were 'incredibly professional and she had a lot of faith in them'.<sup>35</sup>

Another person praised one particular officer who was 'incredibly good and helpful and really made it feel like the police were doing right by me', and who was also good at talking to the witnesses and 'incredibly responsive to the perpetrator harassing' the person and other witnesses.<sup>36</sup>

Another person who identified as Aboriginal or Torres Strait Islander reflected that, when she had been sexually assaulted many years ago, there had been 'nowhere to go', but when she reported her daughter's assault 'the SOCIT team were amazing'.<sup>37</sup>

One person spoke of how her excellent and supportive police officer 'restored my faith in the police' and reinforced the importance of the 'consistency of having one very capable caring woman' who had made it 'accessible, easy and less intimidating'.<sup>38</sup>

17.28 We still heard, however, of issues with police practices. We discuss the need for more trauma-informed responses later in this chapter. We identified four themes in police responses that should be addressed in the Victims' Charter Act or the multi-agency protocol:

- more flexible approaches to reporting and taking statements
- improving the consistency of practice in communication
- giving victim survivors more choices over the gender of the person interviewing them
- improving the use of intervention orders.

32 Submission 32 (A victim survivor of sexual assault (name withheld)).

33 Consultation 56 (Cecilia, a victim survivor of sexual assault).

34 Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021).

35 Consultation 69 (Deborah, a victim survivor of sexual assault).

36 Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021).

37 Ibid.

38 Ibid.

## Taking reports and statements could happen more flexibly

- 17.29 The way police reports and statements are taken can have a profound effect on people's experiences of the criminal justice system (see also Chapters 7 and 8). For example, people told us what a difference it had made when they spoke to police over the phone, at home, or in another safe and supported environment (see box).

### The value of a safe and supported environment

Lucille told us her investigator was thorough, committed and encouraging. She was only able to recount her experience in increments of 1–1.5 hrs, which the investigator understood and accommodated. The investigator would also come in on her daughter's school holidays and would attend her home to talk in a safe environment until the statement was complete.<sup>39</sup>

Mark told us that the police 'were very obliging and gave options of where I could make [the] statement, including my home .... The [police officer] was an exceptional professional within her field, who handled this delicate meeting, with empathy and a warm encouragement of delivery.'<sup>40</sup>

- 17.30 Victoria Police recognises this in its policies and procedures. Its Code of Practice sets out guidance on interviewing. Interviewers are required to provide a 'private and comfortable setting to conduct the interview', limit the number of people present, and try to build rapport. The Code advises police to 'thoroughly explain' the interviewing process and to prepare the complainant for the questions.<sup>41</sup>
- 17.31 In taking the statement, the Code advises the investigator to allow the person to disclose details 'in their own words without interruptions', and to phrase 'questions in a clear and sensitive manner' to reduce their 'embarrassment, shame or self-blame'.<sup>42</sup>
- 17.32 Sexual Assault Services Victoria told us that sometimes police interview victim survivors in their homes or at a service with counsellor advocates. It thought this was 'a great option' for helping people feel safer that 'could be offered more regularly rather than only when a [counsellor advocate] has advocated for this to happen'.<sup>43</sup>
- 17.33 Knowmore legal service similarly supported people:  
having access to a safe and supportive environment when they make a report to police, ... [and] especially support victims and survivors being able to make all reports directly to specialist police officers, and ideally outside of the normal police station environment.<sup>44</sup>
- 17.34 The value of a safe and supportive environment was supported by people who had reported to police. Deborah told us she had found it 'very confronting' to make her report in the large police station at Spencer Street, and that it would have been 'much better' to report in an environment where she was more comfortable. She also noted that being in the police station can make people feel as though they are the criminal, and victim survivors can feel very sensitive to this.<sup>45</sup>
- 17.35 We heard that police members often do not provide people with enough information when they are making a statement. The Law Institute of Victoria told us that police often assume that victim survivors are aware of the legal process, its drawn-out nature, and what might happen to the alleged offender.<sup>46</sup>

39 Consultation 54 (Lucille Kent, a victim survivor of sexual assault).

40 Consultation 62 (Mark, a person who has experienced sexual harm).

41 Victoria Police, *Code of Practice for the Investigation of Sexual Crime* (Policy, 2016) 25 <<https://content.police.vic.gov.au/sites/default/files/2019-01/Code-of-Practice-for-the-Investigation-of-Sexual-Crime-%282016%29.pdf>>.

42 Ibid. This is also reflected in the Victoria Police, 'Sexual Offence Investigations' in *Victoria Police Manual* (2018) 2–3.

43 Submission 17 (Sexual Assault Services Victoria).

44 Submission 22 (knowmore legal service).

45 Consultation 69 (Deborah, a victim survivor of sexual assault).

46 Submission 40 (Law Institute of Victoria).

- 17.36 Victoria Police told us it had already made available internal guidance to support victim survivors to 'engage with police at a time and location they feel comfortable doing so'. It noted that arrangements for taking formal statements outside a police station were 'already in place and routinely offered and taken up'. However, 'in certain circumstances practical requirements, such as access to technology [for recording evidence], must take precedent'.<sup>47</sup>
- 17.37 We also heard concerns from victim survivors about the process of taking a statement (see box).<sup>48</sup> They emphasised that police should allow more breaks and offer more support in practice.

### The experience of making a statement

Danielle told us about her experience three years ago: 'I had no idea about any of it, I didn't understand the law, I didn't understand the reporting process, I just thought I'd rock up to a police station. So I went through everything in detail with her [the first police woman], and then she said, "This is not your official statement," and I was like "What? Shit – I have to do it again?" ... It was when I got this call from SOCIT, this woman, and she was like, "You're going to come in and we'll take your statement and it's going to take all day."'

'She said something like, "I just want to make sure that you're going to be able to go through the court system." She was like, "Don't come in and make a report if you can't go through with it." It was like a complete deterrent, like "don't come in unless you're prepared". She said, "It's going to take years." ...

'In the lead up—and I had to email her as much information as I had [I had emailed all the information I had about the person who assaulted me]—she was like "So, I couldn't find his address" [but I had sent her all the information previously], it was like she hadn't even read it before my interview.'

'So, at one point I pulled out the blanket and said, "Can I put this on?" and she laughed at me. Not outwardly laughed but sniggered. So I put it away and straightened up in my seat, and I was like "there to be formal" ... I had heard that reporting is traumatising ... but I thought that was because of telling the story. And yes, that was traumatising. But it was so much worse than that.'<sup>49</sup>

One person told us she wasn't allowed to have a support person during the four hours it had taken to report less than a year ago. She was not offered any water or a break, and the questions 'felt laden with victim-blaming and slut-shaming'.<sup>50</sup>

Another person, who had reported a sexual assault less than a year ago, told us the officer 'made me repeat myself and didn't let me step out for air when I was very worked up and struggling to tell them what had happened'.<sup>51</sup>

Danielle had been told before her interview that she could take as many breaks as she needed, but in practice was not allowed to take breaks when she requested them and was even discouraged from taking breaks. She also wanted to get out of the room and asked if she could leave to have lunch but was told she had to eat it in the room. 'The feeling was like I'm the one who had been arrested here.' Her experience of what she was told about the process beforehand, and what she experienced during making a statement was 'worlds apart'. The victim told the Commission that the experience left her feeling that she 'had no value, voice, or control'.<sup>52</sup>

47 Consultation 93 (Victoria Police (No 4)).

48 See also Submission 64 (Victorian Advocacy League for Individuals with Disability).

49 Consultation 81 (Danielle, a victim survivor).

50 Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021).

51 Ibid.

52 Submission 15 (Danielle).

- 17.38 Victoria Police, in contrast, emphasised that 'a central focus of members engaging with victim-survivors, including at the time of taking a statement, is to assess an individual's needs are met. This includes allowing for, or of (sic) required prompting individuals to take breaks.'<sup>53</sup>

## The gender of interviewer matters

- 17.39 We heard from several people about the need to be interviewed by a police officer of the same gender (see box).<sup>54</sup> We were told that requests for a female police officer were not always granted, which could lead to a person withdrawing from the process.<sup>55</sup>
- 17.40 Sexual Assault Services Victoria (SAS Victoria) observed that, while the establishment of SOCITs had improved the process, it had also led to changes in the gender composition of the police. This meant many women had no choice other than to provide details of their experience of sexual violence to male investigators.<sup>56</sup>

### The choice of gender

Often you cannot get a female police officer when you ask for one when you call or go into a police station, and then at times when they do provide a female the men are hanging around the call and the female has to report back to them anyway. Many women I know don't want men involved in their sexual assault reports or legal action and this needs to be respected when requested by women. Because many women are traumatised especially women with psychosocial disabilities and other disabilities.<sup>57</sup>

One young woman with whom the Commission spoke suggested that young girls who experienced sexual harm would be deterred from interacting with police who were 'grown men'. She went on to describe, 'If there is a female officer, I would rather her come up and talk to me than a big guy coming and talking to me.'<sup>58</sup>

Mark suggested that police should offer a choice of gender when taking the statement of a victim.<sup>59</sup> He considered that the gender should be the choice of the victim survivor, explaining that he 'built a good relationship with the female sergeant who interviewed [him] ... [e]very victim has a different experience and varied personalities'.<sup>60</sup>

Deborah told us that she found it hard and surprising to speak first to a young male police officer, and told us that there should be an option to speak with a woman.<sup>61</sup>

One person, who had reported a sexual assault less than a year ago, spoke of having lost her faith in police because, in part, a female officer wasn't available.<sup>62</sup>

- 17.41 The Victoria Police Manual already advises that the SOCIT member responsible for conducting the interview should be of the same gender as the victim, unless otherwise requested by the victim.<sup>63</sup> Victoria Police told us that, while it tried to meet requests for a police officer of a specific gender, it was not always possible to do so.

53 Consultation 93 (Victoria Police (No 4)).

54 See also Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021).

55 Consultation 17 (Roundtable consultation focused on the experience of women with disability).

56 Submission 17 (Sexual Assault Services Victoria).

57 Consultation 32 (Anonymous member, Victim Survivors' Advisory Council ).

58 Consultation 76 (YACVic and YACVic Young People).

59 Consultation 62 (Mark, a person who has experienced sexual harm).

60 Ibid.

61 Consultation 69 (Deborah, a victim survivor of sexual assault).

62 Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021).

63 Victoria Police, 'Sexual Offence Investigations' in *Victoria Police Manual* (2018) 2.

- 17.42 However, in cases where the request could not be met immediately, Victoria Police would 'ensure the immediate support and forensic needs of the individual are facilitated', while deferring the taking of the statement for a later time.<sup>64</sup> Victoria Police also told us that only a small percentage of victims requested female officers, and that this number was declining, reflecting SOCITs' high level of training.<sup>65</sup> It said that gender-identified positions would not be viable from either a workforce or operational perspective.<sup>66</sup>
- 17.43 Gender is only one factor in a police response, of course. Specialist training and aptitude are also key. However, given the gender-based nature of the crime, for some complainants a choice of gender in the officer they deal with can be a key part of their experience.<sup>67</sup>
- 17.44 An evaluation in New Zealand shows people value having a choice of police officer by gender and this contributes to their sense of safety and comfort. People are more satisfied if they are offered an option or can express a preference, even if they do not end up requesting a police officer of their own gender.<sup>68</sup>

### Communication could be improved

- 17.45 Another key theme in this, as in our previous inquiry into the victims of crime, was the value of regular and effective communication with the police throughout the case.<sup>69</sup> This is key to keeping people engaged with the criminal justice process.<sup>70</sup>
- 17.46 The Victims' Charter Act already requires:
- the police and prosecution to consider certain matters when communicating with a victim, such as their preferred method of contact and issues affecting their communication
  - the police to provide 'at reasonable intervals' information about the progress of an investigation (unless this would jeopardise the investigation)
  - the police and prosecution, when prosecuting offences, to provide information about the charges and any changes to charges, including not charging or accepting pleas of guilty to lesser charges.<sup>71</sup>
- 17.47 Victoria Police's Code of Practice advises that police should provide ongoing support by engaging in regular communication, either by phone or in person. Its guidance states that:
- It is the responsibility of the investigator to provide regular status updates to the victim so they are fully informed of the investigation and any key events, i.e., court dates, court outcomes, bail applications, appeals etc. Police are to maintain regular contact with the victim regardless of what investigation progress, if any, has been made.<sup>72</sup>
- 17.48 The Code also sets out in more detail the responsibilities of police to communicate at key stages, such as the release of the suspect, and to advise and assist with matters such as crimes compensation or transport to court.<sup>73</sup>

64 Consultation 93 (Victoria Police (No 4)).

65 Consultation 70 (Victoria Police (No 1)).

66 Consultation 93 (Victoria Police (No 4)).

67 Jan Jordan, 'Will Any Woman Do?' (2002) 25(2) *Policing: An International Journal of Police Strategies & Management* 319.

68 Tania Boyer et al, *Improving the Justice Response to Victims of Sexual Violence: Victims' Experiences* (Research Report, Ministry of Justice (NZ), August 2018) 40–1 <<https://www.justice.govt.nz/assets/Documents/Publications/Improving-the-justice-response-to-victims-of-sexual-violence-victims-experiences.pdf>>.

69 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) [6.17]–[6.49].

70 S Caroline Taylor et al, *Policing Just Outcomes: Improving the Police Response to Adults Reporting Sexual Assault* (Report, Social Justice Research Centre, Edith Cowan University, October 2012) 102–3 <<https://apo.org.au/node/34661>>.

71 *Victims' Charter Act 2006* (Vic) ss 7B, 8–9.

72 Victoria Police, *Code of Practice for the Investigation of Sexual Crime* (Policy, 2016) 26 <<https://content.police.vic.gov.au/sites/default/files/2019-01/Code-of-Practice-for-the-Investigation-of-Sexual-Crime-%282016%29.pdf>>.

73 Ibid.

- 17.49 Some people told us of excellent practice by police in this respect.<sup>74</sup> However, this practice appears to be inconsistent (see box). SAS Victoria described victim survivors often reporting 'feeling in the dark' about the investigation process, and stated that this caused significant anxiety.<sup>75</sup> Sarah, a counsellor with Northern CASA, explained that one client:

From the beginning ... reported feeling invalidated by the police. In the preceding 6 months, the detectives have not once contacted the Victim/Survivor to provide her with an update on the investigation. ... as time went on with no communication, she started to doubt the seriousness of the crimes she suffered ... [The client] described feeling disappointed by the process. This client suffered serious PTSD symptoms from the sexual assault and her symptoms were compounded by SOCIT's lack of communication with her.<sup>76</sup>

### Communicating with police and prosecution

One consultation participant gave an example of having to email the SOCIT after not getting any responses for over a year.<sup>77</sup>

Another person who had reported to police expressed her support for a more formal communication system with victim survivors, because 'the waiting in the unknown for days and days was excruciating, to the point I needed medication'.<sup>78</sup>

One parent, whose children had been sexually abused, reported: 'We found it incredibly difficult to be updated about the court proceedings and we were completely cut out of the first two hearings. The only avenue we had was the police informant who was very unhelpful and told us we didn't need to be involved even though we wanted to be.'<sup>79</sup>

Danielle told us that she didn't hear anything about her case for about a month or two after making her statement, and when she contacted the police officer was told that they 'were very busy with "more important" cases ... and then [she] blamed me for the hold up ... because ... I was meant to go back into SOCIT again to try and get a recorded confession from my attacker ... but when the date drew closer I realised I couldn't go through with it as I found the first time too distressing. She said because I was "unwilling" to do that things couldn't proceed and that she couldn't and wouldn't do anything until I did'.<sup>80</sup>

- 17.50 Victoria Police told us that 'requiring a member to prioritise (for example) telephoning a victim survivor to provide a regular update, over responding to a more urgent matter such as a victim survivor who has walked into a police station to report a sexual offence would be unrealistic in an operational policing context'.<sup>81</sup>
- 17.51 The Royal Commission into Institutional Responses to Child Sexual Abuse has also emphasised the importance of ongoing communication by police.<sup>82</sup>

74 See, eg, Submission 32 (A victim survivor of sexual assault (name withheld)); Consultation 56 (Cecilia, a victim survivor of sexual assault); Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021). See also Submission 26 (Northern CASA).

75 Submission 17 (Sexual Assault Services Victoria).

76 Submission 26 (Northern CASA).

77 Consultation 53 (Elizabeth Morgan House and a victim survivor of sexual assault).

78 Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021).

79 Ibid.

80 Submission 15 (Danielle).

81 Consultation 93 (Victoria Police (No 4)).

82 Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report (Parts III to VI, 2017) Recommendation 7(b).



## We heard concerns about the use of intervention orders

- 17.52 In Victoria, a person can apply for an intervention order to protect them from physical or mental harm. The order has conditions which the respondent (the person the order is made against) must follow. An intervention order can be against a family member (a Family Violence Intervention Order) or someone else (a Personal Safety Intervention Order). The police can make an application for an intervention order on someone's behalf.<sup>83</sup>
- 17.53 Victoria Legal Aid told us that:
- women who have disclosed sexual assault do not receive sufficient support from Victoria Police to make an application for [an intervention order]. This can occur even where allegations of sexual offending are being actively investigated by Victoria Police and an alleged perpetrator has been arrested and charged with a sexual offence.<sup>84</sup>
- 17.54 Victoria Legal Aid told us that police should be more active in applying for intervention orders if a complainant supported it, unless the person accused is a child or a person with a cognitive impairment. It illustrated this with a case study (see box).<sup>85</sup>
- 17.55 It recommended establishing new protocols to ensure that disclosures of sexual violence, either directly to police or in intervention order applications, would trigger a police response, including applications for intervention orders in appropriate circumstances. This would ensure people were given advice on their criminal justice options and received appropriate referrals for advice and support services.<sup>86</sup>
- 17.56 We put this proposal to Victoria Police, with an indication that 'appropriate circumstances' could include where the complainant was supportive of an application for an intervention order, or the accused was not a child or a person with a cognitive impairment. Victoria Police expressed 'significant concerns' about this, fearing that it 'would potentially make FVIOs into a tool for coercive control; have FVIOs be viewed as a secondary form of punishment; and potentially be seen to trivialise their value and application as a key community safety mechanism'.<sup>87</sup> It stressed that the 'purpose and intent of FVIOs ... is to address real and immediate risk'.<sup>88</sup>

83 *Family Violence Protection Act 2008* (Vic) ss 45, 74, 81; *Personal Safety Intervention Orders Act* (Vic) 2010 (Vic) ss 15, 61, 67.

84 Submission 27 (Victoria Legal Aid).

85 Ibid.

86 Ibid.

87 Consultation 93 (Victoria Police (No 4)).

88 Ibid.



### Case study

Sophie (not her real name) was sexually assaulted by someone known to her and reported this to police. The police investigated, arrested and interviewed the person Sophie had named. That person then applied for an intervention order against Sophie, claiming she had told people in their community what had happened, and he had then missed out on work opportunities.

The Court granted his application for an interim order based on his allegations of 'economic abuse'. Although the police were investigating the sexual assault, they refused to become involved in the proceedings.

While her lawyer advised her she could contest the intervention order, Sophie decided she could not manage the stress of a contested hearing. Instead, she made her own application for an intervention order and in the end both applications were withdrawn by a mutual undertaking.

Sophie described the experience of having to come to court each time as something she never wants another rape victim to experience. Sophie stated it was 'offensive and horrifying that [the alleged perpetrator] was allowed to launch a counter-attack on me by abusing a law meant to protect victims of sexual violence.'

Even after significant time has passed since Sophie's court matter, she is still disbelieving of what occurred and continues to feel distrustful of police and the court system for what felt like a betrayal.<sup>89</sup>

17:57 This concern was reflected in some stories shared with us by people who had experienced sexual violence.<sup>90</sup> For example, Ani told us of her experience of being stalked and eventually raped by a former boyfriend. Ani told us that, although police had at first offered to help with an intervention order, when she gave the statement they told her they would not help her. She 'wound up having to deal with the ... continued stalking and harassment on [her] own'.<sup>91</sup>

17:58 Kelly told us of a similar experience. The police were investigating her sexual assault by a former partner, and she asked for help to get an intervention order. She continued:

They said they could, but it would take some time. I was being threatened still and I was in the house where the abuse took place. So, I went to the Magistrates' Court to get the order myself. As soon as they learned I was linked in with a SOCIT, they advised that I wait for them to do it. I was in fear for my children's and my own safety, as I suspected the offender would return to the house to assault me. His family members were also threatening me. I was extremely frustrated by this judicial response. Fortunately, the counsellor I saw at CASA assisted me to self-apply and I was able to get an [intervention order] in place.<sup>92</sup>

89 Submission 27 (Victoria Legal Aid).

90 See also Consultations 31 (Geraldine, Deputy Chairperson of the Victim Survivors' Advisory Council), 32 (Anonymous member, Victim Survivors' Advisory Council); Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021).

91 Submission 26 (Northern CASA).

92 Ibid.

### **What reforms would strengthen the police response?**

- 17.59     The law and policies already support flexible reporting and interviewing processes, a choice of gender of interviewer, ongoing communication by police, and applying for intervention orders by police. What is needed now is to improve the consistency of practice.
- 17.60     Our approach to improving the consistency of practice is to embed good practice into a multi-agency protocol and to set clear expectations through changes to the Victims' Charter Act. This will provide a framework for collaboration, transparency and accountability, with the Victims of Crime Commissioner to provide oversight. (See Chapter 4.)
- 17.61     The Charter already includes rights to communication on the progress of cases, and the Code of Practice provides guidance on these responsibilities. However, the protocol would be an appropriate place to detail and entrench those responsibilities clearly.
- 17.62     This would be especially helpful in identifying who communicates with a victim, including if the model of victim advocates recommended in Chapter 12 is introduced. For example, the model protocol in Virginia includes a template checklist for who should be responsible for communicating with a person (see Figure 18). The protocol could also identify who should be involved in the discussion about the options available to the victim survivor (the 'options talk'), and the content of the options talk.

**Figure 18: Checklist from Virginia SART model protocol<sup>93</sup>**

**Critical Elements For Sexual Assault Crime Response**

<b>Instructions:</b> 1. Place a "P" in the column where the primary responsibility exists. 2. Place a check mark (✓) under any other column that may share or possess follow-up responsibility. 3. If you have a critical element that is not being adequately addressed or inherently causes problems, or you would like to more fully discuss this element, place an asterisk ( * ) in the "problem area" column.	<b>Advocate</b>	<b>Medical</b>	<b>Law Enforcement</b>	<b>Prosecutor</b>	<b>Victim Witness</b>	<b>Courts</b>	<b>Corrections</b>	<b>Problem Area</b>
Address victim's concerns of safety								
<b>Arraignment/initial appearance</b>								
Notify victim of time and place of hearing								
Discuss desired conditions of release with victim before bail hearing								
Request that any release on bail include protection orders for the victim								
<b>Pretrial</b>								
Inform victim of pretrial hearings/motions								
Include victim's participation in all hearings in which defendant has a right to be present								
Consider needs of victim in scheduling proceedings								
<b>Plea Negotiations</b>								
Inform victim of reasons to consider a negotiated plea								
Describe optional courses of action								
Determine what action the victim wants to take								
Consider the needs of the victim in accepting a plea								
<b>Sentencing</b>								
Ensure opportunity for victim impact statement as part of sentence considerations								
Include victim's needs as part of sentence (i.e., restitution, protection, emotional security)								
<b>Incarceration</b>								
Notify victim about changes in offender status								
Notify victim of scheduled parole hearings								
Provide opportunity for victim testimony at parole hearings								
Notify victim of release and status of release (i.e., parole, discharge, etc.)								

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Virginia Department of Criminal Justice Services, *Sexual Assault Response Teams (SART): A Model Protocol for Virginia* (Report, May 2011) Appendix E <<https://www.communitysolutionsva.org//index.php/resources/item/sexual-assault-response-teams-sart-a-model-protocol-for-virginia>>.

- 17.63 Similarly, we consider it would be useful to address in the protocol the role of intervention orders. Intervention orders are one of the justice options that should be considered to meet the needs of victim survivors. We recognise the concerns of Victoria Police that intervention orders may not always be appropriate, and we do not propose changing the way they are used.
- 17.64 Rather, we recommend that the protocol provides clear processes and guidance for when they are appropriate, and who should provide support to make intervention order applications. For example, if it is not appropriate for the police to help apply for an intervention order in a case, another person, such as the victim advocate recommended in Chapter 12, could provide that support. Spelling this out in a protocol will help all partners, and complainants, understand who is responsible and when to consider an intervention order.
- 17.65 We recommend extending the Charter to include a right to specify the gender of a police officer. This can be modelled after the right in the comparable legislation in Scotland.
- 17.66 This provides a right for victims of specified offences, including sexual offences, to specify the gender of an investigating officer who is carrying out an interview. However, the investigating officer need not comply with the request if complying is likely to prejudice a criminal investigation, or it would not be reasonably practicable to do so.<sup>94</sup>
- 17.67 This communicates clearly the right of someone to specify the gender of an interviewer, but also takes into account the practical concerns of Victoria Police. While this already reflects existing policy, including the right in the Charter will have several benefits. It will:
- communicate clearly to victim survivors the right to make the request
  - improve consistency of practice in ensuring that the request is heard
  - provide people supporting victim survivors with clear guidance about this right
  - introduce a mechanism for monitoring and oversight of this right in practice.
- 17.68 It would be useful to extend the Charter to include a right to flexible arrangements for police interviews, for the same reasons. This right can be subject to similar conditions as the right to specify the gender of a police officer, such as that it is reasonably practicable to comply with the request. The kinds of flexible arrangements for police interviews should also be spelt out in the multi-agency protocol. It could set expectations for routinely offering to take statements in more supportive environments, and standard practices on matters such as taking breaks.
- 17.69 We recommend in Chapter 4 that the multi-agency protocol include feedback processes, including from people who report and those who support them such as victim advocates or community-based organisations. This will help improve the consistency of practice.
- 17.70 These issues are addressed in our recommendations in Chapter 4, detailing the issues that should be covered within the multi-agency protocol and the changes that should be made to the Victims' Charter Act.

## How can information and evidence gathering for children be improved?

### Interviewing children requires skill

- 17.71 Interviews with children need to take into account factors unique to children, such as:
- the nature of child development
  - their different communication needs
  - the impact of trauma on children
  - barriers to reporting such as the fear of disclosure that is typical of child sexual abuse.<sup>95</sup>
- 17.72 Laws aim to minimise the need to interview children through the recording of their evidence, including the police interview (see Chapter 21). Child sexual abuse intersects with other legal systems, including Child Protection investigations (see Chapter 5). Although the aims of these laws and systems are important, they also make child interviewing both more complex and more crucial.
- 17.73 In Chapter 5, we recommend a revised protocol for joint Child Protection and criminal investigations into child sexual abuse. The aim of this protocol is to bring those involved in responding to child sexual abuse into an effective and integrated partnership model.
- 17.74 Child interviewing will become more common under the reportable conduct scheme introduced in Victoria (see Chapter 4). The body responsible for that scheme, the Commission for Children and Young People, has commissioned publicly available resources for interviewing children and young people.<sup>96</sup>
- 17.75 A recent reform in Victoria has piloted the use of intermediaries who work with police and courts to improve communication with children and people with a cognitive impairment. Their role includes working with police to improve interviews with children. This has been an extremely successful reform that we recommend expanding as a priority (see Chapter 15).

### Concerns were raised about child interviewing

- 17.76 There have long been concerns about the quality of police interviews with children in cases involving sexual offences.<sup>97</sup> In this inquiry we heard two key concerns.
- 17.77 The first is that interviews with children were not always trauma-informed and did not always take into account child development. For example, the Gatehouse Centre, a specialist provider of sexual assault services for children, told us about practical issues with interviews:
- Interviewers seldom meet the children beforehand, reducing their ability to build rapport with the children.
  - Some interviewers do not thoroughly assess the needs and circumstances of the children before the interview, which can lead to poor decisions about where the interview takes place, the accused family member being too close to the child during the interview and ineffective strategies for interviewing children.
  - Interviews can be arranged with little notice to families and no coordination with support services.

95 See generally Commission for Children and Young People (Vic), *Guide for Including Children and Young People in Reportable Conduct Investigations* (Report, December 2019) <<https://ccyp.vic.gov.au/assets/Uploads/Guide-Including-Children-and-Young-People-in-Reportable-Conduct-Investigations.pdf>>.

96 Ibid.

97 See, eg, Martine Powell, Kim Roberts and Belinda Guadagno, 'Particularisation of Child Abuse Offences: Common Problems When Questioning Child Witnesses' (2007) 19(1) *Current Issues in Criminal Justice* 64; Martine Powell et al, *An Evaluation of How Evidence Is Elicited from Complainants of Child Sexual Abuse* (Report for the Royal Commission into Institutional Responses to Child Sexual Abuse, August 2016) <<https://apo.org.au/node/67421>>; Submission 43 (Ffiona Livingstone Clark, PhD researcher and barrister).

- Some interviews, such as separate Child Protection and police interviews, duplicate each other.<sup>98</sup>
- 17.78 The Gatehouse Centre suggested including a documented planning meeting prior to any interview, to address health, child development and communication needs.<sup>99</sup> We discuss the need to strengthen collaborative approaches to child sexual abuse, including through interviews, in Chapter 5.
- 17.79 The second key concern is that the quality of interviews, especially the use of questions, needs to be improved.<sup>100</sup> This problem has been researched for decades.<sup>101</sup> For example, studies show that police officers consistently fail to use enough free narrative-style questions,<sup>102</sup> even though such questions are known to improve the accuracy of testimony.<sup>103</sup>
- 17.80 We discuss in Chapter 21 concerns about the quality of the video and audio-recorded evidence (VAREs) in the courtroom. These VAREs are used for children and for people with cognitive impairment. These include concerns about the dual purpose of the police interview, both as an investigative tool and as evidence, as well as practical and technical concerns about the quality of the interviews.
- 17.81 Ffiona Livingstone Clark, a barrister and a PhD student researching this topic, helpfully identified three key problems from the increasing research into this area:
- the need to use 'narrative' questioning (open-ended questioning)
  - the need to consistently describe ('particularise') specific allegations, and to differentiate these from other allegations
  - the training of investigators.<sup>104</sup>
- 17.82 Professor Martine Powell, a leading expert on police interviewing, led a study evaluating police interviews in child sexual abuse cases for the Royal Commission into Institutional Responses to Child Sexual Abuse (see box).<sup>105</sup> That research, which included specially trained investigators in Victoria, found that the interviews had too few open-ended questions and a high number of specific, leading and developmentally inappropriate questions. It also identified other failings that undermined the value of the evidence.<sup>106</sup>

98 Submission 14 (Gatehouse Centre, Royal Children's Hospital). See also Consultations 23 (Sexual Assault Services Victoria Specialist Children's Services), 35 (A victim survivor of sexual assault).

99 Submission 14 (Gatehouse Centre, Royal Children's Hospital).

100 Submission 43 (Ffiona Livingstone Clark, PhD researcher and barrister). See also *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report* (Executive Summary and Parts I-II, 2017) 446–83.

101 For a useful summary of the relevant research findings, see Submission 43 (Ffiona Livingstone Clark, PhD researcher and barrister).

102 See, eg, Belinda L Guadagno, Martine B Powell and Rebecca Wright, 'Police Officers' and Legal Professionals' Perceptions Regarding How Children Are, and Should Be, Questioned about Repeated Abuse' (2006) 13(2) *Psychiatry, Psychology and Law* 251.

103 See, eg, Anne Sophie Pichler et al, 'Discussions about Child Witness Interviews during Australian Trials of Child Sexual Abuse' (2021) 22(1) *Police Practice and Research* 938, 939.

104 Submission 43 (Ffiona Livingstone Clark, PhD researcher and barrister).

105 Martine Powell et al, *An Evaluation of How Evidence Is Elicited from Complainants of Child Sexual Abuse* (Report for the Royal Commission into Institutional Responses to Child Sexual Abuse, August 2016) <<https://apo.org.au/node/67421>>.

106 Ibid 159.



## The Royal Commission into Institutional Responses to Child Sexual Abuse on training for the interviewing of children

### Recommendation 9 relevantly provided that police interviewing in child sexual abuse should follow these principles:

- All police responding to child sexual abuse should receive at least basic training in understanding sexual offending, including child sexual abuse and institutional child sexual abuse offending.
- All police responding to child sexual abuse should be trained to interview the complainant in accordance with current research and learning about how memory works.
- The importance of video-recorded interviews for children and other vulnerable witnesses should be recognised.
- Investigative interviewing of children and other vulnerable witnesses should be undertaken by police with specialist training that focuses on understanding child sexual abuse and the developmental and communication needs of children and other vulnerable witnesses, and on developing skills in planning and conducting interviews.
- Specialist police should undergo refresher training periodically.
- Experts should from time to time review a sample of video-recorded interviews for quality assurance and training purposes and to reinforce best-practice interviewing techniques.
- State and territory governments should introduce legislation to remove barriers to the use of video interviews for quality assurance and training purposes (but not the use of video-recorded interviews for general training in a manner that would raise privacy concerns).
- Police should continue to work towards improving the technical quality of video-recorded interviews.
- Police should recognise the importance of interpreters, including for some Aboriginal and Torres Strait Islander victim survivors and other witnesses.
- Intermediaries should be available to assist in police investigative interviews of children and other vulnerable witnesses.<sup>107</sup>

In its submission to the Royal Commission, the Victorian Government supported further work to improve interviewing techniques, 'with a focus on translating the findings of evidence-based research into policing practices'. It also noted the legislative barriers that restricted the use of interviews for quality assurance and training purposes.<sup>108</sup> In 2020, the Victorian Government reported that there had been 'minor updates' to specialist training for interviewing children.<sup>109</sup>

17.83 At a roundtable on children and young people, Professor Martine Powell told us that there had been a cultural shift such that allegations of abuse are more likely to be heard and taken seriously. However, the questioning approach used to elicit witness evidence has not kept up with the science (see box). The typical style of questioning tends to compound error and inconsistencies in witness' accounts.<sup>110</sup>

<sup>107</sup> Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report (Executive Summary and Parts I-II, 2017) Recommendation 9.

<sup>108</sup> Department of Justice and Regulation (Vic) and Victoria Police, *Victorian Government Response to the Royal Commission: Current Approaches to Policing in Child Sexual Abuse Matters* (Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, July 2015) 14, 16 <[https://www.childabuseroyalcommission.gov.au/sites/default/files/VPOL\\_3038.001.0001.pdf](https://www.childabuseroyalcommission.gov.au/sites/default/files/VPOL_3038.001.0001.pdf)>.

<sup>109</sup> Victorian Government, *Annual Report 2020—Royal Commission into Institutional Responses to Child Sexual Abuse* (Report, December 2020) 21 <<https://content.vic.gov.au/sites/default/files/2020-12/RCIIR%20to%20Child%20Sexual%20Abuse%20Annual%20Report20.pdf>>.

<sup>110</sup> Consultation 85 (Roundtable on the experience of children and young people).



- 17.84 To improve conviction rates, there needs to be more detail and a tighter focus on the elements of the offence. She told us that the 'good news' was that knowledge about how to train people to interview effectively was 'becoming settled in the science'. We now know which series of activities should be followed, and in which order, for learning to transfer to the field.<sup>111</sup>
- 17.85 In her view, the key was to have a skilled interviewer from the beginning. This would reduce the need for an independent examiner, which adds complexity to the system.<sup>112</sup>

#### Four principles for interviewing

A review of the literature reports that there is a 'clear consensus' on the best way to accurately interview children and other vulnerable witnesses.<sup>113</sup> This can be distilled into four principles (SAFE):

- Simple communication: simple questions hold attention and reduce the risk of confusion or error
- Avoiding assumptions: false assumptions are often made about 'appropriate behaviour' and the competency of witnesses
- Flexible response options: avoiding influencing the answers through suggesting misleading information or indicating that certain answers are preferred
- Encouraging elaboration: using open-ended rather than specific questions.<sup>114</sup>

In summarising these principles, the authors emphasised that the 'essence of a high-quality investigative interview with a child witness is the use of non-leading, open-ended questions; questions that encourage an elaborate response but do not specify what specific information the interviewee is required to report'.<sup>115</sup>

These principles are not new. Experts have long accepted that the questions in an interview need to be matched to the abilities of a person to communicate, that there was a need to establish rapport, and to avoid suggestive or leading questions. They also recognised the fundamental importance of open-ended questioning.<sup>116</sup>

Another study identified a disconnect between what police officers and legal professionals saw as appropriate questioning. Police believed they had to ask specific questions, while legal professionals reported that getting too many details could cause confusion and undermine the credibility of the child.<sup>117</sup>

- 17.86 Ms Livingstone Clark observed it was challenging for police used to interviewing the accused to 'flip that switch' and use an open-ended interview style. She supported exploring different models, including a model of an independent child examiner.<sup>118</sup> This was also supported by Sexual Assault Services Victoria and the Gatehouse Centre.<sup>119</sup>
- 17.87 These expert interviewers would be skilled in eliciting testimony from children, and could conduct interviews that would meet both child protection and investigation needs. The interviewers would be highly trained and independent of both Victoria Police and Child Protection, and would be regulated by the state and recognised as expert witnesses in all aspects of child testimony.

<sup>111</sup> Ibid.

<sup>112</sup> Ibid.

<sup>113</sup> Martine B Powell and Becky Earhart, 'Principles to Enhance Communication with Child Witnesses' (2018) 30(9) *Judicial Officers Bulletin* 85, 85.

<sup>114</sup> Ibid 85–8.

<sup>115</sup> Ibid 85.

<sup>116</sup> Martine B Powell, 'Specialist Training in Investigative and Evidential Interviewing: Is It Having Any Effect on the Behaviour of Professionals in the Field?' (2002) 9(1) *Psychiatry, Psychology and Law* 44, 45–6.

<sup>117</sup> Belinda L Guadagno, Martine B Powell and Rebecca Wright, 'Police Officers' and Legal Professionals' Perceptions Regarding How Children Are, and Should Be, Questioned about Repeated Abuse' (2006) 13(2) *Psychiatry, Psychology and Law* 251.

<sup>118</sup> Consultation 85 (Roundtable on the experience of children and young people).

<sup>119</sup> Submissions 14 (Gatehouse Centre, Royal Children's Hospital), 17 (Sexual Assault Services Victoria).

- 17.88 These interviews would be conducted in a way consistent with VAREs, although the Gatehouse Centre proposed further innovations by allowing people to give real-time written responses to interview questions (for example, by typing answers) or other appropriate communication supports. They could produce reports to assist police officers, Child Protection and the courts.<sup>120</sup>
- 17.89 This model is used in the United States, as part of a broader model of a Child Advocacy Centre. Ffiona Livingstone Clark pointed to an example in Texas where a 'neutral individual' conducted the interview.<sup>121</sup> Carolyn Worth and Mary Lancaster suggested looking at a model in Santa Monica in which the police, child support, interviewer and legal counsel are all present, using one-way screens while the child is interviewed by an expert. The videotape is then presented in court.<sup>122</sup>
- 17.90 In Australia, most states use police to interview children. New South Wales has moved away from using child protection interviewers more recently, because police were trained in obtaining evidence and ensuring that evidence was admissible in court, although in a Western Australian pilot, specialist child protection interviewers worked together with specialist police interviewers (see Chapter 5).<sup>123</sup>
- 17.91 However, Victoria Police told us that this model, of having a specialist unit within a specialist unit, would probably not be feasible because of limits on resources.<sup>124</sup>

### **There should be a renewed focus on improving interviews with children**

- 17.92 There is consensus that much can and should still be done to improve the quality of interviews with children. Interviewing needs to be planned for carefully and in a trauma-informed way. The research indicates that this requires a special set of skills which can be taught, but that there are challenges in training people and maintaining those skills.
- 17.93 The question is how to achieve this. The option of an independent child examiner would be likely to improve the quality of interviews but would be difficult to implement. There would be a much smaller pool of interviewers, which could cause delays, and there may be flow-on effects into the criminal justice system, such as whether examiners would be available to testify in court.
- 17.94 The challenge appears to be more about a lack of adequate planning and training than a model that requires institutional independence from the police. This indicates instead a need for Victoria Police to improve its processes. This usually requires a mix of measures, such as:
- guidance, procedures and other resources
  - training programs
  - feedback processes
  - quality assurance processes
  - organisational measures to improve and reward performance
  - leadership within the organisation to drive improvement.
- 17.95 We discuss the need for training later in this chapter. We also emphasise the need for quality assurance, which was a key part of the recommendation of the Royal Commission into Institutional Responses to Child Sexual Abuse.<sup>125</sup> This aspect and other measures should be discussed as part of a broader plan with those working with children within the sexual assault system, and this should also include some measures of accountability.

<sup>120</sup> Ibid.

<sup>121</sup> Submission 43 (Ffiona Livingstone Clark, PhD researcher and barrister).

<sup>122</sup> Submission 10 (Carolyn Worth AM and Mary Lancaster).

<sup>123</sup> New South Wales Ombudsman, *The JIRT Partnership—20 Years On* (Report, August 2017) 351 <<https://www.ombo.nsw.gov.au/news-and-publications/publications/reports/child-protection/the-jirt-partnership-20-years-on>>.

<sup>124</sup> Consultation 70 (Victoria Police (No 1)).

<sup>125</sup> *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report* (Executive Summary and Parts I-II, 2017) 459.

- 17.96 The ideal forum for this discussion would be in the development of the revised protocol for child sexual abuse recommended in Chapter 5. The protocol will need to cover joint child interviews, and could usefully include both best-practice principles in interviewing and a feedback process for partners.
- 17.97 The protocol could mirror the approach taken to child sexual exploitation under the existing Protecting Children Protocol by establishing a subcommittee that has a mandate to develop a strategy for improving the quality of child interviewing.
- 17.98 We therefore recommend that the revised protocol on child sexual abuse should identify as a priority child interviewing, and include ways to measure and improve the quality of interviewing.

## Recommendation

- 64 The protocol for child sexual abuse referred to in Recommendation 13 should identify as a priority evidence-informed practices in child interviewing and ways to measure and improve the quality of interviews.

## What opportunities are there to improve police training?

### Police training has been the subject of reform

- 17.99 Since 2004, there have been significant changes to the education and training of SOCIT officers.
- 17.100 All members of Victoria Police receive training around sexual offences. Victoria Police recently reviewed and updated foundational training for general duties members in response to recommendations from the Royal Commission into Institutional Responses to Child Sexual Abuse.<sup>126</sup> This included providing guidelines to police members who are first responders to the scene of a sexual crime, as well as to police members who receive reports of such crimes.<sup>127</sup>
- 17.101 Family violence reforms have also had a significant impact, including the establishment of the Family Violence Centre of Learning.<sup>128</sup> As discussed in Chapter 18, police are also included within system-wide training requirements as part of family violence reforms.
- 17.102 Victoria Police requires specialised training for police specialising in sexual offences.<sup>129</sup> SOCITs are trained in the 'Whole Story' investigative framework. This was developed from research that identified the need for contextual evidence gathered about the offending, such as any relationship dynamics between those experiencing and causing sexual violence.<sup>130</sup> This framework has positively influenced the mindsets and practice of investigators.<sup>131</sup>

<sup>126</sup> Victorian Government, *Annual Report 2020—Royal Commission into Institutional Responses to Child Sexual Abuse* (Report, December 2020) 21 <<https://content.vic.gov.au/sites/default/files/2020-12/RCIIR%20to%20Child%20Sexual%20Abuse%20Annual%20Report20.pdf>>.

<sup>127</sup> Ibid.

<sup>128</sup> Victorian Government, 'Victoria Police Establish a Family Violence Centre of Learning', *VIC.GOV.AU* (Web Page, 18 May 2020) <<http://www.vic.gov.au/family-violence-recommendations/victoria-police-establish-family-violence-centre-learning>>.

<sup>129</sup> Consultation 93 (Victoria Police (No 4)).

<sup>130</sup> Patrick Tidmarsh, 'Training Sexual Crime Investigators to Get the "Whole Story"' (PhD Thesis, Deakin University, 2016) chs 5–6 <<http://dro.deakin.edu.au/eserv/DU:30102808/tidmarsh-training-2017.pdf>>.

<sup>131</sup> Submission 44 (Dr Patrick Tidmarsh and Dr Gemma Hamilton); Consultation 70 (Victoria Police (No 1)). See also Patrick Tidmarsh, 'Training Sexual Crime Investigators to Get the "Whole Story"' (PhD Thesis, Deakin University, 2016) chs 10–11 <<http://dro.deakin.edu.au/eserv/DU:30102808/tidmarsh-training-2017.pdf>>.

- 17.103 Victoria Police also offers sexual offences training to police prosecutors, who receive a shortened version of the SOCIT program.<sup>132</sup> In our report *Committals*, we also recommended Victoria Police should receive regular and up-to-date training on charging.<sup>133</sup>

### Work is already underway on police training

- 17.104 Victoria Police has committed to strengthening its training. This includes expanding 'initial and refresher targeted training in the Whole Story Investigative Framework, including across [Family Violence Investigation Units], Sex Crimes Squad and relevant taskforces'.<sup>134</sup>
- 17.105 Victoria Police has also taken steps to improve its specialisation in the prosecution of sexual offences, including by:
- appointing a Senior Sergeant to oversee sexual offence prosecutions statewide
  - creating a dedicated team of prosecutors at the Melbourne Magistrates' Court of Victoria
  - establishing a Senior Advocacy Team of qualified lawyers for sexual offence matters.<sup>135</sup>

### What still needs to be done on police training?

#### There needs to be an understanding of how people experience sexual violence and its effects

- 17.106 We continued to hear of the need for police to be trained in understanding trauma and its impacts on how people who have experienced trauma behave or communicate (see Chapter 18), and in understanding the experiences and contexts of diverse communities (see box). This was true of both general duties members and specialised police.

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<sup>132</sup> Submission 44 (Dr Patrick Tidmarsh and Dr Gemma Hamilton).

<sup>133</sup> Victorian Law Reform Commission, *Committals* (Report No 41, March 2020) Recommendation 19.

<sup>134</sup> Victoria Police, *Policing Harm, Upholding the Right: Victoria Police Strategy for Family Violence, Sexual Offences and Child Abuse 2018-2023* (Policy, 2017) 24 <<https://www.police.vic.gov.au/sites/default/files/2019-03/Policing-Harm-Upholding-The-Right.pdf>>.

<sup>135</sup> Consultation 71 (Magistrates' Court of Victoria (No 1)).

### What people told us

Many victim survivors told us that police, including specialist police, need more education and training.<sup>136</sup>

Responses to our online feedback form strongly supported more and better training of police, including in:

- understanding sexual assault, its impacts and its prevalence
- trauma-informed principles and training
- dealing with victim survivors of child sexual abuse
- supporting victim survivors to come forward regardless of the likelihood of a conviction
- taking all disclosures seriously and committing to investigating complaints if desired.<sup>137</sup>

Shine Lawyers (on behalf of Ms Kim Elzaibak) told us that trauma training should be required for all police officers, at all levels of training and experience. Training should occur annually, like first-aid courses. The training itself should be in consultation with psychologists to learn the psychological effects of sexual violence. Police officers should be taught how to communicate with victims in a way that allows victims to express themselves in a safe space and feel as if they are being heard.<sup>138</sup>

One person told us of the need for sexual assault officers on the front lines who can be prioritised to attend sexual assault. The person told us that it would also be good to see them trained in more varied ways of collecting evidence, such as using photos and videos, or witnessing phone calls between the complainant and the accused.<sup>139</sup>

- 17.107 Sexual Assault Services Victoria noted improvements in practice as a result of SOCIT training, but told us 'police responses continue to be experienced by [victim survivors] as inconsistent, insensitive, dismissive and disbelieving'.<sup>140</sup> They described a need for 'ongoing training and skill development in relation to understanding the impact of sexual assault, and trauma informed liaison and care'.<sup>141</sup>
- 17.108 They also proposed measures to 'increase [SOCIT] responsiveness' to Aboriginal, LGBTIQ+ and culturally and linguistically diverse communities.<sup>142</sup> The need for greater responsiveness and engagement with these communities was echoed by most groups we spoke to.<sup>143</sup>
- 17.109 Project Respect and Sex Work Law Reform Victoria highlighted the need for further police training to support people working in the sex industry.<sup>144</sup> We also heard of the need for peer-led sensitivity training for police regarding sex workers and the need to protect their identities.<sup>145</sup>
- 17.110 Advocates and organisations working with people with disability also raised concerns about the 'variability of police responses at the point of the first report' and about police approaches to the credibility of people with disability.<sup>146</sup>

136 Consultation 63 (A victim survivor of sexual assault, name withheld).

137 Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021).

138 Submission 62 (Shine Lawyers (on behalf of Ms Kim Elzaibak)).

139 Consultation 32 (Anonymous member, Victim Survivors' Advisory Council).

140 Submission 17 (Sexual Assault Services Victoria).

141 Ibid.

142 Ibid.

143 See, eg, Submission 54 (Victorian Multicultural Commission).

144 Submission 50 (Project Respect); Consultation 45 (Sex Work Law Reform Victoria).

145 Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021).

146 Consultation 17 (Roundtable consultation focused on the experience of women with disability). See also Submission 41 (Office of the Public Advocate).

- 17.111 Elizabeth Morgan House, which works with Aboriginal women, told us that training police and court staff in trauma-informed practice should be a priority. They told us:
- The clients feel like they are criminals – there is no differentiation between the victim-survivor and the perpetrator.<sup>147</sup>
- 17.112 The Commission for Children and Young People (CCYP) similarly told us that specialist police training about children and trauma needed to be more sophisticated and noted the variable quality of investigators.<sup>148</sup> The CCYP and others also recommended further resources and training for police in relation to children in out-of-home care.<sup>149</sup> Care Leavers Australia Network said that police need to be better educated about the experience of people who grew up in out-of-home care.<sup>150</sup>
- 17.113 The Victims of Crime Commissioner emphasised the role of the police as 'gatekeepers' to the system and the way misconceptions held by police directly affect people's experiences and willingness to engage with the criminal justice system. It supported a universally accessible specialist response and cultural change within Victoria Police.<sup>151</sup>

### Skills need to be improved

- 17.114 We discuss above and in Chapter 21 concerns about the quality of police interviewing of children and in video and audio-recorded evidence (VAREs). The County Court of Victoria told us that expanding education could improve the quality of the evidence.<sup>152</sup> The Law Institute of Victoria similarly said that a significant number of charges do not proceed because of evidence gathered by police being insufficient, and called for 'a more prescriptive approach' to writing briefs of evidence.<sup>153</sup>
- 17.115 Experts told us there was a need to improve police knowledge and attitudes about image-based sexual abuse offences.<sup>154</sup> Associate Professor Nicola Henry identified concerns with 'unsympathetic' police responses and 'lack of knowledge of the laws'.<sup>155</sup> The Sentencing Advisory Council also identified this in a recent report.<sup>156</sup>
- 17.116 Victoria Police itself acknowledged that there is an opportunity to improve 'technology literacy' within the force, though it emphasised the challenge of providing deeper training in sexual assault to frontline police in an already busy 31-week training program.<sup>157</sup>
- 17.117 The Magistrates' Court of Victoria highlighted a need for better resourcing and training for police prosecutors in summary hearings for sexual offences.<sup>158</sup> While acknowledging Victoria Police efforts to improve training, the Magistrates' Court of Victoria noted that police prosecutors are 'invariably at a disadvantage' against experienced defence barristers.<sup>159</sup>
- 17.118 One person who had experienced sexual violence told us that, in her experience, police did not understand the law well enough to know if a crime had been committed.<sup>160</sup>

<sup>147</sup> Consultation 53 (Elizabeth Morgan House and a victim survivor of sexual assault).

<sup>148</sup> Consultation 65 (Commission for Children and Young People).

<sup>149</sup> Ibid. See also Consultation 85 (Roundtable on the experience of children and young people).

<sup>150</sup> Consultation 98 (Care Leavers Australasia Network).

<sup>151</sup> Submission 45 (Victims of Crime Commissioner).

<sup>152</sup> Submission 59 (County Court of Victoria).

<sup>153</sup> Submission 40 (Law Institute of Victoria).

<sup>154</sup> See generally Consultation 5 (Associate Professors Anastasia Powell and Asher Flynn).

<sup>155</sup> Consultation 7 (Associate Professor Nicola Henry).

<sup>156</sup> 'Qualitative research has suggested that low awareness among police of the harms and illegality of IBSA [image-based sexual abuse] may contribute to "victim blaming and harm minimisation attitudes": Sentencing Advisory Council (Vic), *Sentencing Image-Based Sexual Abuse Offences in Victoria* (Report, 27 October 2020) 8 <<https://www.sentencingcouncil.vic.gov.au/publications/sentencing-image-based-sexual-abuse-offences-in-victoria>>.

<sup>157</sup> Consultation 70 (Victoria Police (No 1)).

<sup>158</sup> Consultation 71 (Magistrates' Court of Victoria (No 1)).

<sup>159</sup> Ibid.

<sup>160</sup> Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021).



## We recommend improvements to training and skills

- 17.119 Police are, as the Victims of Crime Commissioner told us, the 'gatekeepers' to the criminal justice system.<sup>161</sup> Their responses can make all the difference to the experience of a victim survivor, and to their decision to continue with a case. Their skills are also key to proving a case in court.
- 17.120 Specialisation has clearly improved the experience of victim survivors, and we welcome the commitments of Victoria Police to further training. We recognise the challenges of training a diverse workforce, especially in such a complex context.
- 17.121 This report has made other recommendations that will support the police in improving their response. A key theme is improving supports and pathways so that people will be supported to report to police and to stay engaged in the criminal justice system (see Chapters 7 and 8). These should give those who are not reporting recent sexual assaults options that do not involve reporting at a local police station. A more collaborative approach, as discussed in Chapter 5, can also improve police responses.
- 17.122 In Chapter 18, we discuss how the same needs for more training to understand the diverse contexts of sexual violence and trauma exist across the criminal justice system. We recommend in that chapter more training for all those working in the criminal justice system about:
- the prevalence, nature and dynamics of sexual harm and how it affects victim survivors, including their ability to give evidence
  - how to respond empathetically to disclosures of sexual violence
  - responding appropriately to people with diverse needs and experiences
  - myths and misconceptions about sexual harm, such as data on the low rate of false allegations, the background to and application of any recent legislative changes, and legislative changes arising from this report.
- 17.123 In this chapter, we recommend identifying other areas that police should address in a strengthened program of training and resources, including areas that are discussed in other chapters. These reflect the concerns we identified through our inquiry and are not intended to be comprehensive. They include strengthening training and resources for specialised police officers to address:
- interviewing of children and the recording of VAREs (see above and Chapter 21)
  - responses to children in out-of-home care, people who have contact with the justice system and people working in the sex industry (see Chapters 7 and 8)
  - the appropriate use of interpreters, including through existing training developed for family violence (see Chapter 15)
  - its understanding of image-based sexual abuse (see above)
  - the quality of evidence gathering (see above)
  - the quality of police prosecutions (see above).
- 17.124 We recognise that there are many ways of delivering training and resources to improve police responses, and so we do not prescribe methods of training or types of resources. We note Victoria Police's view that recommendations targeting police training can be difficult to put into practice, because police officers only have a certain number of hours allocated to training per year.<sup>162</sup> However, we are equally conscious of the need to ensure that training 'transfers' to the workplace, and that training needs to be refreshed to prevent it fading.<sup>163</sup> In Chapter 18, we also talk of the value of cross-agency training.

<sup>161</sup> Submission 45 (Victims of Crime Commissioner).

<sup>162</sup> Consultation 80 (Victoria Police (No 2)).

<sup>163</sup> See the discussion in Submission 43 (Ffiona Livingstone Clark, PhD researcher and barrister).



## Recommendation

- 65 Victoria Police should review and strengthen its training and resources to ensure regular and ongoing professional development for specialised police dealing with sexual offences. This should include addressing:
- responses to children (particularly children in out-of-home care), people in contact with the justice system and people working in the sex industry
  - interviewing of children and the recording of VAREs
  - the appropriate use of interpreters
  - its understanding of image-based sexual abuse
  - the quality of evidence gathering
  - the quality of police prosecutions.

## How can decision making be improved?

### We have made recommendations to reduce delays in charging

- 17.125 Victoria Police conducts most criminal investigations in this state. As we discussed in our 2020 report *Committals*, the Director of Public Prosecutions (DPP) is not involved in the drafting of charges by police in lower courts, although it can advise in some cases. The DPP is also not often involved until later in committal proceedings.<sup>164</sup>
- 17.126 In that report, we recommended that the DPP should be involved in reviewing and instructing on the most appropriate charges at an earlier stage. This was widely supported. In cases such as sexual offences where a brief of evidence could be filed, we recommended that the police should prepare an 'initial charge brief' with a summary of the evidence and the proposed charges. The DPP should review this brief and instruct on the suitability of the proposed charges. These instructions should be binding.<sup>165</sup>
- 17.127 These changes are similar to the process of 'early investigative advice' used in England and Wales. This process allows the police to ask for guidance and advice in serious, sensitive or complex cases. A recent change in policy means that all rape cases should receive this advice.<sup>166</sup>
- 17.128 A recent review of rape in the criminal justice system has found promising results in the work of different areas of England and Wales promoting the use of early investigative advice. While evaluations were still underway, early results are promising (see box).

<sup>164</sup> Victorian Law Reform Commission, *Committals* (Report No 41, March 2020) [8.6]–[8.10].

<sup>165</sup> Ibid [8.51]–[8.70], Recommendations 19–22.

<sup>166</sup> Rachel George and Sophie Ferguson, *Review into the Criminal Justice System Response to Adult Rape and Serious Sexual Offences across England and Wales* (Research Report, Home Office (UK)).

### Early investigative advice

A pilot in the south-east of England, launched in November 2020, included a strict 42-day deadline to provide early advice, as well as monthly clinics on case progression. Early results showed a 47 per cent increase in cases referred by police to prosecutors.

In the south-west of England, work has been done to invite police to seek early investigative advice in all rape and serious sexual offence cases. This has led to a 211 per cent improvement in seeking early advice.

In Wessex, police forces have agreed to submit rape cases for early advice within three months under an action plan. This has led to a 145 per cent increase in cases being referred by police.

In many areas, including London South, police stations have hosted early advice clinics. In London South, this has led to a 94 per cent increase in cases being referred by police.

The report concludes that, while not all of these cases may reach court, 'early advice makes progression more likely and can assist with the building of stronger cases'.<sup>167</sup>

## Should there be an independent review function?

- 17.129 In our issues paper we asked how well decisions to charge and prosecute were working and how they could be improved.<sup>168</sup> We referred to our previous recommendations on charging in our 2020 report *Committals*, and to our recommendations in our 2016 report *The Role of Victims of Crime in the Criminal Trial Process*.<sup>169</sup>

### We made previous recommendations on reviews of prosecution decisions

- 17.130 In 2016, we heard support for the review of prosecutorial decisions based on a model similar to the Victims' Right to Review scheme in England and Wales (see box). This included support from the Victims of Crime Commissioner and several academics specialising in this area.<sup>170</sup>

<sup>167</sup> Ministry of Justice (UK), *The End-to-End Rape Review Report on Findings and Actions* (Consultation Paper No 437, June 2021) 43 <<https://www.gov.uk/government/publications/end-to-end-rape-review-report-on-findings-and-actions>>.

<sup>168</sup> Victorian Law Reform Commission, *Sexual Offences: The Trial Process* (Issues Paper E, October 2020) Question 1.

<sup>169</sup> Victorian Law Reform Commission, *Committals* (Report No 41, March 2020) Recommendations 19–23; Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) Recommendation 10.

<sup>170</sup> Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) [4.171], citing Submissions 8 (Mary Iliadis), 14 (Victims of Crime Commissioner, Victoria), 31 (Professor Jonathan Doak, Nottingham Trent University); Consultation 30 (Dr Tyrone Kirchengast, University of New South Wales).

### Victims' Right to Review

In 2014, the Crown Prosecution Service in England and Wales established the Victims' Right to Review scheme, following criticisms of previous processes in the Court of Appeal of England and Wales.<sup>171</sup> It is also an entitlement under the Code of Practice for Victims of Crime.<sup>172</sup>

Only some decisions can be reviewed. These include decisions not to lay charges or to offer no evidence and decisions that effectively end a prosecution.<sup>173</sup>

The scheme is accessible and transparent:

- Victims are notified of the prosecution decision not to bring proceedings, or to discontinue them.
- The notification includes information about whether the decision was made on evidential or public interest grounds.
- The notification confirms that the victim can seek a review and provides enough information to let the victim decide whether they want a review and, if they do, what steps to take.

A request for review is ordinarily made within 10 working days of the date of the decision letter, but requests may be made after that time. Requests made more than three months after the decision was communicated are unlikely to be accepted unless there are exceptional circumstances.<sup>174</sup>

The review process itself is conducted in two stages. First, an attempt is made to resolve the issue at a local level by assigning a new prosecutor to review the decision. Secondly, a victim whose concerns are not resolved at the local level may request an independent review by an Appeal and Review Unit.<sup>175</sup>

A similar scheme applies to police decisions not to charge someone, or not to pass the case on to the prosecution service, where a suspect has been identified and interviewed. In cases involving sexual offences, guidance advises that police should consider the need for support to make an informed decision about this right, and should expedite the review.<sup>176</sup>

17.131 As we noted in our 2016 inquiry, the key benefits of this scheme are:

- It provides a greater sense of transparency and accountability in decision-making processes.
- It enables the public prosecutions service to measure where failures are made and to rectify incorrect decisions.
- It gives victims a mechanism to challenge prosecutorial decisions.
- It could increase victims' understanding and confidence in the validity, transparency and accountability of the criminal trial process.
- Even where decisions are not overturned, the scheme can provide victims with an explanation and better understanding of why the case cannot proceed.<sup>177</sup>

171 *R v Killick* [2011] EWCA Crim 1608. It also gave effect to a European Union directive requiring member states to have a mechanism in place that allows victims to seek review of a decision not to prosecute: *Parliament and Council Directive EU/2012/29 of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision JHA/2001/220* [2012] OJ L 315/57, art 11.

172 Ministry of Justice (UK), *Code of Practice for Victims of Crime in England and Wales* (Code of Practice, November 2020) [6.10]–[6.11] <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/974376/victims-code-2020.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/974376/victims-code-2020.pdf)>.

173 Crown Prosecution Service (UK), *Victims' Right to Review* (Legal Guidance, 27 May 2021) [18] <<https://www.cps.gov.uk/legal-guidance/victims-right-review-scheme>>.

174 Ibid [26]–[30].

175 Ibid [36]–[37].

176 Association of Chief Police Officers, *National Policing Guidelines on Police Victim Right to Review* (Guidelines, February 2017) [4.2]–[4.3], [6.2]–[6.3] <[http://www.operationresolve.co.uk/media/1370/np\\_guidance\\_on\\_police\\_victim\\_right\\_to\\_review\\_feb\\_2.pdf](http://www.operationresolve.co.uk/media/1370/np_guidance_on_police_victim_right_to_review_feb_2.pdf)>.

177 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) [4.181], citing Submission 8 (Mary Iliadis).

- 17.132 Researchers have confirmed that the scheme does have many of these benefits, including giving victims a voice, validation, control and greater transparency. However, it also noted limitations on how it worked in practice, including the lack of information on the decision making before a charge, and the review being an internal and not an independent review.<sup>178</sup>
- 17.133 In our previous report, we said that, in principle, we would support the introduction of a similar scheme. However, the Victims' Right to Review scheme could not simply be adopted in Victoria, because:
- the design of the scheme in England and Wales was not appropriate for the size and scale of the Victorian DPP
  - most decisions reviewed under the Victims' Right to Review scheme are of decisions not to file charges, which are made by police in Victoria.<sup>179</sup>
- 17.134 Instead, we recommended that victims be granted a right 'to seek internal review of a decision by the DPP to discontinue a prosecution or to proceed with a guilty plea to lesser charges'.<sup>180</sup>

### **We said independent reviews should be revisited**

- 17.135 Our Victims of Crime inquiry also considered the need for review by an independent entity other than a court. We heard support for different models, such as:
- an independent reviewer from a panel of independent senior counsel
  - review by the DPP followed by review by an independent barrister
  - an independent oversight mechanism, similar to the Crown Prosecution Inspectorate (which reviews processes rather than individual cases)
  - a review body that could review and refer matters back for consideration.<sup>181</sup>
- 17.136 We concluded that the need for a scheme for independent review of decisions to discontinue a prosecution or proceed with lesser charges should be revisited in five years, by which time the internal review process should have been operating for several years. We said that if this scheme had not been established or an evaluation revealed that it was not working effectively, a statutory independent review process should be created.<sup>182</sup>

### **We did not recommend judicial review**

- 17.137 In Australia, prosecutorial decisions are not subject to judicial review. The position is different in the United Kingdom. In our previous inquiry, we found no support for access to judicial review, and 'unequivocal' opposition to introducing judicial review. We therefore did not recommend this as an option.<sup>183</sup>

## **What did the Royal Commission into Institutional Responses to Child Sexual Abuse recommend?**

- 17.138 The Royal Commission into Institutional Responses to Child Sexual Abuse came to similar conclusions when it canvassed these issues. It held a national roundtable with prosecutors to discuss options for internal, independent and judicial review. Part of this roundtable included a recording of a discussion between the Commission and staff involved in the Victims' Right to Review Scheme and the UK Crown Inspectorate.<sup>184</sup>

178 Mary Iliadis and Asher Flynn, 'Providing a Check on Prosecutorial Decision-Making: An Analysis of the Victims' Right to Review Reform' (2018) 58(3) *British Journal of Criminology* 550.

179 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 73–74 [4.182]–[4.189].

180 Ibid Recommendation 10.

181 Ibid 76 [4.201]–[4.205]. As we noted in that report, this is already within the Auditor-General's mandate.

182 Ibid 76 [4.207].

183 Ibid 74–76 [4.191]–[4.200].

184 Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice—DPP Complaints and Oversight Mechanisms* (Public Hearing, 29 April 2016) <[https://www.childabuseroyalcommission.gov.au/sites/default/files/roundtable\\_transcript\\_cj\\_dpp\\_complaints\\_and\\_oversight\\_mechanisms.pdf](https://www.childabuseroyalcommission.gov.au/sites/default/files/roundtable_transcript_cj_dpp_complaints_and_oversight_mechanisms.pdf)>.

- 17.139 The roundtable identified several concerns about establishing a process of review when requested by the victim survivors. These included:
- concerns about undermining the constitutional independence of the DPP by a reviewer directing the making of a different decision
  - the small size of prosecutorial offices and the senior level of decision making and existing multiple layers of internal review, which made this a very different context from the United Kingdom
  - a preference for ongoing and supported engagement with complainants instead of a process that focused on review
  - concerns about the challenge in striking a balance in explaining the reasons for the decision about the charges, in a way that did not undermine a person's mental health
  - concerns about the value of oversight bodies with recommendatory powers, and the extra layers of bureaucracy involved.<sup>185</sup>
- 17.140 The Royal Commission recommended that each state should have an internal merits review scheme for key decisions.<sup>186</sup> It found the Victims' Right to Review scheme could not be adopted for practical reasons in the same form.<sup>187</sup> It also did not recommend judicial review because of 'strong opposition' from stakeholders.<sup>188</sup>

## The OPP has a discontinuance framework

- 17.141 An internal review scheme has been implemented through the Office of Public Prosecution's (OPP) Discontinuance Framework. This framework applies to decisions to discontinue all charges against an accused, or to discontinue all charges regarding a complainant. The complainant must first be consulted before decisions to discontinue are made and before these decisions are reviewed.<sup>189</sup>
- 17.142 In cases that do not involve a death, a decision by a Crown Prosecutor or Senior Crown Prosecutor is reviewed by another Senior Crown Prosecutor. If the reviewer disagrees with the decision, the DPP makes the final decision.<sup>190</sup>
- 17.143 The OPP indicated there are several benefits to this review process. First, it can review the merits of the decision, and not just the procedure. Secondly, the decision is reviewed before the discontinuance is filed. Thirdly, the review process can be used for decisions to discontinue cases well before a trial, as well as decisions to discontinue when a trial is about to start or is already being heard. It also told us that it had not received any complaints from victim survivors about this process, and many had appreciated the care taken in making both the initial and the review decisions.<sup>191</sup>

<sup>185</sup> Ibid 74–80, 89–94, 101, 116–17, 121.

<sup>186</sup> Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report (Parts III to VI, 2017) Recommendation 41.

<sup>187</sup> Ibid 406.

<sup>188</sup> Ibid 406–7.

<sup>189</sup> Director of Public Prosecutions (Vic), *Discontinuance Review Framework* (Policy, Office of Public Prosecutions Victoria, September 2018) <<https://www.opp.vic.gov.au/Home/Resources/Discontinuance-Review-Framework>>. Decisions to discontinue all charges against an accused who has died are reviewed by the Director of Public Prosecutions, and complainants' views must be sought unless the complainant has indicated that they do not want to be contacted or cannot be contacted after reasonable attempts.

<sup>190</sup> Ibid. Cases that involve a death are subject to a different review process.

<sup>191</sup> Consultation 94 (Office of Public Prosecutions (No 2)).

## Victoria Police is running a 'brief authorisation' pilot

- 17.144 In June 2021, Victoria Police announced it had established an independent panel of experts to re-examine closed sexual assault cases. This would determine if further work could be done to get more evidence and lay charges.<sup>192</sup>
- 17.145 The pilot, known as the 'brief authorisation program', will run for the next 12 months. It will involve a specialist lawyer from the OPP and an experienced detective not involved in the original sexual assault investigation. Victoria Police said, in support of the pilot:
- We think it's really important to go back and give victims that option. We want to give every brief the best chance it can to go through to court if the evidence is there.<sup>193</sup>

### What did people tell us about prosecution decisions?

Sarah told us 'The OPP told me it was unlikely that the perpetrator would be found guilty "beyond reasonable doubt" so they would not be going to trial. I was devastated. I couldn't believe this could happen after all the reassurances I had been given. It was like living my worst nightmare. I tried to fight. I met with the OPP on [two] occasions ... I reminded them there were text messages where he admitted raping me. I told the OPP I was strong and that I would not let the ... lawyers break me. I begged them. It felt like they humored me by meeting with me but they had already made their decision. So I was left to deal with the whole mess. I felt betrayed by everyone, by all the reassurances that I was believed, that I would be safe, that the perpetrator would go to jail, that there would be justice. ... The perpetrator walked free ... I was back where I started from but everything felt a hundred times worse.'<sup>194</sup>

A victim survivor told us that she was informed by the barrister that the barrister had offered the offender a plea bargain consisting of bundling up the charges and offering a Community Correctional Order (CCO). The victim survivor said: 'The barrister asked me how I felt about this and I told her I was not happy and did not agree. My motive in pursuing this was to protect the community and my expectation was a prison sentence. I felt the barrister should have consulted me or the police before offering a plea bargain ... I felt very let down by the OPP. The barrister had met me once for 45 minutes and made this decision on my behalf ... the offender was sentenced to a Community Correctional Order... I ... felt that justice had not been served as an armed robbery and aggravated sexual assault is a serious crime and I felt deserved a harsher punishment.'<sup>195</sup>

Penny told us that what she 'didn't understand is that most reports don't result in charges. This was shocking. The police officer was great during the investigation but when I found out this would not result in charges, that's what devastated me. I was crying non-stop for 2 days ... There is inconsistency with which cases get referred to court. I had CCTV footage of me passed out in a taxi etc, still no charges. It feels like a betrayal. We get told it's so good to report, report straight away, don't have a shower etc. I did all that stuff and it still wasn't enough. I just see cases that get through to court and trial, and I wonder how it got through when mine didn't. I had access to the 'not authorised' brief report. There was a heading about victim credibility. There were errors on it. They hadn't questioned him about certain things. It was like they decided not to charge him. In the interview with him they didn't ask about specific acts.'<sup>196</sup>

192 Aneeka Simonis, 'Sexual Assault Perpetrators Put on Notice with Dramatic Police Reforms', *Herald Sun* (online, 12 June 2021) <<https://www.heraldsun.com.au/news/victoria/sexual-assault-perpetrators-put-on-notice-with-dramatic-police-reforms/news-story/0384f092dc2ff83a9d10fe3239114e2a>>.

193 Ibid.

194 Submission 26 (Northern CASA).

195 Submission 32 (A victim survivor of sexual assault (name withheld)).

196 Consultation 59 (Ashleigh Rae, Nicole Lee, Penny).

One woman told us of her 'devastat[ion]' when, after having been allocated a prosecutor, the DPP exercised her discretion to discontinue the case involving historical clerical sexual abuse. It was indicated that, while it was thought she would make an 'excellent witness', the decision was based on the view that there was no reasonable prospect of conviction. In her view, there had been 'no recognition of the value of the court process itself, for both victim and perpetrator', and the decision led to a mental breakdown. She was also unhappy with the opportunity she was given to respond to this decision. She felt that, as the reasons for discontinuing were not given before she had to respond, she was 'writing blind'. She recommended that the DPP's powers to discontinue should be curtailed and all rape charges should be allowed to enter the system irrespective of the anticipated outcome.<sup>197</sup>

Alison, the mother of a rape survivor, reported that she went to the Attorney-General and asked for the case to go to the OPP. 'The OPP reviewed it, but then the sergeant phoned and said that it wasn't going to go any further ... The review process didn't feel very independent and I said to the sergeant, "Can I have a copy of the letter that the OPP has sent you, saying that they have looked at the evidence and are not going to proceed?" "No, it's not addressed to you," the sergeant said. So I have no information as to why the case is not going ahead ... When we got the final news about the DPP not going forward [with the case], [my daughter] went home and cut her arms more than 100 times. She said, "I just want to die, I just want to die."<sup>198</sup>

- 17.146 Victoria Police opposed introducing an independent review scheme of police and prosecution decisions. Victoria Police stated that any external oversight of such decisions would be 'legally and procedurally problematic'. It emphasised that 'it would not be appropriate' for an external review process to overturn charging and prosecutorial decisions or to direct Victoria Police to prosecute a matter which had been determined as not having a reasonable prospect of success.<sup>199</sup>
- 17.147 Victoria Police also suggested that such a scheme might 'compound victim dissatisfaction' with their overall experience of the justice system, lead to 'perverse outcomes' for both complainants and the accused, and 'overlap with the powers and authorities of many existing agencies' and functions of government.<sup>200</sup>
- 17.148 The OPP similarly opposed such a scheme, emphasising the importance of the DPP, Chief Crown Prosecutor and Senior Crown Prosecutors remaining independent. On a practical level, the OPP also questioned whether the DPP would be required to prosecute a case after having previously considered the matter and determined otherwise.<sup>201</sup>
- 17.149 The OPP also questioned how the members of any review panel could have more expertise than the original decision makers. Finally, the OPP emphasised the rigour of the current internal review process.<sup>202</sup>
- 17.150 The Victims of Crime Commissioner expressed support for an independent review scheme. The Commissioner emphasised that value judgments about reliability and credibility in sexual offences could lead to cases not progressing.<sup>203</sup>

197 Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021).  
198 Consultation 99 (Alison, the mother of a rape survivor).  
199 Consultation 93 (Victoria Police (No 4)).  
200 Ibid.  
201 Consultation 94 (Office of Public Prosecutions (No 2)).  
202 Ibid.  
203 Submission 45 (Victims of Crime Commissioner).



- 17.151 To remedy this situation, the Commissioner recommended that the Victorian Government should:
- introduce a Victims' Right to Review scheme underpinned by new rights contained in the Victims' Charter Act enabling independent review of police and prosecution decisions after internal review options are exhausted.<sup>204</sup>
- 17.152 Dr Kerstin Braun also endorsed an independent review scheme modelled on the system in England and Wales.<sup>205</sup>

## **An independent review of police and prosecution decisions is needed**

### **Why is an independent review needed?**

- 17.153 In principle, we continue to support more transparency and accountability in the decision-making process than exists now. As with any exercise of public power, there are benefits in processes of review and accountability. These are:
- improving the quality of decision making
  - providing transparency and accountability
  - ensuring that people can provide their views before decisions are made.
- 17.154 While these benefits are general, there are reasons why they are of special importance in sexual offences. Sexual offences have a high attrition rate, and the reasons for this remain unclear. The public, including victim survivors, need to be confident that the police and the prosecution are taking sexual offences seriously, and that their decisions are being made on the evidence and not because of misconceptions or a lack of effort. If cases are filtered out because the laws need to be changed, this will help us target future law reforms.
- 17.155 Decision making on sexual offences also often turns on an assessment of a person's credibility or reliability. This is relevant to whether there is a 'reasonable prospect' of conviction, but often this assessment will lead to victim survivors being dissatisfied with prosecutorial decisions. These assessments should be subject to scrutiny, so that we can be sure that flawed reasoning about a person's credibility or reliability is not the reason a case has been discontinued.
- 17.156 We continue to be concerned that we do not know enough about the quality of decision-making processes. In this inquiry, we did not have access to police or prosecution files, and as we discuss in Chapter 6, this is an area that is poorly researched. We therefore recommend in that chapter an analysis of police and prosecution files as a step towards improving our understanding of the decision-making processes.
- 17.157 We continue to be concerned that victim survivors do not feel confident in the validity, transparency and accountability of the decision-making process. Too many are left without a good enough explanation or understanding of why the case did not proceed.
- 17.158 More needs to be done to address these concerns, including introducing a model of independent review in Victoria.

### **We recommend an independent panel to review prosecution decisions**

- 17.159 There are many ways to achieve these aims, and the best method depends on the context. We recognise that police and prosecutorial decisions are complex decisions which weigh many factors. While the interests and views of victim survivors should be important factors, they are only part of the decision-making process.

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Ibid.  
Submission 2 (Dr Kerstin Braun).

- 17.160 We recognise the improvements that have already been made. These changes include a review panel established by police, although we note that victim survivors do not appear to have a way to raise cases for review. We also note the DPP has established a clear process on discontinuance and is working on improving the way it communicates with victim survivors in understanding prosecution decisions.
- 17.161 We note that the prosecution process in Victoria differs greatly from the context in England and Wales. Discontinuance decisions are already being made at the most senior levels in Victoria, with levels of internal review.
- 17.162 This makes it difficult to establish a scheme of review that would overturn the decision personally made by the DPP. This is very different from the scheme in England and Wales, where the decisions being overturned were made within the office of the Crown Prosecution Service, as the Director does not take as direct a role in decision making.
- 17.163 We recognise the concerns raised by the police and prosecution about a system of review that would allow decisions to be formally overturned, and therefore do not recommend such a system of review. However, we consider that many of the same benefits could be achieved by a method of independent review that:
- reviews the quality of decision making
  - makes recommendations to the police and prosecution to continue with charges
  - makes recommendations to address other issues identified as part of that review.
- 17.164 This model leaves the final decision to the police and prosecution. This would be similar in nature to the pilot being run by Victoria Police. It would aim to review cases with fresh eyes to assess if cases should be progressed further. In reviewing the merits of decisions, it would apply the same guidelines as those making the original decision.
- 17.165 An example of how this can be done is the Crown Prosecution Inspectorate in England and Wales. As part of the comprehensive review of rape recently completed in England and Wales, the Crown Prosecution Inspectorate conducted a thematic review of rape cases. This review assessed the standard of casework and the inspectors were asked to identify whether they would have made a different decision in the same case.<sup>206</sup> This review could also provide a way to identify how to improve the procedures for involving complainants in the decision-making process or their treatment. Even if prosecutions are discontinued, there may be ways to improve processes so that complainants feel a sense of procedural justice.
- 17.166 The scope of the review should include identifying any legal issues that act as barriers to decision making as part of the review of individual cases. For example, as we discuss in Chapter 19, appeals in sexual offence cases may affect the capacity of the police or prosecution to continue with historical cases. This could provide evidence that will help shape future legal reforms.
- 17.167 While these powers overlap to some extent with the role of the Victorian Auditor-General by examining processes,<sup>207</sup> the specialist expertise of the panel means that it can make recommendations that go beyond the mandate and expertise of the Auditor-General. These powers are confined to the review of individual cases, too, rather than general powers to examine processes as a whole.

206 HM Crown Prosecution Service Inspectorate (UK), *2019 Rape Inspection: A Thematic Review of Rape Cases* (HCMPSI Publication No CP001:1627, 17 December 2019) <<https://www.justiceinspectorates.gov.uk/hmcpai/inspections/rape-inspection-on-report-december-2019/>>.

207 'Who Do We Audit?', *Victorian Auditor-General's Office* (Web Page, 2021) <<https://www.audit.vic.gov.au/who-do-we-audit/>>. For examples of its audits on police and prosecution processes, see, eg, Victorian Auditor-General's Office, *Managing Registered Sex Offenders* (Independent Assurance Report No 1, 28 August 2019) <<https://audit.vic.gov.au/report/managing-registered-sex-offenders/>>; Victorian Auditor-General's Office, *Crime Data* (Independent Assurance Report No 6, 5 September 2018) <<https://www.audit.vic.gov.au/report/crime-data/>>; Victorian Auditor-General's Office, *Asset Confiscation Scheme* (Report, September 2013) <<https://www.audit.vic.gov.au/report/asset-confiscation-scheme/>>.

- 17.168 There would be three key differences between our proposed model and the pilot established by Victoria Police. First, the review should be conducted by an independent panel, so that victim survivors can be confident that their case will be looked at independently. We note that research into the Victims' Right to Review scheme in England and Wales suggested that the perception of a lack of independence meant that some of the benefits of that scheme were not realised in practice.<sup>208</sup>
- 17.169 This review should be conducted by a panel that includes highly qualified and experienced police and prosecutors, as in the model used by Victoria Police. The seniority of those on the panel, and their experience within the operational context, will be important for ensuring that their recommendations are soundly based and are more likely to be accepted by the police and prosecution.
- 17.170 We note that there are concerns that it will be difficult to find suitable people to sit on this panel because of the small pool of people with such experience and the potential for a perception of conflict of interest. We consider, however, that the panel would only need a few members, and that these could be recruited from retired or interstate prosecutors.
- 17.171 Secondly, unlike the pilot being run by Victoria Police, these reviews would be triggered by a request by complainants or people acting on their behalf (such as the parents of child complainants). As research on the Victims' Right to Review scheme suggests, it can be empowering for victim survivors to have a right to request review.<sup>209</sup> This independent review should, however, only be available after completion of any internal reviews, including the OPP's discontinuance process.
- 17.172 Thirdly, while the panel for an independent review should include people with experience of police and prosecutorial decision making, we also consider a multi-disciplinary approach should be taken. A key area of concern for many people is whether misconceptions and other biases are used in decision making (see Chapter 6). Having people who are from a different discipline allows for the testing of assumptions that might be held by the police and prosecution due to their organisational cultures and practices.
- 17.173 A model for this kind of multi-disciplinary approach that can also enhance transparency and improve partnerships is the Philadelphia rape audit (see box). Some of the benefits of this model can be achieved by including within the panel independent review advocates and researchers with specialised expertise in sexual offending. This would increase public confidence and trust, and provide a different disciplinary perspective on decision making.

208 Mary Iliadis and Asher Flynn, 'Providing a Check on Prosecutorial Decision-Making: An Analysis of the Victims' Right to Review Reform' (2018) 58(3) *British Journal of Criminology* 550.  
 209 Ibid.

### Philadelphia Model for Rape Investigations

In Philadelphia, a coalition of advocacy organisations was invited in 2000 by the police to review police files annually over several days. The audit reviewed all the cases that had been closed as 'unfounded', as well as a random sample of cases. Reviewers would write their concerns on files on sticky notes, and the police would meet periodically to discuss those concerns. This review has continued to be conducted every year.

The review is conducted respectfully in a collegial manner. Organisations involved sign a confidentiality agreement. It has improved relationships between advocates and the police, significantly improved the quality of the documentation and has led to some cases being reopened.<sup>210</sup>

The model has been adopted in New York,<sup>211</sup> and in parts of Canada.<sup>212</sup>

- 17.174 We note that the OPP's discontinuance framework is limited to decisions to discontinue all charges either against an accused or in respect of a complainant. We recommend that the panel should also have the power to review decisions not to file charges or indictments, as these have similar effects on the interests of complainants.
- 17.175 Decisions to drop some but not all charges, or to proceed with lesser charges than originally filed, may have a similar impact on complainants. But expanding the powers of the panel to review these decisions would increase the workload of the reviewers, especially as such cases are not usually reviewed internally. The scope of the panel's powers requires further consideration - in particular, whether it should be able to review decisions not to proceed with some charges, or to substitute lesser charges, including during 'plea negotiations'.
- 17.176 Consistently with the approach taken elsewhere in this report, we also recommend that the right to request a review should be included within the Victims' Charter Act to ensure that its operation can be monitored by the Victims of Crime Commissioner. This right is included in our recommendation for changes to the Act in Chapter 4.
- 17.177 Finally, we note that our recommendation is for a panel that will review sexual offence cases, in line with our terms of reference. Our 2016 inquiry recommended establishing an independent review for all victims of crime. As noted earlier, there are reasons why an independent review is especially important to sexual offences. However, we note that there may be merit in extending the scope of this panel to other offences, either when it is established or at a later stage.

210 Women's Law Project, *Advocacy to Improve Police Response to Sex Crimes* (Policy Brief, February 2013) 8–9 <[https://womenslawproject.org/wp-content/uploads/2017/02/Policy\\_Brief\\_Improving\\_Police\\_Response\\_to\\_Sexual\\_Assault.pdf](https://womenslawproject.org/wp-content/uploads/2017/02/Policy_Brief_Improving_Police_Response_to_Sexual_Assault.pdf)>.

211 Tina Rosenberg, 'Rape Victim Advocates Get a Role Alongside the Police', *The New York Times* (online, 27 June 2018) <<https://www.nytimes.com/2018/06/27/opinion/rape-victim-advocates.html>>.

212 Gary Ennett, 'London Police to Pilot "Philadelphia Model" for Reviewing Sexual Assault Investigations', *CBC News* (online, 12 December 2017) <<https://www.cbc.ca/news/canada/london/london-police-pilot-philadelphia-model-sexual-assault-cases-1.4442900>>; Joe Pavia, 'What Is the "Philadelphia Model" Used to Review Sex Assaults?', *CBC* (online, 23 April 2017) <<https://www.cbc.ca/news/canada/kitchener-waterloo/unfounded-sex-assaults-waterloo-task-force-carol-tracy-philadelphia-1.4080309>>; Women and Gender Equality Canada, 'New Funding Aims to Improve Tracking and Reporting of Sexual Assaults in Ontario' (Media Release, 5 December 2017) <[https://www.canada.ca/en/women-gender-equality/news/2017/12/new\\_funding\\_aimstoimprovetrackingandreportingofsexualassaultsino.html](https://www.canada.ca/en/women-gender-equality/news/2017/12/new_funding_aimstoimprovetrackingandreportingofsexualassaultsino.html)>.

## Recommendation

- 66 The Victorian Government should establish an independent and high-level panel that includes multi-disciplinary expertise to review police and prosecution decisions.
- A complainant or a person acting on the complainant's behalf should have the right to request a review by this panel of decisions to discontinue or not file charges or indictments in sexual offence cases after any internal review.
- This panel should have the power to make recommendations, based on its review of these decisions, to:
- a. the police and prosecution about if and how they should continue individual cases, after any internal review process has been completed
  - b. the police and prosecution about how to improve the quality of their decision making
  - c. the Victorian Government to address barriers to progressing sexual offence cases.



# CHAPTER 18

## Specialisation and sexual offence trials

388 Overview

388 Why specialisation?

390 Does Victoria need a specialist sex offences court?

395 We should strengthen specialisation through education and training

401 How do we entrench education and training for lawyers and judicial  
officers?



# 18. Specialisation and sexual offence trials

## Overview

- Sexual offences are a complex area of legal work. To handle these matters well, everyone working in the criminal justice system needs to understand the nature of sexual offending and trauma, and the diverse contexts and experiences of sexual violence. They also need to understand complex laws and procedures.
- There has been progress in improving this understanding. But there is room to strengthen this further through a specialised approach to sexual offences in the criminal justice system.
- This specialised approach should build on the elements that have worked to improve responses in specialist sexual offence courts. It should include strengthened education and training.
- It should include specialist accreditation for lawyers appearing in courts. Fees also need to be increased so that this complex work attracts more skilled lawyers.
- It should include requiring specialist training for judicial officers.

## Why specialisation?

- 18.1 Sexual violence is complex, and so are the ways the justice system responds to it. People who respond to sexual violence need to understand the nature and dynamics of sexual violence. They need to understand how to interact with people who have experienced trauma, and how to reduce the risk of traumatising them further.
- 18.2 Not everyone working in the criminal justice system knows how to do this kind of work well. The knowledge, skills and attitudes needed are not built into legal education and training.
- 18.3 This area of criminal law is complex. Some procedures, rules of evidence and jury directions are unique to sexual offence cases. They have changed over the years, which can make it difficult to keep up. Along with the risks that come with interacting with people who have experienced trauma, this makes sexual offences a complex and sensitive area of practice.
- 18.4 A key theme in reforms has therefore been to require people who respond to sexual offences to have some specialised knowledge.<sup>1</sup> For example, our 2004 report on sexual offences led to a more specialised approach by police and in courts.<sup>2</sup> Training and guidance were developed for police, lawyers and judicial officers to counter

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1 See especially Patrick Parkinson, 'Specialist Prosecution Units and Courts: A Review of the Literature' (Research Paper No 16/26, The University of Sydney Law School, March 2016) 6–10 <<https://papers.ssrn.com/abstract=2756305>>.

2 Victorian Law Reform Commission, *Sexual Offences* (Report No 5, July 2004) [2.95]–[2.96], [3.94]–[3.137], Recommendations 30, 50–58.

misconceptions about sexual harm.<sup>3</sup> Our 2016 report on the role of victims of crime took this work further. In it we made recommendations to support cultural change in the treatment of victims.<sup>4</sup>

- 18.5 A key benefit of specialisation is that the people who work regularly in an area will be more skilled in it. Specialisation can also support legal and practice reforms, such as training. The success of reforms hinges on putting what is on the books into practice by shifting attitudes and the understanding of people on the ground in the criminal justice system.<sup>5</sup>
- 18.6 Past reforms, including education and training, have helped support cultural change—the process of changing attitudes and practices.<sup>6</sup> Survey results have suggested victims are becoming more satisfied with their experience of the trial in recent years.<sup>7</sup> Some specific examples of cultural change over the years include:
- a shared understanding that sexual offences is a specialised and complex area of law
  - an acceptance of the 'interventionist role' of judicial officers in sexual offence cases
  - an acceptance of alternative means of giving evidence, such as the use of remote witness facilities (see Chapter 21)
  - some improvements in cross-examination practices
  - better recognition of victim survivors in the process—for example, through routine use of victim impact statements
  - understanding and acceptance of children as effective witnesses.<sup>8</sup>
- 18.7 In this inquiry we heard that, following past reforms, there was more awareness of misconceptions about sexual violence and a shift in the style of cross-examination.<sup>9</sup> Judges make efforts to create a respectful courtroom environment and intervene when there is improper questioning of complainants. People who work in the criminal justice system have also accepted the use of intermediaries for communication difficulties. We discuss these changes in Chapters 15 and 21.
- 18.8 While there has been a positive shift, it is not yet consistent across the criminal justice system. Good practice remains 'hit or miss'.<sup>10</sup> For example, problematic cross-examination still features in trials, and prosecution counsel or judicial officers do not intervene as much as they could (Chapter 21). Reforms such as the communicative model of consent do not feature much in sexual offence trials (Chapter 14). Many education and training initiatives introduced since our 2004 review have fallen away.
- 18.9 Changing culture is an ongoing process, and we should persist. In this chapter we put forward reforms that aim to create a highly specialised criminal justice workforce, made up of people who are skilled in sexual offence law and procedure and are trauma-informed.

3 See, eg, Legal Services Board and Office of Public Prosecutions (Victoria), *A Guide to the Sexual Offences Interactive Legal Education Program: Professional Development Advancing Best Practice in Sexual Offence Cases* (Report, 2012) <<http://www.opp.vic.gov.au/getattachment/d4c4246a-56cf-44d7-9db6-0dfa085b8346/ilep-booklet-final.aspx>>; Patrick Tidmarsh, 'Training Sexual Crime Investigators to Get the "Whole Story"' (PhD Thesis, Deakin University, 2016) chs 5–6 <<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 Offence Cases: A 12-Month Follow-up Study' (2020) 47(9) *Criminal Justice and Behavior* 1176, 1179.

4 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) ch 4, Recommendations 3–14.

5 Nicole Bluett-Boyd and Bianca Fileborn, *Victim/Survivor-Focused Justice Responses and Reforms to Criminal Court Practice* (Research Report No 27, Australian Institute of Family Studies (Cth), April 2014) 51 <<https://aifs.gov.au/publications/victim-survivor-focused-justice-responses-and-reforms-criminal-court-practice>>.

6 Success Works, *Sexual Assault Reform Strategy* (Final Evaluation Report, Department of Justice (Vic), January 2011) iii <<https://trove.nla.gov.au/version/169811763>>.

7 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) [4.2].

8 Success Works, *Sexual Assault Reform Strategy* (Final Evaluation Report, Department of Justice (Vic), January 2011) iii <<https://trove.nla.gov.au/version/169811763>>.

9 Submissions 1 (knowmore legal service), 47 (Criminal Bar Association). For a discussion of these misconceptions: see Australian Institute of Family Studies and Victoria Police, *Challenging Misconceptions about Sexual Offending: Creating an Evidence-based Resource for Police and Legal Practitioners* (Report, 2017) <<https://www.police.vic.gov.au/sites/default/files/2019-01/For-Internet--Challenging-Misconceptions-Report.pdf>>.

10 Submission 13 (Australian Association of Social Workers).

## Does Victoria need a specialist sex offences court?

### What are specialist courts?

- 18.10 Specialist sexual offence courts exist elsewhere, for example South Africa and in New York. New Zealand piloted a specialist sexual violence court in 2016 (see box).<sup>11</sup> A review in Scotland has recently recommended such a court.<sup>12</sup>
- 18.11 A specialist court deals only with sexual offences and has its own rules and procedures. A specialist court could be staffed by trained judges, legal practitioners and others providing support.<sup>13</sup>
- 18.12 In our 2004 inquiry, we considered but did not recommend a specialist sexual offence court. Instead, we recommended specialist lists within the Magistrates' Court of Victoria and County Court of Victoria.<sup>14</sup>

#### The New Zealand Sexual Violence Court Pilot

New Zealand's pilot sexual violence court was branded as a court but was run as a list within its District Court. The pilot featured:

- training judges and lawyers about sexual violence and the experience of complainants in court
- best practice guidelines for court processes
- case managers active in addressing potential delays.<sup>15</sup>

An evaluation found that cases progressed more quickly, with the average time for all cases 'to be disposed' decreasing by 134 days. The quality of case review hearings and trials improved, with judges intervening more often to prevent unacceptable questioning.<sup>16</sup>

Better case management 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.<sup>17</sup>

11 Gravitas Research and Strategy Ltd, *Evaluation of the Sexual Violence Court Pilot* (Report, Ministry of Justice (NZ), June 2019) <<https://www.districtcourts.govt.nz/reports-publications-and-statistics/publications/sexual-violence-court-pilot-evaluation-report/>>.

12 Lord Justice Clerk's Review Group, *Improving the Management of Sexual Offence Cases* (Report, Scottish Courts and Tribunal Service, March 2021) 7 <<https://www.scotcourts.gov.uk/docs/default-source/default-document-library/reports-and-data/Improving-the-management-of-Sexual-Offence-Cases.pdf?sfvrsn=6>>.

13 Law Commission (New Zealand), *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (Report No 136, December 2015) [5.4]–[5.5] <<https://www.lawcom.govt.nz/our-projects/alternative-models-prosecuting-and-trying-criminal-cases?id=1270>>.

14 Victorian Law Reform Commission, *Sexual Offences* (Report No 5, July 2004) Recommendations 50, 53–55.

15 Gravitas Research and Strategy Ltd, *Evaluation of the Sexual Violence Court Pilot* (Report, Ministry of Justice (NZ), June 2019) <<https://www.districtcourts.govt.nz/reports-publications-and-statistics/publications/sexual-violence-court-pilot-evaluation-report/>>.

16 Ibid 17.

17 Ibid 20, 76.

### The New Zealand Sexual Violence Court Pilot (Continued)

The evaluation also identified issues including:

- the availability of judicial officers and lawyers for the defence
- the availability of technology to support cases
- improving the design of the building and the availability of space to make sure victim survivors were safe
- inconsistencies around cross-examination questioning protocols
- the level of support provided to victim survivors.<sup>18</sup>

The evaluation found that the list increased the workload for those in court because they needed to prepare more for case review hearings. It also identified 'burn out' as a risk among staff.<sup>19</sup>

The New Zealand District Court continues to run a sexual offence list along the principles of the pilot in Whāngarei and Auckland. Other District Courts have also taken up many of the initiatives from the pilot.<sup>20</sup>

## Specialist courts: support and concerns

- 18.13 In our issues paper, we asked about support for a specialist court for sexual offences and what features it should have. We noted the New Zealand model.<sup>21</sup> More recently, the Australian Government has announced a national initiative, including states and territories, that will consider specialist sexual offence courts.<sup>22</sup>

### There was support for a specialist court

- 18.14 Most of the submissions which responded to this question supported a specialist sexual offence court.<sup>23</sup>

There is value in having a specialist sexual assault court which is trauma informed and has the right supports for victim survivors. At the moment you are going into the County Court and not knowing what judge you are going to get. The only way to overcome this is specialist training. Victim survivors will get more consistency in how they are treated.—Nicole<sup>24</sup>

18 Ibid 3.

19 Ibid 79–80.

20 Consultation 37 (New Zealand District Court judges with experience on the sexual violence court pilot).

21 Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Questions* (Report, October 2020) 1 (Issues Paper B Questions 2–3) <[https://lawreform.vic.gov.au/sites/default/files/2657-VLRC\\_Sexual%20Offences-Improving%20the%20Response%20Questions-web.pdf](https://lawreform.vic.gov.au/sites/default/files/2657-VLRC_Sexual%20Offences-Improving%20the%20Response%20Questions-web.pdf)>.

22 Attorney-General for Australia and Minister for Industrial Relations (Cth), 'Leading a National Approach to Justice for Victims and Survivors of Sexual Assault, Harassment and Coercive Control' (Media Release, 17 May 2021) <<https://www.attorneygeneral.gov.au/media/media-releases/leading-national-approach-justice-17-may-2021>>.

23 Submissions 10 (Carolyn Worth AM and Mary Lancaster), 14 (Gatehouse Centre, Royal Children's Hospital), 17 (Sexual Assault Services Victoria), 20 (Anonymous member of Aboriginal community), 27 (Victoria Legal Aid), 39 (Rape & Domestic Violence Services Australia), 44 (Dr Patrick Tidmarsh and Dr Gemma Hamilton), 45 (Victims of Crime Commissioner); Consultations 6 (Dr Emma Henderson and Dr Kirsty Duncanson), 10 (Professor Jane Goodman-Delahunty), 25 (CASA senior counsellor/advocates), 59 (Ashleigh Rae, Nicole Lee, Penny).

24 Consultation 59 (Ashleigh Rae, Nicole Lee, Penny).

- 18.15 The most important reason that people supported this model was the value of more specialised training about sexual violence.<sup>25</sup> Other reasons included that it would improve:
- the way complainants were treated
  - case management, reducing delay
  - the timing of guilty pleas
  - the design and facilities of courtrooms
  - the consistency of decision making
  - support for staff and complainants.<sup>26</sup>
- 18.16 Victoria Legal Aid (VLA) supported piloting a specialist sexual offence court. It told us of the value it had seen in specialist and 'problem-solving' courts in the criminal justice system, such as the Drug Court and specialist family violence courts established following family violence reforms. These family violence courts are a Division of the Magistrates' Court of Victoria.<sup>27</sup>
- 18.17 Although VLA supported a specialist court, it also warned of the risk that a new specialist sexual offence court could cause 'postcode inequalities'.<sup>28</sup> VLA also supported introducing a sexual offence list within the specialist family violence courts to ensure that sexual offending could be responded to 'through a family violence lens'.<sup>29</sup>

### Some preferred a specialised response rather than a court

- 18.18 Others, including the courts, the Office of Public Prosecutions (OPP) and the Criminal Bar Association, supported improving the specialisation within sexual offence lists in courts.<sup>30</sup>
- 18.19 The OPP submitted that in any given week approximately 60 per cent of trials in the County Court of Victoria involve sexual offences.<sup>31</sup> Data provided by the County Court of Victoria shows that sexual offence trials made up approximately half of the court's criminal trial work.<sup>32</sup> The County Court of Victoria told us it:
- opposes the creation of a specialist sexual offence court *per se*. This is because the issue of judicial burnout looms large and it is important that the workload of sexual offence matters is shared amongst all judges. This is particularly important in a jurisdiction like the County Court, where sexual offence matters make up the bulk of trial work.<sup>33</sup>
- 18.20 The court supported 'continual and intensive' training of judicial officers and recognised that 'regular training of judges can assist in ensuring consistent and tailored support for complainants, while maintaining procedural fairness for accused'. The court told us that this training should include the judges of the Victorian Court of Appeal as those judges often sit on appeals of trials from the County Court of Victoria that involved the trial judge's exercise of discretion in sexual offence trials.<sup>34</sup>

25 Submissions 10 (Carolyn Worth AM and Mary Lancaster), 14 (Gatehouse Centre, Royal Children's Hospital), 44 (Dr Patrick Tidmarsh and Dr Gemma Hamilton), 45 (Victims of Crime Commissioner); Consultations 10 (Professor Jane Goodman-Delahunty), 59 (Ashleigh Rae, Nicole Lee, Penny).

26 Submissions 10 (Carolyn Worth AM and Mary Lancaster), 14 (Gatehouse Centre, Royal Children's Hospital), 17 (Sexual Assault Services Victoria), 20 (Anonymous member of Aboriginal community), 27 (Victoria Legal Aid), 39 (Rape & Domestic Violence Services Australia), 44 (Dr Patrick Tidmarsh and Dr Gemma Hamilton), 45 (Victims of Crime Commissioner); Consultations 6 (Dr Emma Henderson and Dr Kirsty Duncanson), 10 (Professor Jane Goodman-Delahunty), 59 (Ashleigh Rae, Nicole Lee, Penny).

27 Submission 27 (Victoria Legal Aid).

28 Consultation 49 (Victoria Legal Aid).

29 Submission 27 (Victoria Legal Aid).

30 Submissions 59 (County Court of Victoria), 63 (Office of Public Prosecutions); Consultation 41 (Individual views of the Honourable Justice Chris Maxwell AC and Judicial Registrar Tim Freeman).

31 Submission 63 (Office of Public Prosecutions).

32 Provided to the Victorian Law Reform Commission, 20 January 2021. In the past five financial years the approximate percentages were: 48% in 2015–16; 47% in 2016–17; 54% in 2017–18; 46% in 2018–19; 51% in 2019–20.

33 Submission 59 (County Court of Victoria).

34 Ibid.

- 18.21 The Magistrates' Court of Victoria did not support a 'stand-alone sexual offences court'. It expressed concern that:
- creating a new court would require significant funding that may divert resources from the many other services that the Court provides. Establishing a stand-alone court that hears and determines all sexual offences could also result in complainants, witnesses and accused in regional areas being dislocated from their supports and services if their cases are not heard in their local region.<sup>35</sup>
- 18.22 It pointed out that an accused person would often be charged with non-sexual offences as well. If there was a separate court, these offences may need to be severed from sexual offences, which would be inefficient and unfair to the accused.<sup>36</sup>
- 18.23 Like the County Court of Victoria, the Magistrates' Court of Victoria supported a specialised response. This included effective case management and 'regular, comprehensive' training.<sup>37</sup>
- 18.24 The Magistrates' Court of Victoria also did not support expanding the role of its Specialised Family Violence Division to include sexual offences. It told us that these courts already faced backlogs and any expansion would increase delays. It told us that in three out of five of the Division's venues, cases involving indictable offences were not being heard and that 'no committal proceedings could be heard if the [Division's] remit was widened.' Further, as many sexual offence cases do not involve family violence, including such cases would undermine the purpose and effectiveness of the Division.<sup>38</sup>
- 18.25 The Magistrates' Court of Victoria also observed that, where there is an overlap between family violence intervention orders and sexual offences:
- Its processes already link the two cases so that they are heard together, with the same magistrate hearing both criminal and civil matters when these are contested.
  - Complainants in those cases have access to the same supports.
  - Complainants in those cases can benefit from the improvements in safety in courtroom design.<sup>39</sup>
- 18.26 The OPP did not support specialist courts. It told us the judicial officers in sexual offence lists were already specialised and that, given the volume of sexual offence cases in the County Court of Victoria, 'in many respects it was already a specialist court'.<sup>40</sup>
- 18.27 The OPP did, however, support regular and ongoing specialist training. It told us:
- If there is a perception that outdated thinking still persists in this space, be they held by the judiciary, their support staff or legal practitioners more broadly, then in our view specialist training would be a more effective and efficient way to tackle this issue than specialist courts.<sup>41</sup>
- 18.28 The Criminal Bar Association did not support a stand-alone court and told us that there was already a high degree of specialisation. It also expressed concern about separating other charges connected to the sexual offence matters.<sup>42</sup>

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35 Consultation 71 (Magistrates' Court of Victoria (No 1)).  
 36 Ibid.  
 37 Ibid.  
 38 Ibid.  
 39 Ibid.  
 40 Submission 63 (Office of Public Prosecutions).  
 41 Ibid.  
 42 Submission 47 (Criminal Bar Association).

## Specialist courts have challenges

- 18.29 Some people we heard from, including those who supported specialised sexual offence courts, identified the risks of a specialised court, including the risk of 'burn out' or vicarious trauma.<sup>43</sup> The Criminal Bar Association explained:

Sex offence work is confronting. Although specialisation does not need to be an 'all in' proposition, a specialist court may have issues both in attracting judges and advocates, as well as retaining them.<sup>44</sup>

- 18.30 Judges from the New Zealand pilot court told us:

It's important that any judicial officer have a variety of different types of work. There would be burn out if judges were required to do sexual assault cases day after day. This is why you should not have a stand alone sexual violence court.<sup>45</sup>

- 18.31 We heard other concerns that there might be fewer judicial officers available to hear cases, and the risk of regional disadvantage.<sup>46</sup>

## What did people tell us about the Koori Court?

- 18.32 We received feedback on whether the Koori Court should hear sexual offences.<sup>47</sup> The Koori Court is for Aboriginal and Torres Strait Islander people who have taken responsibility and pleaded guilty to a criminal offence. It is run more informally and reflects cultural issues. People can choose to have their case heard in the Koori Court.<sup>48</sup>

- 18.33 Neither Djirra nor the Aboriginal Justice Caucus supported the Koori Court hearing sexual offences. They expressed concerns that this would risk the privacy of a complainant if Aboriginal community members were involved, and it could also place pressure on the complainant to accept a lesser outcome. Djirra also warned of the danger that 'so called "cultural arguments" about violence may excuse violence against women'.<sup>49</sup>

## We should strengthen the specialised response—but we do not need a court

- 18.34 Many of the benefits of a specialised court can be achieved without the great disruption and costs that would be caused by creating a stand-alone court. We recognise that a stand-alone court would be especially disruptive for the County Court of Victoria, since it would need to carve out a sizeable portion of its criminal work into a separate court.<sup>50</sup> It would also be less flexible than a specialist list, which can more readily deal with issues of burn-out.
- 18.35 It would be difficult to fund and roll out a specialist court in an accessible way across Victoria. This is already challenging enough for family violence courts. It would be even more challenging for sexual offence cases heard in the County Court of Victoria, which does not sit permanently in regional areas. This would lead to 'postcode injustice'.
- 18.36 We are also persuaded by the reasons given by the Magistrates' Court of Victoria that expanding specialist family violence courts to sexual offences would not be practical or needed.

43 Ibid; Submission 63 (Office of Public Prosecutions); Consultation 37 (New Zealand District Court judges with experience on the sexual violence court pilot). Those who supported a specialist court included: Consultation 6 (Dr Emma Henderson and Dr Kirsty Duncanson); Submission 14 (Gatehouse Centre, Royal Children's Hospital).

44 Submission 47 (Criminal Bar Association).

45 Consultation 37 (New Zealand District Court judges with experience on the sexual violence court pilot).

46 Submission 47 (Criminal Bar Association); Consultation 71 (Magistrates' Court of Victoria (No 1)).

47 Submissions 9 (Djirra), 21 (Victorian Aboriginal Child Care Agency), 59 (County Court of Victoria).

48 'Koori Court', *Magistrates' Court of Victoria* (Web Page, 23 January 2020) <<https://www.mcv.vic.gov.au/about/koori-court>>.

49 Submission 9 (Djirra).

50 As noted above, data provided by the County Court of Victoria to the Victorian Law Reform Commission on 20 January 2021 shows that sexual offence trials make up approximately half of its criminal trial work.



- 18.37 The benefits of a specialist court do not come from its status as a separate court, as the New Zealand example shows. They come from improved case management and processes, and quality training. The benefits can be achieved by strengthening these elements, without a specialist court.
- 18.38 The Magistrates' Court of Victoria explained that 'rigorous case management' allows cases to resolve earlier through guilty pleas.<sup>51</sup> The County Court of Victoria operates an Emergency Case Management Model which reduces delays and increases efficiency.<sup>52</sup> We made recommendations for improving case management in our recent report on committals.<sup>53</sup>
- 18.39 The rest of this chapter discusses how to strengthen these elements within existing specialist lists. We discuss supports for complainants and courtroom design in Chapter 21 and reforms to address delay in Chapter 19.

## We should strengthen specialisation through education and training

- 18.40 Law reform must be accompanied by cultural change. If not, there may be an 'implementation gap' between the reforms as they are written and what happens in practice.<sup>54</sup> Cultural change requires education of everyone working in the criminal justice system.<sup>55</sup>
- 18.41 We heard strong support in this inquiry for improving education and training throughout the criminal justice system for responding to sexual offences.<sup>56</sup> For example, the County Court of Victoria submitted:
- The criminal justice system has over recent decades matured in its understanding of sexual harm and attitudes towards complainants in sexual offending matters. There is of course always a need to continually improve the understanding of such matters. Continual and expanded training and education around sexual harm can assist with this, not only for those within the legal profession, but also the broader community.<sup>57</sup>
- 18.42 We recommend strengthening training and education by:
- identifying the topics and key principles for a training program
  - encouraging lawyers and requiring judicial officers to complete this program and other training.

## What do people need more training about?

### A trauma-informed approach should be embedded in the criminal justice system

- 18.43 There was strong support for everyone in the criminal justice system, including police (see Chapter 17), to be trained in trauma-informed practices.<sup>58</sup> These approaches understand and respond to the psychological and social effects of trauma, including on memory and cognition.

<sup>51</sup> Consultation 71 (Magistrates' Court of Victoria (No 1)).

<sup>52</sup> Submission 59 (County Court of Victoria). This was introduced to address the backlog created by the coronavirus (COVID-19) pandemic and built on the Active Case Management System Reform pilot: County Court of Victoria, *Annual Report 2019-20* (Report, 2020) 21 <<https://www.countycourt.vic.gov.au/files/documents/2021-02/ccvannualreport2019-20.pdf>>.

<sup>53</sup> Victorian Law Reform Commission, *Committals* (Report No 41, March 2020) Recommendations 2, 8–14.

<sup>54</sup> Nicole Bluett-Boyd and Bianca Fileborn, *Victim/Survivor-Focused Justice Responses and Reforms to Criminal Court Practice* (Research Report No 27, Australian Institute of Family Studies (Cth), April 2014) 57–8 <<https://aifs.gov.au/publications/victim-survivor-focused-justice-responses-and-reforms-criminal-court-practice>>.

<sup>55</sup> Ibid 50–1; Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 14.91–14.751.

<sup>56</sup> Submissions 7 (Dr Bianca Fileborn, Dr Rachel Loney-Howes, Dr Tully O'Neill and Sophie Hindes), 44 (Dr Patrick Tidmarsh and Dr Gemma Hamilton), 45 (Victims of Crime Commissioner), 59 (County Court of Victoria), 63 (Office of Public Prosecutions), 68 (Victoria Police); Consultations 25 (CASA senior counsellor/advocates), 32 (Anonymous member, Victim Survivors' Advisory Council), 49 (Victoria Legal Aid), 71 (Magistrates' Court of Victoria (No 1)).

<sup>57</sup> Submission 59 (County Court of Victoria).

<sup>58</sup> Submissions 13 (Australian Association of Social Workers), 14 (Gatehouse Centre, Royal Children's Hospital), 17 (Sexual Assault Services Victoria), 22 (knowmore legal service), 39 (Rape & Domestic Violence Services Australia), 62 (Shine Lawyers (on behalf of Ms Kim Elzaibak)), 68 (Victoria Police); Consultations 13 (Intermediary Pilot Program, Department of Justice and Community Safety), 23 (Sexual Assault Services Victoria Specialist Children's Services), 32 (Anonymous member, Victim Survivors' Advisory Council), 53 (Elizabeth Morgan House and a victim survivor of sexual assault); Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021).

- 18.44 Trauma-informed approaches in the criminal justice system have benefits such as:
- reducing further trauma for complainants
  - building complainants' trust in the system
  - better awareness and responses among those dealing with complainants in the criminal justice system
  - empowering complainants to participate in the system.<sup>59</sup>

### What people told us

One man, who had been through the courts within the past five years, told us that the criminal justice system was not trauma-informed. As an example, he said that the prosecutor had decided not to proceed after he had already been subpoenaed to attend court. When asked to explain this, the prosecutor implied that his case of historical sexual assault was a 'low priority'.<sup>60</sup>

Another man, whose case was heard in two courts within the past five years, said that the 'legal fraternity needs to have a good hard look at itself', as 'some of the tactics are putrid'.<sup>61</sup>

Another person said that the OPP was patronising and that they 'may be smart but as humans they struggle'.<sup>62</sup>

- 18.45 The Victims of Crime Commissioner told us:

Trauma-informed responses are key to reducing the risk of secondary victimisation by the criminal justice system ... While there are some aspects of the adversarial criminal justice system that, by their very nature, will not be victim-centred, even laws and processes that advance the interests of the state and the rights of the accused should be reviewed with a trauma-informed lens.<sup>63</sup>

- 18.46 The Victims of Crime Commissioner further submitted that trauma-informed law, policy and practice involve:

- realising the impact and recognising the signs of trauma
- actively seeking to reduce re-traumatisation
- emphasising physical, psychological and emotional safety for complainants
- providing complainants with voice and choice, including different ways to engage to minimise harm
- creating opportunities for complainants to rebuild a sense of control and empowerment
- recognising that trauma may impact complainants' engagement with the process
- being responsive to complainants' diversity
- promoting trust and transparency in process and decision making.<sup>64</sup>

- 18.47 Specialist children's services told us that there needed to be more training and education about children's development and the impact of child sexual abuse.<sup>65</sup>

59 Submission 45 (Victims of Crime Commissioner). See especially Judicial College of Victoria, *Victims of Crime in the Courtroom: A Guide for Judicial Officers* (Guide, 2019) Note 2 <<https://www.judicialcollege.vic.edu.au/resources/victims-crime-courtroom>>; Blue Knot Foundation, *Trauma and the Law: Applying Trauma-Informed Practice to Legal and Judicial Contexts* (Background Paper, 2016) <<https://www.blueknot.org.au/Resources/Publications/Trauma-law>>.

60 Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021).

61 Ibid.

62 Ibid.

63 Submission 45 (Victims of Crime Commissioner).

64 Ibid.

65 Submission 14 (Gatehouse Centre, Royal Children's Hospital); Consultation 23 (Sexual Assault Services Victoria Specialist Children Services).

- 18.48 Some people told us that there was a need to improve the understanding of the nature and prevalence of sexual violence. This includes within the context of family violence and intimate partner violence. It also includes the diverse experiences and contexts of sexual violence: among Aboriginal people, people from culturally and linguistically diverse backgrounds, people with disability, people who work in the sex industry, and LGBTIQ+ people among others (see box and Chapter 2).<sup>66</sup>

It is hard enough to tell your story and what happened but when the person making the decision on the case doesn't have a good understanding of the complexities of sexual assault in a marriage or same sex relationship then this places the victim to be traumatised by the system or let down as the judge only understands sexual assault as being the rape of a female by a male who she doesn't know.—Anonymous member of Aboriginal community<sup>67</sup>

- 18.49 We were told that there was a need to improve understanding about the communication needs of people with disability (see Chapter 15).<sup>68</sup>
- 18.50 Other areas identified as topics for further training included:
- the types of people who commit sexual violence, and the dynamics of sexual offending<sup>69</sup>
  - barriers to disclosure, especially those faced by children and young people.<sup>70</sup>
- 18.51 Education and training should be directed at these topics. Even though this chapter focuses on lawyers and judicial officers, police should also be trained in these topics (see Chapter 17).

### **The Multi-Agency Risk Assessment and Management (MARAM) framework should be built upon**

- 18.52 The Multi-Agency Risk Assessment and Management (MARAM) Framework is a good starting point for embedding a trauma-informed approach for everyone working in the criminal justice system. This framework is used by organisations and services to assess the risk of and respond to family violence (see Chapter 1).
- 18.53 Many principles of the MARAM framework address the training needs identified in this inquiry, such as understanding family violence, trauma and the need for culturally responsive and safe responses (see above).
- 18.54 Sexual violence is recognised as a high-risk factor within the framework, and practice guidance provides context around this.<sup>71</sup> Family Safety Victoria, which has responsibility for implementing MARAM, told us that there was:
- significant opportunity to improve the identification of sexual assault as a risk factor through implementation strategies including training and practice guidance.<sup>72</sup>
- 18.55 The MARAM Framework requires prescribed organisations to complete training, including police, sexual assault services and court staff. Training is tailored to the organisation and covers cultural awareness, trauma-informed practice and family violence training.<sup>73</sup>

66 Submission 39 (Rape & Domestic Violence Services Australia); Consultation 6 (Dr Emma Henderson and Dr Kirsty Duncanson); Consultation 45 (Sex Work Law Reform Victoria).

67 Submission 20 (Anonymous member of Aboriginal community).

68 Consultation 11 (Family violence and sexual assault practitioners focusing on disability inclusion).

69 Submissions 14 (Gatehouse Centre, Royal Children's Hospital), 17 (Sexual Assault Services Victoria), 39 (Rape & Domestic Violence Services Australia), 44 (Dr Patrick Tidmarsh and Dr Gemma Hamilton), 63 (Office of Public Prosecutions).

70 Submission 17 (Sexual Assault Services Victoria).

71 Consultation 75 (Family Safety Victoria (No 2)).

72 Ibid.

73 Family Safety Victoria, *Family Violence Multi-Agency Risk Assessment and Management Framework a Shared Responsibility for Assessing and Managing Family Violence Risk* (Framework, Victorian Government, 2018) <<https://www.vic.gov.au/maram-practice-guides-and-resources>>; *Family Violence Protection Act 2008* (Vic) pt 11; *Family Violence Protection (Information Sharing and Risk Management) Regulations 2018* (Vic) sch 3 (prescribing organisations that must comply).

- 18.56 The MARAM framework is being rolled out progressively across services. Phase 2 began in April 2021, and includes most health and human services, including Commonwealth-funded programs for refugees and migrants.<sup>74</sup>
- 18.57 Organisations that are not prescribed can still benefit from MARAM-aligned training. For example, the Department of Education and Training has partnered with the Centre for Workforce Excellence to deliver training in identifying and responding to family violence risk.<sup>75</sup>
- 18.58 Lawyers are not included within the MARAM framework. Domestic Violence Victoria submitted that MARAM-aligned training for legal practitioners ‘will assist in embedding a shared understanding of family violence—including sexual assault that occurs in the context of family violence—across the justice system’.<sup>76</sup>
- 18.59 In the latest rolling action plan on family violence, the Victorian Government has committed to working with legal services to deliver MARAM-aligned training. As well, all Australian Attorneys-General will embed family violence competency into Continuing Professional Development (CPD) frameworks for lawyers across Australia.<sup>77</sup> CPD frameworks are discussed later in this chapter.
- 18.60 The MARAM Framework provides a solid foundation for ensuring safe and consistent responses to sexual violence, as well as family violence. The framework already covers sexual violence, but we agree with Family Safety Victoria that there is a significant opportunity to strengthen training and guidance in relation to sexual violence. This will also lift the profile of sexual violence within family violence.
- 18.61 As we discuss in Chapter 2, some patterns of sexual violence are distinctive and will require separate treatment. Sexual violence does not always involve family violence and as such MARAM-aligned training alone will not be enough. We make recommendations later in this chapter for specialisation and training on sexual violence for everyone working in the criminal justice system. However, for sexual violence in a family violence context, we see no reason training on these dynamics cannot be delivered as part of, or alongside, MARAM-aligned training.
- 18.62 The move to include MARAM-aligned training within legal professional development frameworks makes this an ideal time to strengthen MARAM-aligned training and guidance for sexual violence. This will ensure appropriate and tailored training is delivered to all lawyers practising in areas of sexual offences and family violence. This extends to solicitors, not just counsel appearing in sexual offence cases.
- 18.63 We recommend that legal professional bodies should encourage and promote MARAM-aligned training for their members.
- 18.64 The MARAM framework could assist others outside the criminal justice system who come into contact with victim survivors—for example, disability workers—who do not always know how to identify sexual violence.<sup>78</sup> In Chapter 3 we note opportunities for the MARAM framework to be used for health professionals. In Chapter 8 we suggest its use as part of the training and upskilling of community organisations in sexual violence. In Chapter 17 we discuss how the MARAM framework applies to police.

74 Victorian Government, ‘Appendix 2—Organisations Prescribed in Phase Two’, [VIC.GOV.AU](http://www.vic.gov.au/report-on-implementation-of-the-family-violence-risk-assessment-and-management-framework-2018-19/appendix-2-organisations-prescribed-in-phase-two) (Web Page, 27 February 2020) <<http://www.vic.gov.au/report-on-implementation-of-the-family-violence-risk-assessment-and-management-framework-2018-19/appendix-2-organisations-prescribed-in-phase-two>>.

75 Department of Education and Training (Vic), *22510 VIC Course in Identifying and Responding to Family Violence Risk* (Course Material, 2020) <<https://www.education.vic.gov.au/Documents/training/providers/rto/curr22510VICidentifyingrespondingfamilyviolencerisk.pdf>>; Department of Education and Training (Vic), *22561VIC Course in Intermediate Risk Assessment and Management of Family Violence Risk* (Course Material, 2020) <<https://www.education.vic.gov.au/Documents/training/providers/rto/curr22561riskfamviolence.pdf>>.

76 Submission 56 (Domestic Violence Victoria).

77 Victorian Government, *Family Violence Reform Rolling Action Plan 2020–2023: Activities Index* (Combined Activity Summary) 10 <<https://www.vic.gov.au/family-violence-reform-rolling-action-plan-2020-2023>>.

78 Consultation 11 (Family violence and sexual assault practitioners focusing on disability inclusion). While training programs have been delivered for Victorian disability workers, the Victorian Government reports that progress with the National Disability Insurance Scheme has been affected by COVID-19 and that lessons and improvements, as well as further training, will be shared with the Commonwealth Government and the National Disability Insurance Agency: Victorian Government, ‘All Disability Services Workers Complete Certified Training in Identifying Family Violence’, [VIC.GOV.AU](http://www.vic.gov.au/family-violence-recommendations/all-disability-services-workers-complete-certified-training) (Web Page, 8 January 2021) <<http://www.vic.gov.au/family-violence-recommendations/all-disability-services-workers-complete-certified-training>>.

## Recommendations

- 67 The Victorian Government and Victoria Police should review and strengthen training and practice guidance on sexual violence under the Family Violence Multi-Agency Risk Assessment and Management (MARAM) Framework, including for training to be delivered to those working in the criminal justice system.
- 68 The Law Institute of Victoria and the Victorian Bar should encourage and promote MARAM-aligned training for their members.

### Getting the best evidence and respecting victim survivors should be a focus

- 18.65 While MARAM-aligned training should address some foundational knowledge, people also need training in knowledge and skills specific to the trial context.
- 18.66 There is a need for more training and education on how to communicate effectively with children and young people. The Child Witness Service explained that the language used by lawyers was often too difficult and needed to be explained by support workers.<sup>79</sup>
- 18.67 We also heard there was a need for training and education about 'victim-centric' practices.<sup>80</sup> These include the use of alternative arrangements for giving evidence (see below), how to cross-examine and use intermediaries, and how to intervene to protect complainants from improper questioning (see Chapter 21).<sup>81</sup> As we discuss in Chapter 21, both judicial officers and prosecutors may need training to intervene in or object to questionable cross-examination.
- 18.68 Sexual Assault Services Victoria and experts also proposed training and education on how to identify and counter misconceptions about sexual violence that play out directly or indirectly in trials (see Chapter 20 and 21).<sup>82</sup> The OPP suggested training on emerging issues and research related to sexual offences and the law.<sup>83</sup>
- 18.69 These skills will assist in getting the best evidence from complainants and putting into practice the aims of the law, such as:
- protecting complainants from re-traumatisation
  - stopping improper questioning
  - countering misconceptions about sexual violence.<sup>84</sup>
- 18.70 Other suggestions related to training for people involved in the Therapeutic Treatment Order (TTO) system. Training was suggested for lawyers, Child Protection and police prosecutors to ensure everyone understood its aims and operation.<sup>85</sup> We discuss the TTO system in Chapter 8.

79 Consultation 15 (Child Witness Service). See also Submission 14 (Gatehouse Centre, Royal Children's Hospital).

80 Submission 63 (Office of Public Prosecutions).

81 Submission 45 (Victims of Crime Commissioner); Consultations 13 (Intermediary Pilot Program, Department of Justice and Community Safety), 23 (Sexual Assault Services Victoria Specialist Children Services).

82 Submissions 7 (Dr Bianca Fileborn, Dr Rachel Loney-Howes, Dr Tully O'Neill and Sophie Hindes), 17 (Sexual Assault Services Victoria). These were also observed in Julia Quilter and Luke McNamara, *Qualitative Analysis of County Court of Victoria Rape Trial Transcripts* (Report to the Victorian Law Reform Commission) (forthcoming).

83 Submission 63 (Office of Public Prosecutions).

84 *Jury Directions Act 2015* (Vic) pt 5; *Evidence Act 2008* (Vic) s 41; *Victims' Charter Act 2006* (Vic) s 4.

85 Submissions 17 (Sexual Assault Services Victoria), 21 (Victorian Aboriginal Child Care Agency), 47 (Criminal Bar Association).

18.71 Throughout this report we have recommended a range of reforms to improve justice responses to sexual offences. If the government accepts our recommendations, there must also be education and training to accompany the reforms. For example, training on:

- having the 'options talk' (see Chapter 17) and referrals to other justice options like restorative justice (see Chapter 9)
- the role of victim advocates (see Chapter 12)
- the content and procedure for jury directions (see Chapter 20)
- greater use of integrated jury directions and other decision-making aids for jurors (see Chapter 20)
- the use of a panel to source experts who can give evidence, and the use of expert evidence (see Chapter 20)
- having a discussion about cross-examination and other measures to ensure complainants are respected (see Chapter 21).

### Training should be collaborative and regular

18.72 Training in the criminal justice system is delivered within organisations and through a range of bodies, including through continuing professional development (see below). Legal professional bodies and the Judicial College of Victoria also play a role.

18.73 While we do not prescribe how such training should be delivered, we have identified some best practice principles for strengthening training and education. These include:

- the value of cross-agency and cross-jurisdictional training<sup>86</sup>
- the value of including lived experience (see box)
- including the expertise of counsellor advocates and social workers<sup>87</sup>
- the need for regular training that addresses emerging issues and captures new lessons.<sup>88</sup>

Lived experience training course should be mandated to be developed by people with lived experience of sexual abuse (and its impacts), for schools, educational institutions, courts, legal services, and police. Because having more education and awareness will change how people respond to sexual abuse, and them not always prioritising it last.—Anonymous member, Victim Survivors' Advisory Council<sup>89</sup>

18.74 An evaluation of New Zealand's Sexual Violence Court Pilot observed that:

well-designed, motivational training, regular opportunities to re-energise (such as through refresher training and regular stakeholder meetings) and regular communications of performance statistics will be important to maintaining momentum.<sup>90</sup>

18.75 We also support educational content designed in a way that is available on-demand and accessible through the use of technology.

86 Submissions 17 (Sexual Assault Services Victoria), 45 (Victims of Crime Commissioner); Legal Services Board and Office of Public Prosecutions (Victoria), *A Guide to the Sexual Offences Interactive Legal Education Program: Professional Development Advancing Best Practice in Sexual Offence Cases* (Report, 2012) <<http://www.opp.vic.gov.au/getattachment/d4c4246a-56cf-44d7-9db6-odfa085b8346/ilep-booklet-final.aspx>>. See also Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) Recommendation 6.

87 Submission 45 (Victims of Crime Commissioner); Consultation 32 (Anonymous member, Victim Survivors' Advisory Council).  
88 Submission 63 (Office of Public Prosecutions); Gravitas Research and Strategy Ltd, *Evaluation of the Sexual Violence Court Pilot* (Report, Ministry of Justice (NZ), June 2019) 85–7 <<https://www.districtcourts.govt.nz/reports-publications-and-statistics/publications/sexual-violence-court-pilot-evaluation-report/>>.

89 Consultation 32 (Anonymous member, Victim Survivors' Advisory Council (VSAC)).

90 Gravitas Research and Strategy Ltd, *Evaluation of the Sexual Violence Court Pilot* (Report, Ministry of Justice (NZ), June 2019) 4 <<https://www.districtcourts.govt.nz/reports-publications-and-statistics/publications/sexual-violence-court-pilot-evaluation-report/>>.



18.76 These principles should apply to the recommendation at the end of this chapter.

## How do we entrench education and training for lawyers and judicial officers?

### We should learn from past reforms

- 18.77 Our 2004 inquiry into sexual offences also dealt with the need for strengthening education and training.<sup>91</sup> While these recommendations led to several key reforms, these efforts have stalled.
- 18.78 For example, the Sexual Offences Interactive Legal Education Program was a pilot program of professional development and training for lawyers, led by the OPP and funded by the Legal Services Board. The Program was strongly supported and evaluated positively.<sup>92</sup> It included:
- an online module covering sexual offences, evidence, procedural and sentencing perspectives, information about victim survivors, the accused and conferencing
  - four interactive workshops on advocacy
  - confidential peer review after a sexual offence trial.<sup>93</sup>
- 18.79 When the program's funding was exhausted it was stopped.<sup>94</sup> The program is no longer active. A Charter of Advocacy for sexual assault cases was developed but is no longer in use.<sup>95</sup> The Charter was a guide for prosecution and defence lawyers about good conduct in sexual offence proceedings, and it recognised the challenges faced by victim survivors when giving evidence in court.<sup>96</sup> Training opportunities now seem to be based on demand or in response to reform.<sup>97</sup>
- 18.80 In our recent inquiry about improving the treatment of victims of crime, we made several recommendations addressing education and training (see box).

91 Victorian Law Reform Commission, *Sexual Offences* (Report No 5, July 2004) Recommendations 35–41, 171.

92 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) [4.72].

93 Legal Services Board and Office of Public Prosecutions (Victoria), *A Guide to the Sexual Offences Interactive Legal Education Program: Professional Development Advancing Best Practice in Sexual Offence Cases* (Report, 2012) <<http://www.opp.vic.gov.au/getattachment/d4c4246a-56cf-44d7-9db6-odfa085b8346/ilep-booklet-final.aspx>>.

94 Email from the Office of Public Prosecutions (Vic) to the Victorian Law Reform Commission, 23 April 2021.

95 The Charter of Advocacy was developed by the Department of Justice Sexual Assault Advisory Committee with input from the Supreme Court of Victoria, the County Court of Victoria, the Magistrates' Court of Victoria, the Office of Public Prosecutions, Victoria Police, the Victorian Bar Council, the Criminal Bar Association, the Law Institute of Victoria, Victoria Legal Aid and the Judicial College of Victoria: Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) [5.47].

96 Department of Justice (Vic), *The Charter of Advocacy: Prosecuting or Defending Sexual Assault Cases* (Charter, 2010) <[https://webarchive.nla.gov.au/awa/20110324001434/http://www.justice.vic.gov.au/wps/wcm/connect/justlib/DOJ+Internet/resources/4/e/4e3d168043b4ae59b916f9e640f93f6b/Charter\\_of\\_Advocacy\\_prosecuting\\_or\\_defending\\_sexual\\_offence\\_cases.pdf](https://webarchive.nla.gov.au/awa/20110324001434/http://www.justice.vic.gov.au/wps/wcm/connect/justlib/DOJ+Internet/resources/4/e/4e3d168043b4ae59b916f9e640f93f6b/Charter_of_Advocacy_prosecuting_or_defending_sexual_offence_cases.pdf)>.

97 Consultation 4 (Judicial College of Victoria).



**Our recommendations in *The Role of Victims of Crime in the Criminal Trial Process* (2016)**

**Recommendation 3:** The Victorian Legal Admissions Board, through its membership of the Law Admissions Consultative Committee, should advocate for the education and training requirements for admission to the legal profession to include the study of law and procedures relevant to victims, and the causes and effects of victimisation.

**Recommendation 4:** The Legal Services Board should take a lead role in encouraging barristers practising in criminal law to receive victim-related professional development training including, if necessary, exercising its power under the Legal Profession Uniform Continuing Professional Development (Barristers) Rules 2015 to specify that they must complete such training within their first three years of practice.

**Recommendation 6:** Victoria Legal Aid and the Office of Public Prosecutions should lead, in consultation with stakeholders, the development and delivery of a training program to foster cultural change in how victims are perceived and treated during the criminal trial process, based on the Sexual Offences Interactive Legal Education Project.

**Recommendation 17:** The Judicial College of Victoria, in consultation with the heads of jurisdictions, should include in its practical guides for judicial officers information and guidance about responding to the needs and interests of victims in the courtroom, including preferred practices in acknowledging victims in the courtroom and referring to deceased victims by name rather than as 'the deceased'.

The last recommendation has been implemented.<sup>98</sup>

18.81 The waning of these efforts confirms the need to entrench education and training:

There is no requirement for ... legal actors to have up-to-date knowledge of the legislation or its interpretation, as incorrect understandings are corrected in the trial process. Indeed, there is no sanction for practitioners who display a lack of current knowledge. Inconsistent and ad hoc measures to educate legal practitioners about changes to legislation increase the likelihood that practitioners are not up-to-date with the legislation. In relation to education concerning specific reforms, current processes tend to be 'one-off' and largely informal.<sup>99</sup>

18.82 We recommend therefore that funding for this training should be ongoing and the take-up of training should be reported annually by agencies involved.

<sup>98</sup> Judicial College of Victoria, *Victims of Crime in the Courtroom: A Guide for Judicial Officers* (Guide, 2019) <<https://www.judicialcollege.vic.edu.au/resources/victims-crime-courtroom>>.

<sup>99</sup> Nicole Bluett-Boyd and Bianca Fileborn, *Victim/Survivor-Focused Justice Responses and Reforms to Criminal Court Practice* (Research Report No 27, Australian Institute of Family Studies (Cth), April 2014) 58 <<https://aifs.gov.au/publications/victim-survivor-focused-justice-responses-and-reforms-criminal-court-practice>>.

## Lawyers should have ongoing specialised training

### Training lawyers has value

- 18.83 The New Zealand Law Commission explains the importance of training lawyers who appear in court (counsel) in cases involving sexual offences:

Non-specialist defence counsel are likely to be unaware of the best cross-examination techniques to thoroughly test the evidence, but in a way that is least likely to cause harm or distress to a complainant witness. Specialisation may also be beneficial on the prosecution side; for example, prosecutors in sexual violence cases may need to be particularly alive to the forms of cross-examination that are inappropriate ...<sup>100</sup>

- 18.84 Judges from New Zealand's Sexual Violence Court Pilot explained that educating lawyers had been a key part of the pilot, and that even lawyers who resisted it found it helpful.<sup>101</sup> In Scotland, a review has recommended trauma-informed training for lawyers appearing in cases involving children, and suggested training-based accreditation to work on cases funded by legal aid.<sup>102</sup>

#### Examples of training overseas

The training for New Zealand's Sexual Violence Court Pilot (see earlier) covered the scope and purpose of the pilot and how to question children and other vulnerable witnesses. This was delivered by communications experts and through video. They also used training materials and resources from The Advocate's Gateway in England and Wales.<sup>103</sup>

In England and Wales, while lawyers do not have to complete any training to appear in court, in practice it is common for them to complete a course run by the Inns of Court College of Advocacy. This course teaches skills for effective and appropriate questioning of children and vulnerable witnesses.<sup>104</sup>

Trial judges are encouraged to ask lawyers in ground rules hearings if they have completed this course, and the Crown Prosecution Service only instructs lawyers who have completed the course.<sup>105</sup> It may become mandatory in the future for publicly funded representation.<sup>106</sup> This training in specialist skills for effective communication has led to improvements in the way lawyers deal with vulnerable witnesses. Further, younger lawyers may be better disposed to learning and applying new skills.<sup>107</sup>

100 Law Commission (New Zealand), *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (Report No 136, December 2015) [5.54] <<https://www.lawcom.govt.nz/our-projects/alternative-models-prosecuting-and-trying-criminal-cases?id=1270>>.

101 Consultation 37 (New Zealand District Court judges with experience on the sexual violence court pilot).

102 Lord Justice Clerk's Review Group, *Improving the Management of Sexual Offence Cases* (Report, Scottish Courts and Tribunal Service, March 2021) [6.12] <<https://www.scotcourts.gov.uk/docs/default-source/default-document-library/reports-and-data/improving-the-management-of-sexual-offence-cases.pdf?sfvrsn=6>>.

103 Consultation 37 (New Zealand District Court judges with experience on the sexual violence court pilot). See *Advocate's Gateway* (Web Page) <<https://www.theadvocatesgateway.org>>.

104 'Advocacy & The Vulnerable (Crime)', *The Inns of Court College of Advocacy* (Web Page) <<https://www.icca.ac.uk/advocacy-the-vulnerable-crime/>>.

105 JUSTICE (UK), *Prosecuting Sexual Offences* (Report, 2019) 62–3 <<https://justice.org.uk/our-work/criminal-justice-system/prosecuting-sexual-offences/>>.

106 Joyce Plotnikoff and Richard Woolfson, *Falling Short? A Snapshot of Young Witness Policy and Practice* (Report, NSPCC, February 2019) 117–18 <<https://learning.nspcc.org.uk/media/1672/falling-short-snapshot-young-witness-policy-practice-full-report.pdf>>.

107 Ibid 116.

## How are lawyers trained now?

- 18.85 The OPP's Specialist Sex Offences Unit prosecutes sexual offences.<sup>108</sup> The OPP told us that there are a number of specialist in-house lawyers 'who routinely conduct this work and focus on the most complex sexual offence prosecutions'.<sup>109</sup> Crown Prosecutors<sup>110</sup> or external counsel (the 'private bar') appear in court as prosecution counsel. Office-wide training in understanding trauma and working with people experiencing sexual violence is often conducted by social workers from the Witness Assistance Service and Child Witness Service.<sup>111</sup>
- 18.86 The OPP also told us that it 'provides extensive training to staff in relation to criminal law and evidence generally. Sexual offences forms part of that training. There is also extensive training in relation to victim engagement.' A Victims Training Committee identifies areas for skill development in victim engagement.<sup>112</sup> (We discuss police prosecutors in Chapter 17.)
- 18.87 However, external counsel do not receive training. Cecilia, a victim survivor, told us that her experience with prosecution counsel had been 'very negative', and that her prosecution counsel was not trained in sexual offences, but in gangland crime.<sup>113</sup>
- 18.88 Lawyers (including defence and prosecution counsel) must complete 10 continuing professional development (CPD) activities annually to hold a certificate to practise law each year.<sup>114</sup> Counsel must complete at least one CPD activity every year in each of the following areas:
- law, practice and procedure
  - advocacy skills
  - ethics and professional responsibility
  - management and business skills.<sup>115</sup>
- 18.89 The Victorian Bar accredits counsel specialising in criminal law through the Indictable Crime Certificate (ICC), which must be renewed every three years. The scheme was developed to ensure that cases which receive legal aid are run by appropriately skilled counsel, based on recommendations we made in 2009.<sup>116</sup> Certification is based on education, professional experience and assessment components. It covers criminal law generally.
- 18.90 In most cases the, OPP hires ('briefs') external counsel to appear in court.<sup>117</sup> This is also true of Victoria Legal Aid (VLA), which represents accused people who cannot afford a private lawyer.<sup>118</sup>
- 18.91 The OPP matches counsel's expertise to the complexity of cases. There is a pool of approximately 250 barristers.<sup>119</sup>

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108 This was established following our previous inquiry into sexual offences: Success Works, *Sexual Assault Reform Strategy* (Final Evaluation Report, Department of Justice (Vic), January 2011) 64 <<https://trove.nla.gov.au/version/169811763>>.

109 Submission 63 (Office of Public Prosecutions).

110 Crown Prosecutors are appointed by the Governor in Council: *Public Prosecutions Act 1994* (Vic) pt 5. Crown Prosecutors appeared in the most high profile and complex matters: Office of Public Prosecutions (Vic), *Annual Report 2019–20* (Report, 2020) 13 <<https://www.opp.vic.gov.au/getattachment/e11ee2b9-gd3e-4555-88fc-50c7003ea091/15322-OPP-Annual-Report-2019-2020-Full-web.aspx>>.

111 Submission 63 (Office of Public Prosecutions).

112 Information provided by the Office of Public Prosecutions (Vic) to Victorian Law Reform Commission, 12 July 2021. Training provided to staff is also informed by the following report: Centre for Innovative Justice (RMIT University), *Communicating with Victims about Resolution Decisions: A Study of Victims' Experiences and Communication Needs* (Report to the Office of Public Prosecutions (Vic), April 2019) <<https://cij.org.au/cms/wp-content/uploads/2018/08/communicating-with-victims-about-resolution-decisions--a-study-of-victims-experiences-and-communication-needs-1.pdf>>.

113 Consultation 56 (Cecilia, a victim survivor of sexual assault).

114 *Legal Profession Uniform Continuing Professional Development (Barristers) Rules 2015* r 8; *Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015* r 6.

115 'Barrister Professional Development', *Victorian Bar* (Web Page) <<https://www.vicbar.com.au/public/barrister-professional-development>>.

116 Geoffrey M Eames, 'Indictable Crime Certificate Committee Launch' (Summer 2014) (156) *Victorian Bar News* 14; Victorian Law Reform Commission, *Jury Directions* (Report No 17, July 2009) ch 7.

117 In 2019–20, external counsel for the prosecution appeared in 88.2% of all committals, County and Supreme Court trials and appeals: Office of Public Prosecutions (Vic), *Annual Report 2019–20* (Report, 2020) 13 <<https://www.opp.vic.gov.au/getattachment/e11ee2b9-gd3e-4555-88fc-50c7003ea091/15322-OPP-Annual-Report-2019-2020-Full-web.aspx>>.

118 Submission 27 (Victoria Legal Aid).

119 'Our Briefing Practices', *Office of Public Prosecutions Victoria* (Web Page) <<https://www.opp.vic.gov.au/Our-Work/Advocacy-and-Briefing/Our-Briefing-Practices>>.

- 18.92 Counsel who are briefed by VLA's in-house practice or panel law firms to appear in legally aided cases must be on VLA's Criminal Trial Preferred Barrister List.<sup>120</sup> Counsel on this list have different levels of experience and expertise.<sup>121</sup> There is an application process and requirements to be placed on this list, which includes holding an ICC.
- 18.93 VLA used to have a 'specialist sex offences team' but this has been absorbed into its general team for indictable crimes 'because of the concern about staff wellbeing of undertaking only sexual offences work.'<sup>122</sup>
- 18.94 Most lawyers who appear in sexual offence cases are from the private bar.

### Should training be compulsory for lawyers?

- 18.95 We heard widespread support for strengthening training. The more difficult question was whether this should be required, rather than voluntary. We heard widespread support for requiring lawyers to be trained and accredited before appearing in court in a sexual offence case.<sup>123</sup>
- 18.96 The County Court of Victoria suggested that it may be reasonable to expect accreditation because of the complexity of sexual offences.<sup>124</sup> Requiring training through accreditation could help improve the quality of counsel.<sup>125</sup>
- 18.97 However, there may be risks to this approach. For example, it could reduce the availability of counsel,<sup>126</sup> which would especially affect regional areas.<sup>127</sup> We also heard that many criminal barristers prefer not to work only on cases involving sexual offences because of the risks to their wellbeing.<sup>128</sup>
- 18.98 The Criminal Bar Association (CBA) observed that adding to existing requirements for education would affect junior counsel, who earned less while completing training, and it would be unfair if barristers in civil law were not subject to similar requirements.<sup>129</sup>
- 18.99 The Magistrates' Court of Victoria supported increased training for lawyers but expressed concerns about making it mandatory. It argued that mandatory training may result in only a select number of willing counsel doing sexual offence work, and that directing counsel to complete training is less likely to be effective.<sup>130</sup>
- 18.100 The OPP stated that, if training was required, it would need to be accessible so that people remained willing to work in this area.<sup>131</sup>
- 18.101 The County Court of Victoria suggested that accreditation for sexual offence work could be achieved for counsel by incorporating training on sexual violence in the Indictable Crime Certificate (ICC) scheme.<sup>132</sup> It also stated that it would be preferable for counsel who do not undertake the ICC to also undergo accreditation.<sup>133</sup> But VLA told us that adding requirements for accreditation could cause 'certificate fatigue'.<sup>134</sup>

120 'Criminal Trial Preferred Barrister List', *Victoria Legal Aid* (Web Page, 17 December 2018) <<https://www.legalaid.vic.gov.au/information-for-lawyers/doing-legal-aid-work/criminal-trial-preferred-barrister-list>>. There are exceptions for trials of 15 days or less: *Victoria Legal Aid, Annual Report 2019–20* (Report, 2020) 53 <<https://www.legalaid.vic.gov.au/about-us/our-organisation/annual-report>>. VLA's practitioner panels include the Indictable Crime Panel and a Sexual Offences and Major Crimes subset. Private law firms must register and individual lawyers must apply to be on practitioner panels. Eligibility criteria for panels are set by Victoria Legal Aid: 'Practitioner panels', *Victoria Legal Aid* (Web Page, 8 September 2020) <<https://www.legalaid.vic.gov.au/information-for-lawyers/practitioner-panels>>.

121 In 2019–20, there were 233 counsel on the Criminal Trial Preferred Barrister List. Of these 217 were members of the Victorian Bar; 16 were Senior Counsel of the Victorian Bar and 16 were employed by VLA Chambers: *Victoria Legal Aid, Annual Report 2019–20* (2020) 53 <<https://www.legalaid.vic.gov.au/about-us/our-organisation/annual-report>>.

122 Submission 27 (Victoria Legal Aid).

123 Submissions 45 (Victims of Crime Commissioner), 55 (Springvale Monash Legal Service), 59 (County Court of Victoria).

124 Submission 59 (County Court of Victoria).

125 Consultation 49 (Victoria Legal Aid).

126 Submission 59 (County Court of Victoria).

127 Consultation 95 (Victoria Legal Aid (No 2)).

128 Submission 27 (Victoria Legal Aid); Consultation 36 (Criminal Bar Association).

129 Consultation 36 (Criminal Bar Association).

130 Consultation 86 (Magistrates' Court of Victoria (No 2)).

131 Consultation 94 (Office of Public Prosecutions (No 2)).

132 Submission 59 (County Court of Victoria).

133 Ibid.

134 Consultation 49 (Victoria Legal Aid).

- 18.102 We previously recommended victim-related professional development training through the CPD scheme for lawyers within the first three years of practice (see box). A similar approach has been suggested by the Victorian Legal Services Board.<sup>135</sup>
- 18.103 The CBA stated that junior counsel are usually briefed in legally aided cases for sexual offences because VLA fees are not high enough to attract more senior counsel.<sup>136</sup> The CBA explained that funding for preparation is low. It stated:
- The fundamental issue is one of funding ... [sexual offence matters] are often slim briefs, but very dense, and to do them properly requires preparation ... For County Court trials, there is a flat fee structure. They don't have senior counsel in those cases, yet these are cases where people are being sentenced for longer terms.<sup>137</sup>
- 18.104 VLA fees could be increased. VLA told us that this would appropriately signal the importance and complexity of working in sexual offences.<sup>138</sup> This concern has also been recognised in reviews.<sup>139</sup> The OPP suggested that if defence counsel were to receive a fee loading to complete training then prosecution counsel should also have this fee loading to make it an even playing field.<sup>140</sup>

### We recommend encouraging training for lawyers and using fee incentives

- 18.105 We recognise that requiring training creates a risk of reducing the availability of counsel. However, if training is voluntary, there is a risk that only those already keen to adopt best practice will take part.
- 18.106 To balance these competing concerns, there should be an accreditation scheme for counsel appearing in sexual offence cases, with incentives to become accredited.
- 18.107 Accreditation should require completion of the training outlined earlier. It should be a separate specialist accreditation so that it is easily identifiable.
- 18.108 So that it does not limit the availability of counsel, especially in regional areas, there should be incentives for accreditation. This should involve:
- increasing fees for sexual offence cases for both prosecution and defence counsel
  - only briefing prosecution and defence counsel (for legally aided matters) who hold this accreditation.
- 18.109 We made a similar recommendation in our report on jury directions in 2009 to increase fees for counsel because of the complexity of sexual offence trials.<sup>141</sup> Increasing fees would promote higher quality work in sexual offence cases. In our *Committals* report we observed that briefing more experienced counsel would reduce delays and, therefore, reduce the costs of trials.<sup>142</sup> Different fee structures already apply for legally aided work in the Supreme Court of Victoria to recognise the complexity of those matters.
- 18.110 As most counsel appearing in sexual offence matters are briefed by the OPP or are legally aided, limiting their briefs to accredited counsel will be a strong incentive. We recognise, however, that this will not be as strong an incentive for some counsel who work for clients privately.

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135 It recommended that they undertake CPD within the first three years to 'develop values and behaviours that will sustain their career, including in the areas of ethics, diversity and inclusion, sexual harassment, family violence, and health and wellbeing': Chris Humphreys and Victorian Legal Services Board and Commissioner, *Getting the Point? Review of Continuing Professional Development for Victorian Lawyers* (Report, Victorian Legal Services Board and Commissioner, November 2020) Recommendation 8 <[https://lsbc.vic.gov.au/sites/default/files/2020-11/CPD\\_Report\\_Final\\_0.pdf](https://lsbc.vic.gov.au/sites/default/files/2020-11/CPD_Report_Final_0.pdf)>.

136 Consultation 36 (Criminal Bar Association).

137 Ibid.

138 Consultation 95 (Victoria Legal Aid (No 2)).

139 See, eg, PricewaterhouseCoopers, *Criminal and Family Law Private Practitioner Service Delivery Model* (Report for the Law Institute of Victoria, October 2015) 24 <[https://www.liv.asn.au/PDF/Practice-Resources/LIV-Service-Delivery-Model\\_FINAL-REPORT.aspx](https://www.liv.asn.au/PDF/Practice-Resources/LIV-Service-Delivery-Model_FINAL-REPORT.aspx)>; Productivity Commission (Cth), *Access to Justice Arrangements* (Inquiry Report, 2014) vol 2, 726–8 <<https://www.pc.gov.au/inquiries/completed/access-justice/report>>.

140 Consultation 94 (Office of Public Prosecutions (No 2)).

141 Victorian Law Reform Commission, *Jury Directions* (Report No 17, July 2009) Recommendation 49.

142 Victorian Law Reform Commission, *Committals* (Report No 41, March 2020) [7.25]–[7.30], Recommendations 15–18.

- 18.111 For accreditation to achieve the objective of a highly skilled legal workforce, it is important that accreditation depends on counsel continuing to demonstrate their knowledge, skill and a trauma-informed approach.
- 18.112 We do not prescribe how to design or deliver this accreditation scheme. This will require further consultation with the legal profession, and should be decided by the OPP, VLA and relevant legal profession bodies.

## Training judicial officers has value

### How are judicial officers trained now?

- 18.113 In the County Court of Victoria, judges who sit in the Sexual Offences List are 'necessarily experienced in sexual offence trials' and become more effective and efficient as they engage with these issues.<sup>143</sup> Internal education includes 'Court of Appeal workshops' and informal support from judicial colleagues on request. Newly appointed judges are also provided with training videos on ground rules hearings and special hearings developed by the Judicial College of Victoria.<sup>144</sup> A Sexual Offences List User Group also meets to discuss relevant practices and procedures and reforms.<sup>145</sup>
- 18.114 In the Magistrates' Court of Victoria, magistrates build expertise by sitting in the Sexual Offences List. The court arranges regular in-house training on relevant laws, procedures, and court craft. It also arranges presentations from experts to improve understanding of the dynamics of sexual offending and risk.<sup>146</sup> Recent training has covered topics such as ground rules hearings without an intermediary, and legislative reforms.<sup>147</sup>
- 18.115 The Judicial College of Victoria is responsible for education and training of judicial officers, which it develops with judicial officers. Its publications and resources include content on sexual offences and guidance on the treatment of victims of crime in the courtroom.<sup>148</sup> It offers programs on sexual offences based on need and demand, such as a recent webinar on intermediaries and a program on child sexual abuse.<sup>149</sup>

<sup>143</sup> Submission 59 (County Court of Victoria).

<sup>144</sup> Email from the County Court of Victoria to the Victorian Law Reform Commission, 30 July 2021.

<sup>145</sup> The group includes representatives from the County Court, prosecutors and defence lawyers, legal professional bodies, and support services: County Court of Victoria, *Annual Report 2019–20* (Report, 2020) 30 <<https://www.countycourt.vic.gov.au/files/documents/2021-02/ccvannualreport2019-20.pdf>>.

<sup>146</sup> Consultation 71 (Magistrates' Court of Victoria (No 1)).

<sup>147</sup> These took place in 2019–20: *ibid*.

<sup>148</sup> Judicial College of Victoria, *Victims of Crime in the Courtroom: A Guide for Judicial Officers* (Guide, 2019) <<https://www.judicialcollege.vic.edu.au/resources/victims-crime-courtroom>>; implementing Recommendation 17 of Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016).

<sup>149</sup> Consultation 4 (Judicial College of Victoria).



### Training for judicial officers overseas

Judges in England and Wales must be authorised to try sexual offence cases (also known as a 'ticket'). This requires judges to attend a Serious Sexual Offences course every three years.<sup>150</sup> The course aims to equip judges to handle cases confidently and sensitively, as well as to understand the law and practice.<sup>151</sup> In a survey of judges most of them acknowledged that training had a positive impact on their practice.<sup>152</sup>

The New Zealand Law Commission has recommended a similar system of 'designating' judges who must complete training and be considered suitable to deal with matters of sexual violence.<sup>153</sup> Training initiatives for judges are underway in the form of two- or three-day programmes on best practice for dealing with vulnerable complainants in sexual offence cases.<sup>154</sup>

Canada has recently changed its law to require judicial officers to undertake after they are appointed 'training on matters related to sexual assault law and social context, which includes systemic racism and systemic discrimination.'<sup>155</sup>

### Should training be compulsory for judicial officers?

- 18.116 The Magistrates' Court of Victoria and some judges of the County Court of Victoria supported requiring specialised training for magistrates and judges.
- 18.117 The Magistrates' Court of Victoria suggested a similar model to that used in the Specialist Family Violence Division of the Court. A magistrate must complete training before they can sit in that Division. This could apply to the Sexual Offences List, or to hear criminal proceedings involving a sexual offence.<sup>156</sup>
- 18.118 Some judges of the County Court of Victoria favoured requiring ongoing training for all judges on criminal lists, so that the work could be shared.<sup>157</sup> Both courts agreed, however, that some magistrates and judges might use any requirements for training as a reason to avoid this challenging work.<sup>158</sup>
- 18.119 The County Court of Victoria also told us that judges sitting on appeals from County Court trials would also benefit from further education and training on sexual violence, procedures and trauma-informed practices.<sup>159</sup> The OPP also supported training of 'all levels' of the judiciary.<sup>160</sup> Judges sitting on appeals do not have the same specialised training as those running trials.

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150 JUSTICE (UK), *Prosecuting Sexual Offences* (Report, 2019) 60 <<https://justice.org.uk/our-work/criminal-justice-system/prosecuting-sexual-offences/>>.

151 Judicial College (England and Wales), *Prospectus for Courts Judiciary April 2019–March 2020* (Report, 22 April 2021) 30 <<https://www.judiciary.uk/announcements/judicial-college-prospectus-2021-2022/>>.

152 Joyce Plotnikoff and Richard Woolfson, *Falling Short? A Snapshot of Young Witness Policy and Practice* (Report, NSPCC, February 2019) 121 <<https://learning.nspcc.org.uk/media/1672/falling-short-snapshot-young-witness-policy-practice-full-report.pdf>>.

153 Law Commission (New Zealand), *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (Report No 136, December 2015) [5.75]–[5.79], Recommendations 22–23 <<https://www.lawcom.govt.nz/our-projects/alternative-models-prosecuting-and-trying-criminal-cases?id=1270>>.

154 Office of the Under-Secretary to the Minister for Justice (Domestic and Sexual Violence Issues) (NZ), *Improving the Justice Response to Victims of Sexual Violence* (Cabinet Paper, 2 July 2019) [19] <<https://www.justice.govt.nz/assets/Documents/Publications/7236-Proactive-release-SV-response-final.pdf>>.

155 Department of Justice (Canada), *Judicial Continuing Education in Sexual Assault Law and Social Context* (Web Page, 4 February 2020) <<https://www.justice.gc.ca/eng/csj-sjc/pl/jt-fj/index.html>>.

156 Consultation 71 (Magistrates' Court of Victoria (No 1)).

157 Consultation 87 (County Court of Victoria (No 2)).

158 Consultation 86 (Magistrates' Court of Victoria (No 2)); Consultation 87 (County Court of Victoria (No 2)).

159 Submission 59 (County Court of Victoria).

160 Submission 63 (Office of Public Prosecutions).



- 18.120 The Victims of Crime Commissioner supported minimum training and experience requirements for judicial appointments.<sup>161</sup> Domestic Violence and Rape Services Australia similarly suggested that in making judicial appointments, the government should consider relevant training and experience, as well as suitability as to character.<sup>162</sup> Others suggested looking outside the traditional avenues of promotion to appoint more diverse judicial officers.<sup>163</sup>

### Training and the right qualifications should be required for judicial officers

- 18.121 We are persuaded by the County Court of Victoria and the experiences in other countries that training should be required for judicial officers. It is needed to bring about cultural change in courtroom practices and to ensure a respectful and safe environment for complainants.
- 18.122 This should apply to all judicial officers who hear criminal cases in the Magistrates' Court of Victoria and the County Court of Victoria.
- 18.123 The head of each jurisdiction is able to direct all or some of its judicial officers to participate in a specified professional development or continuing education and training activities.<sup>164</sup> This approach could be taken for judicial officers who sit on criminal cases, to ensure everyone is appropriately trained.
- 18.124 The availability of judicial officers would not be limited. By training all judicial officers who sit in crime, courts could still rotate judicial officers to reduce the risk of burn out.
- 18.125 We recognise that judges in the Victorian Court of Appeal do not have the same training needs as judges who run trials, as complainants are not usually present. However, appeal judges regularly review cases run by trial judges, and this creates risks of misconceptions that may then constrain specialised judges.
- 18.126 Appeal judges may not have run sexual offence trials before they were appointed. Those who have run sexual offence trials may have done so before many of the major reforms to sexual offence laws and procedures, including those aimed at recognising the impact of sexual violence on complainants. We consider it would be valuable for them to understand the complexities of these trials, such as directing juries or the use of trauma-informed practices. We recommend, therefore that appeal judges should be required to receive specialised training, although it does not need to be as extensive.
- 18.127 We also agree that the Attorney-General should be required to consider, when appointing new judicial officers, the suitability to hear sexual offence cases for the Magistrates' Court of Victoria and especially the County Court of Victoria. A similar approach to appointments was recommended in the recent review of sexual harassment in courts.<sup>165</sup>

<sup>161</sup> Submission 45 (Victims of Crime Commissioner).

<sup>162</sup> Submission 39 (Rape & Domestic Violence Services Australia).

<sup>163</sup> Consultation 6 (Dr Emma Henderson and Dr Kirsty Duncanson).

<sup>164</sup> *Magistrates' Court Act 1989* (Vic) s 13B; *Supreme Court Act 1986* (Vic) s 28A; *County Court Act 1958* (Vic) s 17AAA; Helen Szoke, *Preventing and Addressing Sexual Harassment in Victorian Courts and VCAT* (Appendix 3, February 2021) 12 <<https://www.shreview.courts.vic.gov.au/wp-content/uploads/2021/04/Appendix-3-Judicial-independence-accountability-and-the-role-of-the-Heads-of-Jurisdictions.pdf>>.

<sup>165</sup> Helen Szoke, *Preventing and Addressing Sexual Harassment in Victorian Courts and VCAT* (Report and Recommendations, March 2021) Recommendation 5 <<https://www.shreview.courts.vic.gov.au/wp-content/uploads/2021/04/Report-and-Recommendations-Preventing-and-Addressing-Sexual-Harassment-in-Vic-Courts.pdf>>.

## Recommendations

- 69 The Victorian Government should fund the development and delivery of a program to educate and train police, lawyers, judges and magistrates on:
- a. the nature and prevalence of sexual violence in the community
  - b. the effects of trauma and how to reduce the risk of further trauma
  - c. barriers to disclosure and reporting sexual violence
  - d. identifying and countering misconceptions about sexual violence
  - e. how to respond to diverse experiences and contexts of sexual violence
  - f. effective communication with and questioning of victim survivors, including children
  - g. procedures related to ground rules hearings and the role of intermediaries
  - h. limits on improper questioning and judicial intervention
  - i. alternative arrangements for giving evidence, and special hearings for children and people with a cognitive impairment
  - j. the therapeutic treatment order system
  - k. any reforms implemented from this report.
- Funding for the program should be on an ongoing basis.
- 70 Data on the take up of the program in Recommendation 69 across each of these agencies should be published annually.
- 71 The Office of Public Prosecutions and Victoria Legal Aid, in consultation with relevant legal professional bodies, should take the lead on developing the requirements for specialised training based on the program in Recommendation 69. Only accredited counsel in sexual offences cases who meet the training requirements should be briefed to appear for the prosecution, or in legally aided cases.
- 72 Victoria Legal Aid and the Office of Public Prosecutions should increase fees for accredited counsel in sexual offence cases who meet the training requirements developed in Recommendation 71, in consultation with the Victorian Bar. The Victorian Government should fund the increase in fees on an ongoing basis.
- 73 All judicial officers in the Magistrates' Court of Victoria, County Court of Victoria and the Victorian Court of Appeal who sit on criminal cases or appeals involving sexual offences should be required to complete education and training in areas covered in the program in Recommendation 69.
- 74 In making future judicial appointments, the Victorian Attorney-General should consider the potential appointees' suitability for hearing cases involving sexual offences.

# CHAPTER 19

## Sexual offence trials: key issues

412 Overview

412 The fundamental features of the trial process

414 Improving the court process still matters

415 The court process keeps being reformed

416 Delays need to be reduced

422 Tendency and coincidence evidence can be critical in child sexual abuse cases

424 There might be a case for improving appeals in sexual offences

# 19. Sexual offence trials: key issues

## Overview

- The fundamental aims and principles of the criminal justice system mean that it may not always give people who experience sexual violence the justice they need.
- Key features of our justice system sometimes make it hard for sexual offences to be proved in court, and hard for victim survivors to go through the process.
- Many factors that affect the experience of victim survivors who go to court, such as delay or the scope for appeal, are issues that affect the broader criminal justice system.
- There have been decades of reform to address these issues. There are also key reforms, such as to tendency and coincidence evidence and joint trials, that are still in progress. We recommend that the government implement recommendations from our *Committals* report.
- Given how critical this evidence is to sexual offence trials, we recommend that reforms to tendency and coincidence evidence are evaluated.
- We also acknowledge concerns about appeals, especially the negative impacts appeals may have on complainants. We suggest a review of appeals.

## The fundamental features of the trial process

### What is the role of a trial?

- 19.1 Sexual offences are heard in different places within our criminal justice system. 'Summary' sexual offences are heard in the Magistrates' Court of Victoria and decided by a magistrate. 'Indictable' sexual offences (usually more serious offences, including rape and sexual assault) are heard in a trial in the County Court of Victoria. Most criminal offences, including all sexual offences involving child accused, are heard in the Children's Court of Victoria by a magistrate.<sup>1</sup>
- 19.2 The trial is an essential feature of Australia's criminal justice system. The rules of evidence and procedure reflect the community's sense of what is fair. In the adversarial system, the trial is a contest between the prosecution, acting as the state's representative, and the accused, who is usually represented by defence counsel. The person who says they have suffered the harm (the complainant) is not a party to the proceeding. They are a witness.
- 19.3 The prosecution and defence decide how to conduct their cases and define the issues for the jury to consider. The case is presented mostly by witness evidence (including the complainant as a witness).

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<sup>1</sup> The definition of a child for this purpose is those aged 10 or above and aged under 18 at the time of the offence, but does not include anyone 19 years or older at the time the proceeding commences: *Children, Youth and Families Act 2005* (Vic) ss 3 (definition of 'child'), 516. 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.

- 19.4 In sexual offence trials, the complainant will usually give their main evidence (evidence-in-chief) before being questioned (cross-examined) by the defence and again (re-examined) by the prosecution. If the accused is convicted, complainants can talk about the experience and impact of the sexual offence committed against them by making a victim impact statement at the sentencing hearing.<sup>2</sup>
- 19.5 The judge ensures that the rules of evidence and procedure are followed. After the prosecution and the defence have presented their cases, the judge instructs the jury about the law to be applied. The jury then decides whether the prosecution has proved beyond reasonable doubt that the accused committed the crimes charged.
- 19.6 The trial is therefore:  
     not an inquiry into 'the truth'. It is a process by which the prosecution seeks to prove guilt beyond reasonable doubt, and in various ways the presumption of innocence manifests. For the defence, gaps in the prosecution case are typically its focal point. They have no ultimate burden of proof, but their focus will be on raising reasonable doubt regarding the prosecution's case. This focus on procedural truth, in contrast to objective truth, acknowledges that truth-seeking is an objective, but not the sole objective.<sup>3</sup>
- 19.7 The accused is entitled to a fair trial. The accused is presumed to be innocent until proved guilty. The accused has rights and minimum guarantees to ensure a fair trial.<sup>4</sup>
- 19.8 The prosecution must act independently and impartially and conduct the case fairly. It must disclose all evidence relevant to the charges against the accused, even if that might undermine the prosecution case or assist the defence.<sup>5</sup> The prosecution must also act in the public interest, which may not always align with the complainant's interest.
- 19.9 This means that within our legal system the role of a complainant in a trial is limited. As Jonathan Doak has said:  
     Although many victims may feel as though they are 'owed' a right to exercise a voice in decision-making processes, such as prosecution, reparation and sentencing, the criminal justice system places such rights or interests in a firmly subservient position to the collective interests of society in prosecuting the crime and imposing a denunciatory punishment.<sup>6</sup>
- 19.10 This was recognised in our recent inquiry into the role of victims of crime at trial. However, as we discussed in depth there, this role is evolving and they are now recognised as having an interest in the criminal justice system's response and as a participant in the proceedings.<sup>7</sup>

### The criminal justice system has its limits

- 19.11 Changing fundamental features of our criminal justice system, such as the burden and standard of proof or the adversarial nature of the trial, would have wide-ranging effects, including on the right to a fair trial. Any such changes would need to have strong support and evidence. We did not find such support or evidence in this inquiry.
- 19.12 We recognise, however, that some of these fundamental features mean that the criminal justice system will limit how much it can provide the form of justice that some people who experience sexual violence need. As we discuss in Chapter 2, people have different 'justice needs' that the criminal justice system may not meet.

<sup>2</sup> *Victims' Charter Act 2006* (Vic) s 13.

<sup>3</sup> Jill Hunter et al, *The Trial: Principles, Process and Evidence* (Federation Press, 2nd ed, 2021) 3.

<sup>4</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 24–25.

<sup>5</sup> See David Plater, 'The Development of the Prosecutor's Role in England and Australia with Respect to Its Duty of Disclosure: Partisan Advocate or Minister of Justice?' (2006) 25(2) *University of Tasmania Law Review* 111.

<sup>6</sup> Jonathan Doak, 'Victims' Rights in Criminal Trials: Prospects for Participation' (2005) 32(2) *Journal of Law and Society* 294, 299–300.

<sup>7</sup> Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) chs 2–3. This is now reflected in *Victims' Charter Act 2006* (Vic) s 4(ba).

- 19.13 Some of these features also make sexual offences more difficult to prove in court. By their nature, sexual offending often happens in private, without other witnesses. The accused does not have to give evidence because they have a right to silence. For rape, the need to prove there was no consent means that many cases will end up focusing on the complainant. For these reasons, trials for sexual offences are also more likely to be more distressing and invasive for complainants.
- 19.14 As counsellor advocates told us, reforms can and have made the system kinder, but that will not address the fundamentals of a system that pits one person's word against another.<sup>8</sup>
- 19.15 For these reasons, we have recommended a range of other justice options (see Chapters 9, 10 and 11) that may better meet the different needs of people who experience sexual violence. We also recommend more focus on preventing sexual offending and earlier responses to sexual offending (see Chapters 3 and 13).

## Improving the court process still matters

### Trials have value to society and victim survivors

- 19.16 Despite these limits, the criminal justice system is still the main response of our society to sexual offending. The courts are where people are tried for their crime and, if they are held to account, where sexual offending is denounced. They are a forum where the community's understandings about sexual violence play out. For at least some people, it is an experience that affirms what happened to them, and which protects others from further violence.
- 19.17 In Chapter 1 we discuss data on the number of people who go to trial. Even though few people who have experienced sexual violence go to trial, it still matters what happens at them. The system can still be made kinder and the decision-making process can still be improved. There are still ways we can improve the trial process and, despite the limits of the system, it is still worth the effort.

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8 Consultation 25 (CASA senior counsellor/advocates). We note that such characterisations of sexual offence trials (also referred to 'word on word' or 'she said/he said') may not be accurate. Often, the accused does not give evidence. There may be other evidence supporting the complainant's evidence such as DNA evidence, expert evidence and CCTV footage. The researchers in our transcript analysis suggest that a more accurate description 'might be "she said/she's lying", which serves to underscore just how firmly the focus remains on the complainant, and how regular lying assertions are': Julia Quilter and Luke McNamara, *Qualitative Analysis of County Court of Victoria Rape Trial Transcripts* (Report to the Victorian Law Reform Commission) (forthcoming).

## The court process keeps being reformed

19.18 There have been decades of law reforms, in Australia and elsewhere, to improve the court process for dealing with sexual offences (see Table 18).

**Table 18: Recent key reforms to trials for sexual offences**

Theme	Reform	See
Limits on evidence	Limits on improper questioning and questioning on sexual history	Chapter 21
	Limits on confidential communications	Chapter 21
Making giving evidence easier	Pre-recorded evidence (Visual and Audio Recorded Evidence) and special hearings for children and people with cognitive impairment, and alternative arrangements for other complainants in sexual offences	Chapter 21
	Witness support services, such as the Victims and Witness Assistance Service and the Child Witness Service	Chapter 12
Jury decision making	Jury directions about sexual violence	Chapter 20
Enhancing access to justice	Intermediaries and ground rules hearings	Chapter 15 and 21
Enhancing the role of victims	<i>Victims' Charter Act 2006</i> (Vic) and victim impact statements	<i>The Role of Victims of Crime in the Criminal Trial</i> (Report No 34, August 2016)

19.19 As we discuss in Chapter 1, we have not focused on issues that are part of ongoing reform processes, including reforms to tendency and coincidence evidence and our recent inquiry on committals, which we discuss below. We also note that many of the issues in our inquiry will be considered in a recently announced national initiative looking at key issues of evidence and procedure.<sup>9</sup>

19.20 Our *Committals* report recommended:

- abolishing the test for committal
- improving charging practices and disclosure
- 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 an adult complainant.<sup>10</sup>

19.21 These reforms have not yet been implemented. But given the benefits of those proposed reforms to sexual offence trials, we call on the government to adopt them.

<sup>9</sup> Attorney-General for Australia and Minister for Industrial Relations (Cth), 'Leading a National Approach to Justice for Victims and Survivors of Sexual Assault, Harassment and Coercive Control' (Media Release, 17 May 2021) <<https://www.attorneygeneral.gov.au/media/media-releases/leading-national-approach-justice-17-may-2021>>.

<sup>10</sup> Victorian Law Reform Commission, *Committals* (Report No 41, March 2020) Recommendations 3, 19–37, 42–8.



- 19.22 The Sentencing Advisory Council has also recently published a report evaluating sentencing reforms for sexual offences,<sup>11</sup> and on the sentencing of image-based sexual abuse offences.<sup>12</sup> This inquiry has therefore not considered the sentencing of sexual offences.
- 19.23 In Chapters 20 and 21, we make recommendations that focus on improving the decision-making process of the jury, and on improving the respect for the complainant within the trial. In Chapter 18, we focus on a specialised approach to sexual offences that should improve both the decision making in trials and the complainant experience.
- 19.24 In this chapter, we discuss three key issues that have an important effect on sexual offences, although they extend beyond them:
- delays
  - tendency and coincidence evidence
  - appeals.

## Delays need to be reduced

### The effects of delay are profound

Delays in the legal process worsen victim/survivors' mental health, especially because of the uncertainty that seems to be built into the legal system. First I had to decide whether or not to make a report to the police knowing that if I did so I was starting what was likely to be a very stressful experience. I had no idea that this stressful experience would last 4 years.

After I gave my police statement I had to wait a long time for the police to gather more evidence and for the police to decide whether to proceed with my case. ... I then had the anxiety of waiting for the OPP's decision.

Even after the OPP decided to proceed with my case I then had to wait for a committal hearing judge to decide whether my case should proceed. Even when that judge decided that my complaint should proceed to a criminal trial it took more than a year for the trial to arrive.

For the nearly 4 years between going to the police and the OPP deciding at the last minute not to proceed with my case at the criminal trial I was unable to put the looming court case out of my mind. My mental health worsened because the looming court case was a constant reminder of the sexual assault that I experienced as a child.<sup>13</sup>

11 Sentencing Advisory Council (Vic), *Sentencing Sex Offences in Victoria: An Analysis of Three Sentencing Reforms* (Report, June 2021) <<https://www.sentencingcouncil.vic.gov.au/publications/sentencing-sex-offences-in-victoria-an-analysis-of-three-sentencing-reforms>>.

12 Sentencing Advisory Council (Vic), *Sentencing Image-Based Sexual Abuse Offences in Victoria* (Report, 27 October 2020) <<https://www.sentencingcouncil.vic.gov.au/publications/sentencing-image-based-sexual-abuse-offences-in-victoria>>.

13 Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021). Minor typographical edits have been made.

- 19.25 Sexual offence trials take a long time. This is a longstanding issue.<sup>14</sup> We continued to hear in this inquiry that the time taken to go through the process:
- prolongs complainants' trauma and makes it difficult for them and their families to move on with their lives
  - leads to complainants choosing not to report or to withdraw from their case
  - affects the quality of complainants' evidence
  - leads to a breakdown in relationships between the complainant and the prosecution.<sup>15</sup>
- 19.26 These effects are even greater when victim survivors are children or have a cognitive impairment.<sup>16</sup> Unexpected or last-minute changes to court schedules are often disruptive and discouraging.<sup>17</sup> The Gatehouse Centre explained:
- the constant changing of dates and the last-minute cancellations of hearings can be very disruptive to the lives of children and their families. The anxiety arising in the lead-up to every hearing date and the multiplication of this anxiety by the frequent (often last minute) rescheduling of meetings can have detrimental psychological and physical health effects. In one recent case, Gatehouse supported a young person in their final year of school. The frequent rescheduling of hearing dates and the concomitant exacerbation of this young person's anxiety led to her missing an entire term of school. It is impossible to precisely calculate the long-term impact these disruptions will have on this young person's future education and career opportunities, but the risk for considerable damage is very real. In such a case, it would be reasonable for this young person to conclude that seeking justice only harmed her further.<sup>18</sup>

### Previous reforms have tried to address delay

- 19.27 There have been many reforms to address delay in sexual offence cases. The laws set out time limits for:
- pre-trial procedures (for example, a committal mention hearing must be held within three months of the commencement of the criminal proceeding)<sup>19</sup>
  - indictments (28 days after a committal, and 14 days if the complainant is a child or a person with a cognitive impairment)<sup>20</sup>
  - special hearings, discussed in Chapter 21 (within three months of committal)<sup>21</sup>
  - starting trials (within three months of committal).<sup>22</sup>
- 19.28 These time limits are often not met, mainly because of a lack of resources.<sup>23</sup> However, sometimes delay cannot be avoided. The OPP stated that sometimes delay cannot be avoided and that every case is 'unique, and it is difficult to place a firm timeframe on how long sexual offence prosecutions as a class should take to be finalised'.<sup>24</sup>

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14 Delays were a major theme in our report in 2004: Victorian Law Reform Commission, *Sexual Offences* (Report No 5, July 2004) ch 3.

15 Submissions 13 (Australian Association of Social Workers), 14 (Gatehouse Centre, Royal Children's Hospital), 17 (Sexual Assault Services Victoria), 18 (In Good Faith Foundation), 20 (Anonymous member of Aboriginal community), 21 (Victorian Aboriginal Child Care Agency), 22 (knowmore legal service), 62 (Shine Lawyers (on behalf of Ms Kim Elzaibak)); Consultations 15 (Child Witness Service), 25 (CASA senior counsellor/advocates), 53 (Elizabeth Morgan House and a victim survivor of sexual assault), 54 (Lucille Kent, a victim survivor of sexual assault), 62 (Mark, a person who has experienced sexual harm).

16 Consultation 25 (CASA senior counsellor/advocates). See also *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report* (Parts VII to X and Appendices, 2017) 207–10.

17 Submission 14 (Gatehouse Centre, Royal Children's Hospital); Consultation 54 (Lucille Kent, a victim survivor of sexual assault).

18 Submission 14 (Gatehouse Centre, Royal Children's Hospital).

19 *Criminal Procedure Act 2009* (Vic) s 126. The court may extend this: s 126(2).

20 *Ibid* s 163. The court may extend or shorten this: s 247.

21 *Ibid* s 371. The court may extend this time: s 371(2).

22 *Ibid* s 212. If there is no committal, the time period begins at the time the indictment is filed or, if a new trial is ordered by the Court of Appeal, the time period begins on the day the order is made. The court may extend this period: s 247.

23 Submission 63 (Office of Public Prosecutions); Consultation 71 (Magistrates' Court of Victoria (No 1)).

24 Submission 63 (Office of Public Prosecutions).

- 19.29 Delays are also addressed by changes to improve case management and specialist lists and emergency case management processes because of COVID-19.<sup>25</sup> Other measures include the use of specialised police prosecutors and priority for eCrime analysis in cases involving child abuse materials with a child complainant.<sup>26</sup>
- 19.30 The impact of COVID-19 has also made delay worse in the courts. The Criminal Bar Association explained 'COVID-19 adds to "ordinary" or "usual" delays in the movement of all prosecutions from investigation to verdict'.<sup>27</sup> Delay was also reported as worse in regional circuit courts.<sup>28</sup>
- 19.31 The Victorian Government has recently announced increased funding to reduce backlogs in courts.<sup>29</sup>
- 19.32 We also recommended reducing pre-trial delay in our *Committals* report (see box). The recommendations have not yet been implemented.

### Our recommendations in *Committals* (2020) to address delay

**Recommendation 2** would link the new case management system for the Magistrates' Court of Victoria and the Children's Court of Victoria with the case management systems of the higher courts. This should improve data about delay.

**Recommendations 8–14** would introduce a new system of pre-trial case management.

**Recommendations 15–18** would ensure the early involvement of the Director of Public Prosecutions (DPP) and experienced defence practitioners to make decision making more efficient.

**Recommendations 19–37** would improve charging and disclosure practices by having the DPP assume all disclosure obligations.

**Recommendations 38–41** would reduce delay caused by forensic reports, including by increased funding for forensic service providers, and introducing forensic case conferencing.<sup>30</sup>

25 County Court of Victoria, *Annual Report 2019–20* (Report, 2020) 20–2 <<https://www.countycourt.vic.gov.au/files/documents/2021-02/ccvannualreport2019-20.pdf>>.

26 Consultation 71 (Magistrates' Court of Victoria (No 1)). eCrime (also known as 'cyber crime') involves the misuse of electronic devices, such as computers, mobile phones or other electronic devices that have internet access.

27 Submission 47 (Criminal Bar Association).

28 Consultation 15 (Child Witness Service).

29 Daniel Andrews (Premier of Victoria), 'Supporting Our Courts To Drive Down COVID-19 Backlogs' (Media Release, 13 May 2021) <<http://www.premier.vic.gov.au/supporting-our-courts-drive-down-covid-19-backlogs>>.

30 Victorian Law Reform Commission, *Committals* (Report No 41, March 2020).

## How much delay is there?

- 19.33 Sexual offences usually take much longer than other cases to be resolved.<sup>31</sup> As Chapter 6 discusses, there is not much data that identifies the causes of delay.<sup>32</sup> While we know how long trials take, we still do not have a good sense of how much of this is delay that can be avoided.
- 19.34 For most incidents (approximately 63 per cent) charges are laid within three months of an incident being reported to police.<sup>33</sup>
- 19.35 We requested data from the Office of Public Prosecutions (OPP) and the County Court of Victoria that shed some light on key stages in a trial process. The OPP has data on the average time between a filing hearing<sup>34</sup> and a sexual offences trial. This shows that in each of the financial years from 2014–15 to 2018–19, sexual offences trials were on average per year brought to trial in 11.6 to 15.7 months. More recently in 2019–20 the average time was significantly faster at 7.7 months.<sup>35</sup>
- 19.36 The County Court of Victoria provided us with data that suggested there has been a small increase in the number of cases being resolved by a plea of guilty before trial in the past few years (from under 75 to around 87 per cent).<sup>36</sup>
- 19.37 The County Court of Victoria also provided data on the average time between a case starting and finishing. There was not much change over the last 10 years, with the average time per year hovering between 7 and 9 months, except for 2019–20 (which was affected by COVID-19). For most of this time, this average was reduced in cases involving a child or someone cognitively impaired, to between 6 and 7 months, but had increased to nearly 9 months in 2018–19 and 9.8 months in 2019–20.<sup>37</sup>
- 19.38 The County Court of Victoria's data indicated, however, that the number of cases which took less than 12 months to complete had also dropped in 2018–19, with more cases taking between 18 to 24 months.<sup>38</sup>

31 In all courts in Australia, the median duration for cases where the principal offence involved sexual offences to be resolved where defendants were proved guilty was 32.3 weeks in 2019–20, with homicide and related offences being the only category that took longer. The publicly available data does not include the duration of cases by type of offence for states and territories. For higher courts, the median duration for sexual offences was 38.9 weeks in higher courts and 22.6 weeks in Magistrates' Courts: Australian Bureau of Statistics, *Criminal Courts, Australia, 2019–20* (Catalogue No 4513.0, 25 March 2021) Table 11 <<https://www.abs.gov.au/statistics/people/crime-and-justice/criminal-courts-australia/latest-release>>. Appeals for sexual offence cases may also take longer to finalise, taking on average 8.5 months compared to 7.2 months for all appeals (excluding 2019–20): Submission 66 (Supreme Court of Victoria).

32 See also Victorian Law Reform Commission, *Committals* (Report No 41, March 2020) [3.24]–[3.35].

33 S Bright et al, *Attrition of Sexual Offence Incidents through the Victorian Criminal Justice System: 2021 Update* (Report, Crime Statistics Agency, 2021). This analysis included offences recorded by police in the 2015–16 and 2016–17 financial years.

34 This is the first hearing in the committal process. It usually occurs after charges are laid: *Criminal Procedure Act 2009* (Vic) ss 101–102.

35 Data provided by the Office of Public Prosecutions (Vic) to the Victorian Law Reform Commission, 12 July 2021.

36 Data provided by the County Court of Victoria to the Victorian Law Reform Commission, 20 January 2021. Before 2016–17, this percentage was under 75%. The percentage reflects the cases where a plea of guilty was entered before 'the door of the court' (that is, on the first day of trial), compared to the total number of guilty pleas. This percentage indicates cases that most likely could have been resolved earlier before trial.

37 Ibid.

38 Ibid.

## What causes delay?

19.39 Although we cannot easily identify the reasons for delay from the data, some reasons were identified during our inquiry (see Table 19).

**Table 19: Causes of delay**

Stage	Cause of delay	Examples
Police investigation	Resourcing	Not enough resourcing of police <sup>39</sup>
	Forensic evidence	DNA evidence; analysis of electronic devices, identification and categorisation of child abuse material <sup>40</sup>
	Quality of investigation	Long investigations, need for further investigation <sup>41</sup>
Prosecution	Experience of prosecutors	Inexperience of police prosecutors who handle prosecutions in the Magistrates' Court of Victoria <sup>42</sup>
Accused	Factors relating to accused	Difficulties in getting or keeping legal representation, including the length of assessments for legal aid funding; <sup>43</sup> complex personal issues, resulting in adjournments; <sup>44</sup> extensions for psychiatric or other assessments <sup>45</sup>
Pre-trial processes	Charges and pleas	Charging practices that mean charges laid are not prosecuted, and barriers to resolving cases earlier with guilty pleas <sup>46</sup>
	Committals	The committals process <sup>47</sup>
	Disclosure	Incomplete disclosure of all the evidence against the accused. <sup>48</sup> This was also identified in our Committals report. <sup>49</sup>
Evidence	Evidence	Materials being subpoenaed, including confidential communications <sup>50</sup>
	Witnesses	Compulsory examination of potential witnesses, availability of other witnesses to give evidence <sup>51</sup>
	Factors relating to complainant	Need for cognitive capacity to be assessed by an expert, or where an intermediary needs to assess their communication needs <sup>52</sup>
Trial	Court availability	Changes to circuit court sittings, <sup>53</sup> availability of judicial officers and courtrooms <sup>54</sup>

39 Submissions 17 (Sexual Assault Services Victoria), 47 (Criminal Bar Association), 63 (Office of Public Prosecutions); Consultation 71 (Magistrates' Court of Victoria) (No 1).

40 Submissions 27 (Victoria Legal Aid), 63 (Office of Public Prosecutions); Consultation 71 (Magistrates' Court of Victoria) (No 1).

41 Submissions 17 (Sexual Assault Services Victoria), 63 (Office of Public Prosecutions); Consultation 71 (Magistrates' Court of Victoria) (No 1).

42 Consultation 71 (Magistrates' Court of Victoria) (No 1).

43 Submission 63 (Office of Public Prosecutions); Consultation 71 (Magistrates' Court of Victoria) (No 1).

44 Submission 17 (Sexual Assault Services Victoria); Consultation 71 (Magistrates' Court of Victoria) (No 1).

45 Submission 68 (Victoria Police).

46 Submission 27 (Victoria Legal Aid).

47 Submission 63 (Office of Public Prosecutions).

48 Submissions 27 (Victoria Legal Aid), 47 (Criminal Bar Association).

49 See Victorian Law Reform Commission, *Committals* (Report No 41, March 2020) ch 9.

50 Submission 63 (Office of Public Prosecutions).

51 Ibid.

52 Ibid.

53 Consultation 15 (Child Witness Service).

54 Submissions 63 (Office of Public Prosecutions), 68 (Victoria Police).

- 19.40 The Law Institute of Victoria observed a correlation between an accused facing a long sentence and their determination to fight the case to its conclusion.<sup>55</sup> We also heard that the defence could use procedural rules to prolong a case or as 'stalling tactics'.<sup>56</sup>

### The work on reducing delay must continue

- 19.41 As the identified causes of delay show, there are many reasons why trials are delayed. Some of these cannot be avoided, such as adjournments to afford procedural fairness to the accused or measures such as the use of intermediaries that protect the complainant's interest.
- 19.42 Many of them point to systemic issues across our criminal justice system, such as a need to invest more resources in the system. We recommend this as the first and most urgent task of reform in Chapters 4 and 5. The effects of COVID-19 only make that task more urgent.
- 19.43 Our previous recommendations in our *Committals* report also address some of these issues (see box above). As discussed above, the government should implement these, given the benefits they have for sexual offence trials. In Chapter 6, we also identify the need to introduce measures to track and explain delay, and recommend that a working group on data find ways to record and address causes of delay more systematically.
- 19.44 We recommend some other measures that may also affect delay in this report. Introducing a model of a victim advocate in Chapter 12 may encourage more timely responses than is currently the case, as someone will be responsible for identifying progress in cases. A victim advocate could also help to support complainants through delays.
- 19.45 In Chapter 17, we recommend specific training for police, including to improve the quality of investigation.
- 19.46 In Chapter 21, we recommend that all complainants should also have the option of pre-recording evidence. This could reduce the time taken for a complainant waiting to give evidence, which is a key cause of stress.
- 19.47 The recommendations in Chapters 4 and 5 for systemic reform and improving collaboration should also improve the way elements of the criminal justice system come together and provide feedback on delays. For example, the feedback process that should be included in the multi-agency protocol recommended in Chapter 4 should include requiring agencies to identify causes of delay in cases and take steps to reduce it.

## Recommendation

- 75 The Victorian Government should implement outstanding recommendations from the Victorian Law Reform Commission's *Committals* report.

## Tendency and coincidence evidence can be critical in child sexual abuse cases

### What is tendency and coincidence evidence?

- 19.48 Evidence of other allegations of sexual offending by an accused may be admitted in a trial as 'tendency and coincidence' evidence. Tendency evidence (also known as 'propensity' evidence) is used to prove that an accused person has a tendency to act in a certain way or have a certain state of mind.<sup>57</sup>
- 19.49 Coincidence evidence (also known as 'similar fact' evidence) refers to the improbability that two or more events coincided, in order to prove that the accused acted in a certain way or had a certain state of mind.<sup>58</sup> This evidence is likely to play a role in sexual offence trials concerning child sexual abuse.
- 19.50 Tendency evidence and coincidence evidence are not admissible unless:
- the court thinks that the evidence will have significant probative value
  - the probative value of the evidence must substantially outweigh its prejudicial effect.<sup>59</sup>

### What are joint trials?

- 19.51 Where more than one person alleges sexual offending 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 tendency and coincidence evidence, meaning that allegations from one complainant can be supported by the evidence of other complainants.
- 19.52 In Victoria, there is a presumption in favour of joint trials for sexual offence cases.<sup>60</sup> However, the Office of Public Prosecutions (OPP) told us that trials are likely to be split ('severed') if the defence requests it, because it is presumed that having multiple complainants will be prejudicial and risk an unfair trial.<sup>61</sup>
- 19.53 The OPP explained the many problems that arose if trials were severed, especially in closely linked cases. They told us these problems included:
- Much of the evidence would have to be repeated in separate trials.
  - Proceedings would be longer and cost more.
  - The interview with an accused would need to be heavily edited, which could make it much less coherent or invite speculation from the jury.
  - There was a substantial risk that a jury would have to be discharged if offending associated with the severed trial was inadvertently raised in evidence.
  - It may mislead the jury into thinking that only one of many children were alleging abuse.<sup>62</sup>
- 19.54 Victoria Police also noted that when trials are severed, it can be traumatising for complainants.<sup>63</sup> A victim survivor suggested keeping complainants in family groups, rather than splitting cases—they thought that splitting cases favoured the accused.<sup>64</sup>

57 *Evidence Act 2008* (Vic) s 97.

58 *Ibid* s 98.

59 *Ibid* ss 97–98, 101(2).

60 *Criminal Procedure Act 2009* (Vic) s 194. The presumption is not rebutted because evidence on one charge is inadmissible on another charge: s 194(3). This presumption was established in Victoria in 1997 under the *Crimes Act 1958* (Vic): Australian Law Reform Commission, *Family Violence—A National Legal Response* (Report No 114, October 2010) [26.136] <<https://www.alrc.gov.au/publication/family-violence-a-national-legal-response-alrc-report-114/>>.

61 Submission 63 (Office of Public Prosecutions).

62 *Ibid*.

63 Submission 68 (Victoria Police).

64 Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021).



## Reforms to tendency and coincidence evidence are underway

- 19.55 Courts have considered the application of rules about tendency and coincidence evidence.<sup>65</sup> More recently, the Royal Commission into Institutional Responses to Child Sexual Abuse recommended changing the laws to make it easier to admit tendency and coincidence evidence in child sexual abuse trials, and to join trials.<sup>66</sup>
- 19.56 Their reasoning was that:
- Tendency evidence and coincidence evidence are highly relevant, without a significant risk of unfair prejudice to the accused.
  - Joint trials are less traumatising for complainants because they can feel supported by other complainants.
  - Juries without a joint trial may be denied the opportunity to hear accounts that give the true picture of what is alleged to have happened.
  - Laws relating to the admissibility of tendency and coincidence evidence have become too 'complicated and unfairly protective of the accused'.<sup>67</sup>
- 19.57 In response, 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.<sup>68</sup> Importantly, these include changes so that:
- It will be presumed that any tendency evidence about the accused's sexual interest in children, or the accused acting on a sexual interest in children, has significant probative value. This presumption can be overcome only if the court is satisfied that there are sufficient grounds to do so.<sup>69</sup>
  - The restriction on admitting both tendency and coincidence evidence will be changed, so that the probative value of the evidence need only 'outweigh', rather than 'substantially outweigh', the danger of unfair prejudice to the accused.<sup>70</sup>
- 19.58 New South Wales has already implemented this change.<sup>71</sup> Victoria has indicated it intends to introduce legislation implementing the Model Bill in 2021.<sup>72</sup>

## Tendency and coincidence reforms are important and should be evaluated

- 19.59 This ongoing reform process is already underway, so we do not recommend any changes to tendency and coincidence evidence. We also note the Australian Government's decision to lead discussions on a national approach to justice for victim survivors of sexual assault, harassment and coercive control—this may include consideration of tendency and coincidence evidence.
- 19.60 We heard mixed views on these proposed reforms, so we have summarised what we heard below. In line with our recommendations in Chapter 6, we recommend that these reforms should be evaluated.
- 19.61 Victoria Legal Aid and Liberty Victoria, among others, expressed concerns about the Model Bill, or were strongly opposed to its adoption.<sup>73</sup> They told us that the proposed laws:

65 See generally *McPhillamy v The Queen* [2018] HCA 52, (2018) 361 ALR 13; *R v Dennis Bauer (a pseudonym)* [2018] HCA 40, (2018) 266 CLR 56; *Hughes v The Queen* [2017] HCA 20, (2017) 263 CLR 338.

66 *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report* (Parts III to VI, 2017) Recommendations 44–51.

67 *Ibid* 591, 633–4.

68 Council of Attorneys-General, 'Communiqué' (Media Release, 29 November 2019) 2 <<https://www.ag.gov.au/sites/default/files/2020-03/Council-of-Attorneys-General-communique-November-2019.pdf>>.

69 *Evidence Amendment (Tendency and Coincidence) Act 2020* (NSW) sch 1 item 2. This provision also lists factors for a court to consider when determining if there are sufficient grounds to rebut the presumption.

70 *Ibid* sch 1 item 4. Cf *Evidence Act 2008* (Vic) s 101.

71 *Evidence Amendment (Tendency and Coincidence) Act 2020* (NSW).

72 Victorian Government, *Annual Report 2020—Royal Commission into Institutional Responses to Child Sexual Abuse* (Report, December 2020) 28 <<https://content.vic.gov.au/sites/default/files/2020-12/RCIIR%20to%20Child%20Sexual%20Abuse%20Annual%20Report20.pdf>>.

73 Submissions 27 (Victoria Legal Aid), 53 (Liberty Victoria); Consultations 26 (Greg Byrne PSM, Legal Policy Consultant, Greg Byrne Law), 41 (Individual views of the Honourable Justice Chris Maxwell AC and Judicial Registrar Tim Freeman).

- will be too broad and therefore unfair to the accused, by undermining the presumption of innocence and creating a genuine risk of innocent people being convicted of crimes<sup>74</sup>
  - would be difficult to apply by courts and may create complex laws leading to appeals and retrials<sup>75</sup>
  - will lower the threshold for admitting tendency and coincidence evidence in all criminal cases, not just those involving child sexual abuse.<sup>76</sup>
- 19.62 Others, such as knowmore legal service, the Victims of Crime Commissioner and Sexual Assault Services Victoria, supported the proposed reforms.<sup>77</sup> The OPP noted that there were advantages in a consistent national approach, and also thought the Model Bill could resolve some concerns it had expressed about severed trials.<sup>78</sup>
- 19.63 In Chapter 6, we recommended that, when introducing reforms, the Victorian Government should, at an early stage, consider how to evaluate the impact of reforms, including the data that will need to be collected. Alongside this, and given how important reforms to tendency and coincidence evidence are, and the concerns expressed about the reforms, we recommend that the proposed Working Group referred to in Chapter 6 should plan to review the reforms after three years to find if they are effective and working fairly.

## Recommendation

- 76 Any reform in Victoria relating to tendency and coincidence evidence resulting from the adoption of the Council of Attorneys-General's Model Bill on this evidence should be evaluated by the government. The evaluation should assess whether the reforms are achieving their aims and working fairly, after three years from the reforms commencing.

## There might be a case for improving appeals in sexual offences

### How do appeals work?

- 19.64 A convicted person has a right to appeal their conviction or sentence to a higher court.<sup>79</sup> Appeals play an important role in correcting legal errors or miscarriages of justice.
- 19.65 There are many reasons for appeals, such as miscarriages of justice, legal or procedural errors, fresh evidence and excessive sentences.
- 19.66 Appeals from the Magistrates' Court of Victoria or Children's Court of Victoria are heard by the County Court of Victoria.<sup>80</sup> Appeals from the County Court of Victoria or Supreme Court of Victoria are only available if the Victorian Court of Appeal gives permission ('grants leave').<sup>81</sup> Similarly, the High Court of Australia can decide if an appeal should be heard ('special leave').<sup>82</sup>

74 Submissions 27 (Victoria Legal Aid), 53 (Liberty Victoria).  
75 Consultations 26 (Greg Byrne PSM, Legal Policy Consultant, Greg Byrne Law), 41 (Individual views of the Honourable Justice Chris Maxwell AC and Judicial Registrar Tim Freeman).  
76 Submission 53 (Liberty Victoria).  
77 Submissions 17 (Sexual Assault Services Victoria), 22 (knowmore legal service), 45 (Victims of Crime Commissioner).  
78 Submission 63 (Office of Public Prosecutions).  
79 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(4).  
80 *Criminal Procedure Act 2009* (Vic) s 254; *Children, Youth and Families Act 2005* (Vic) s 424. These sections also provide that the appeal lies to the Supreme Court of Victoria if it is a decision of the Chief Magistrate.  
81 *Criminal Procedure Act 2009* (Vic) pt 6.3 divs 1–2.  
82 *Judiciary Act 1903* (Cth) ss 35, 35A.

- 19.67 If a defendant succeeds in the appeal, the court may order that they can be re-tried, acquitted or their sentence changed.<sup>83</sup> If a court orders a re-trial, the Director of Public Prosecutions decides whether to proceed with a new trial.<sup>84</sup>
- 19.68 Complainants are generally only required to give evidence in the original trial. Appeal judges have access to the transcript of the trial and evidence before the trial, including recorded evidence (as discussed in Chapter 21).<sup>85</sup>
- 19.69 There have been many reforms to the law and practice of appeals. These include:
- an interlocutory appeals procedure, which allows certain errors to be addressed before or during the trial<sup>86</sup>
  - a reduction in the number of appeals based on erroneous jury directions, as a result of reforms to jury directions<sup>87</sup>
  - using the same defence counsel at trial and appeal<sup>88</sup>
  - introducing a Registrar of Criminal Appeals and support solicitors<sup>89</sup>
  - abolishing appeals that required a court to look at the matter afresh ('de novo') at the County Court of Victoria.<sup>90</sup>

### How many appeals are there in sexual offence cases?

- 19.70 Recent data from the Judicial College of Victoria indicate that in the year 2019–2020, there were 26 successful appeals against conviction and 50 successful appeals against sentence in the Victorian Court of Appeal. This refers to all matters, not just sexual offences.<sup>91</sup>
- 19.71 The most common errors related to errors in sentencing and unreasonable jury verdicts. The study notes that both these grounds are
- intrinsically difficult to address. The former, because of the discretionary nature of sentencing and the often non-specific nature of the error, and the latter due to the highly fact-specific nature of such errors and the fact that jurors are called to perform a difficult task, without training, on a single occasion.<sup>92</sup>
- 19.72 The Supreme Court of Victoria provided data on the number of sexual offence appeals that shows:
- applications for leave to appeal in sexual offence matters accounted for 18.8 per cent of all applications for leave to appeal (sentence and conviction appeals; this excludes interlocutory appeals)
  - successful appeals (appeal allowed in whole or in part) in sexual offence matters accounted for 24.6 per cent of all successful appeals.<sup>93</sup>

83 *Criminal Procedure Act 2009* (Vic) ss 277, 286. Other outcomes include being convicted of another offence, or being asked to stand trial for another offence, making orders or declarations under the *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic), or remitting the matter for sentencing back to the County Court or Supreme Court.

84 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>>.

85 *Criminal Procedure Act 2009* (Vic) s 368(4).

86 Ibid pt 6.3 div 4.

87 *Jury Directions Act 2015* (Vic) pt 3; Greg Byrne and Chris Maxwell, 'Putting Jurors First: Legislative Simplification of Jury Directions' (2019) 43(3) *Criminal Law Journal* 180, 196.

88 Chris Corns, 'Leave to Appeal in Criminal Cases: The Victorian Model' (2017) 29(1) *Current Issues in Criminal Justice* 39, 48; Supreme Court of Victoria, *Practice Note SC CA 1: Criminal Appeals (Second Revision)*, 9 December 2019, [1.3] <<https://www.supremecourt.vic.gov.au/law-and-practice/practice-notes/sc-ca-1-criminal-appeals-second-revision>>.

89 Chris Corns, 'Leave to Appeal in Criminal Cases: The Victorian Model' (2017) 29(1) *Current Issues in Criminal Justice* 39, 48.

90 *Justice Legislation Amendment (Criminal Appeals) Act 2019* (Vic) s 20; substituting *Criminal Procedure Act 2009* (Vic) pt 6.1 div 1. This change is now due to come into force on 1 January 2023: *Justice Legislation Amendment (System Enhancements and Other Matters) Act 2021* (Vic) s 124.

91 Matthew L. Weatherston, 'Judicial College of Victoria: Learning from Upheld Appeals' (2020) 94 *Law Institute Journal* <<https://www.liv.asn.au/Staying-Informed/LIJ/LIJ/October-2020/JCV--Learning-from-upheld-appeals>>.

92 Ibid.

93 Submission 66 (Supreme Court of Victoria) The data was for the past five financial years and for the current financial year up to 7 January 2021.

## Appeals can have negative impacts on those involved

- 19.73 Appeals that result in retrials can draw out the process for those involved and are:  
undesirable ... for all parties to the proceedings, as well as the community, particularly if it results from technical rather than substantive issues. Regardless of the outcome of a further trial, a high rate of retrials has the capacity to damage public confidence in the criminal justice system and result in court delays. The accused has the right to be confident that the jury will be instructed correctly and that the trial will be conducted once; witnesses should expect to give evidence on one occasion, unless exceptional circumstances exist, and the jury should be able to comprehend the directions given to them.<sup>94</sup>
- 19.74 Appeals prolong the criminal justice process for complainants. This can prevent them from moving on with their lives.<sup>95</sup>
- 19.75 The Child Witness Service told us:  
More matters seem to be granted an appeal even when out of time, with examples given of appeals granted 18 months after a conviction and cases that had gone on for five years where those witnesses now had their own children, and those witnesses asked: 'What's the point? We give up now.'<sup>96</sup>
- 19.76 We also heard that complainants can feel excluded in appeals against sentence, because the focus is on the defendant.<sup>97</sup>
- 19.77 The Magistrates' Court of Victoria reported that limits on recording evidence in summary cases meant that complainants had to give evidence again if the matter was appealed to the County Court of Victoria, which is undesirable.<sup>98</sup> We make recommendations about recording evidence in Chapter 21.

## People suggested ways to improve appeals

- 19.78 The OPP suggested the appeal court should have a general power to inform itself in any way it thinks fit to reach a decision, such as by viewing recorded evidence.<sup>99</sup> Sometimes an appeal court may only refer to the trial transcript.<sup>100</sup>
- 19.79 We also heard that a much greater number of appeals are initiated than those that succeed on the ground that a verdict is unreasonable or cannot be supported by the evidence (also known as the 'unsafe and unsatisfactory' ground).<sup>101</sup> This ground of appeal:  
requires an appellate court to make findings of fact to determine whether there was an error in the jury's guilty verdict. The confidentiality of jury deliberations means that the jury's actual decision-making process is 'inscrutable' to an appellate court. Therefore, the appellate court must infer whether the jury made an error.<sup>102</sup>
- 19.80 The Honourable Justice Chris Maxwell AC stated that these cases involve a significant amount of court resources and time and increase the period of uncertainty for the complainant.<sup>103</sup> Academic commentary also questions how much appeal judges are better placed to assess guilt beyond reasonable doubt compared to a jury.<sup>104</sup>

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94 Susan Mills and Stefanie J Sharman, 'Characteristics of Successful and Unsuccessful Appeals Against Conviction for Child Sexual Abuse' (2017) 24(5) *Psychiatry, Psychology, and Law* 655, 663 (citations omitted).

95 See *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report* (Parts VII to X and Appendices, 2017) 332-3.

96 Consultation 15 (Child Witness Service).

97 Consultation 41 (Individual views of the Honourable Justice Chris Maxwell AC and Judicial Registrar Tim Freeman).

98 Consultation 71 (Magistrates' Court of Victoria (No 1)).

99 Submission 63 (Office of Public Prosecutions).

100 Greg Byrne, 'The High Court in *Pell v The Queen*: An "Unreasonable" Review of the Jury's Decision' (2020) 45(4) *Alternative Law Journal* 284, 287.

101 Consultation 41 (Individual views of the Honourable Justice Chris Maxwell AC and Judicial Registrar Tim Freeman); *Criminal Procedure Act 2009* (Vic) s 276(1)(a).

102 Greg Byrne, 'The High Court in *Pell v The Queen*: An "Unreasonable" Review of the Jury's Decision' (2020) 45(4) *Alternative Law Journal* 284, 285 (citations omitted). In determining if there was an error the appellate court must ask itself 'whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty': *M v The Queen* (1994) 181 CLR 487, 493 (Mason CJ, Deane, Dawson and Toohey JJ), (High Court of Australia, Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ, 31 May 1994).

103 Consultation 41 (Individual views of the Honourable Justice Chris Maxwell AC and Judicial Registrar Tim Freeman).

104 See generally Greg Byrne, 'The High Court in *Pell v The Queen*: An "Unreasonable" Review of the Jury's Decision' (2020) 45(4) *Alternative Law Journal* 284.

- 19.81 The OPP told us that it has noticed 'an increase in the numbers of convictions being set aside in the Court of Appeal involving offences over 40 years'.<sup>105</sup>
- 19.82 In a recent case, the Court of Appeal expressed 'disquiet at the apparently increasing frequency with which cases involving delays in the order of 40 to 60 years are coming before the Court'. It observed:
- While it is true that some trials may be fairly held in such circumstances, and the responsibility for deciding whether criminal proceedings should be maintained lies, in the first instance, with the Executive, the forensic difficulties which delays of this order of magnitude inflict suggest that such trials should be rare. It is of course relevant, in deciding whether to grant a permanent stay, to take account of the relative seriousness of the charges. It is to be expected that this is also a matter taken into account in deciding whether to bring charges in the first place.<sup>106</sup>
- 19.83 This likely makes it harder for complainants in historical sexual abuse cases to get an outcome through the justice system and maintain a conviction.
- 19.84 Sexual Assault Services Victoria suggested that the right of appeal could be limited to cases 'where there is additional evidence rather than there being an automatic right'.<sup>107</sup>
- 19.85 The Criminal Bar Association told us that 'the best way to address challenges with appeals is to ensure trials are run fairly at first instance'. It said that the right to seek leave to appeal 'is a vital safeguard to remedy miscarriages of justice and should not be changed'.<sup>108</sup>
- 19.86 The Victims of Crime Commissioner told us there was a need to examine sexual offence appeals to understand how the law was working. This included, for example, 'the complexity of some elements of sexual assault offences, including the construction of "reasonable belief" in consent'.<sup>109</sup>
- 19.87 We also heard that the success of the *Jury Directions Act 2015* (Vic) in reducing the number of appeals based on errors in jury directions needed to be independently reviewed.<sup>110</sup>

## Appeals for sexual offence cases should be reviewed

- 19.88 In every case involving sexual offences, there are many complex factors that may lead to different appeal outcomes. We note the concerns raised in this inquiry about appeals. However, similarly to attrition, which we discuss in Chapter 6, there is also no easy way to identify what is going on without a close review of the reasons for the decisions.
- 19.89 In Chapter 17, we recommend a qualitative review of police and prosecution files to identify the factors that influence a case not progressing. Consistently with that recommendation, we also recommend a review of appeal decisions and data to identify:
- if there are trends in successful appeal decisions
  - the characteristics of cases that lead to successful appeals
  - any legal or process reforms that could address undesirable appeal outcomes.

105 Submission 63 (Office of Public Prosecutions).

106 *Lucciano (a pseudonym) v The Queen* [2021] VSCA 12, [48] (citations omitted).

107 Submission 17 (Sexual Assault Services Victoria).

108 Submission 47 (Criminal Bar Association).

109 Submission 45 (Victims of Crime Commissioner).

110 Consultation 41 (Individual views of the Honourable Justice Chris Maxwell AC and Judicial Registrar Tim Freeman); Submission 45 (Victims of Crime Commissioner).

- 19.90 This is consistent with the recommendation of the Royal Commission into Institutional Responses to Child Sexual Abuse that state governments should monitor appeals in child sexual abuse cases to identify areas of the law in need of reform.<sup>111</sup> The Victorian Government accepted this recommendation.<sup>112</sup>

## Recommendation

- 77 The Victorian Government should review how appeals are operating in sexual offence cases to identify legal or procedural issues needing reform.

<sup>111</sup> *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report* (Parts VII to X and Appendices, 2017) Recommendation 82.

<sup>112</sup> Victorian Government, 'Victorian Government Response to the Royal Commission into Institutional Child Sexual Abuse', VIC.GOV.AU (Web Page, 20 July 2021) <<https://www.vic.gov.au/victorian-government-response-royal-commission-institutional-responses-child-sexual-abuse>>.

# CHAPTER 20

## Juries and sexual offence trials

430 Overview

430 What jurors believe and understand is critical in sexual offence trials

431 Jurors need help to deal with misconceptions

442 The use of expert evidence could improve

446 The tasks of jurors should be made easier

449 Jury reforms need to be implemented well and evaluated



## 20. Juries and sexual offence trials

### Overview

- In sexual offence trials, juries decide whether an accused person is guilty beyond a reasonable doubt of the charges brought against them.
- Jurors, like anyone in the community, may have misconceptions about sexual violence. This may affect their assessment of the facts.
- Sexual offence trials are also complex. A juror's job of assessing the facts in line with the law is a difficult one.
- This chapter sets out our recommendations for improving sexual offence trials by supporting jury decision making. We recommend:
  - giving more jury directions
  - a greater use of independent experts
  - giving jury directions more effectively
  - consistent guidance on the meaning of 'beyond reasonable doubt'
  - improving research on juror understanding, countering misconceptions and supporting the jury's task in sexual offence trials.

### What jurors believe and understand is critical in sexual offence trials

- 20.1 In sexual offence trials in the County Court of Victoria juries decide if an accused is guilty. This is where most sexual offence trials happen.<sup>1</sup>
- 20.2 The role of the jury in a trial is to decide questions of fact, and to apply the law as stated by the judge to those facts to reach a verdict.
- 20.3 This chapter addresses two key issues about the jury's role in sexual offence trials. First, jurors are members of the community. They bring into the jury room their beliefs and understandings about sex, gender and sexual violence. Research shows that these include misconceptions about sexual violence (see Chapter 3). Some studies suggest that jurors are more influenced by their own attitudes to rape than by the evidence at trial.<sup>2</sup>

<sup>1</sup> A magistrate decides sexual offence cases in the Magistrates' Court of Victoria.

<sup>2</sup> See, eg, James Chalmers, Fiona Leverick and Vanessa E Munro, 'The Provenance of What Is Proven: Exploring (Mock) Jury Deliberation in Scottish Rape Trials' (Scottish Jury Research Working Paper No 2, 2019) <[https://www.gla.ac.uk/media/Media\\_704446\\_smxx.pdf](https://www.gla.ac.uk/media/Media_704446_smxx.pdf)>; Fiona Leverick, 'What Do We Know about Rape Myths and Juror Decision Making?' (2020) 24(3) *The International Journal of Evidence & Proof* 255; Louise Ellison and Vanessa E Munro, 'Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility' (2009) 49(2) *The British Journal of Criminology* 202.

- 20.4 Secondly, jurors have a hard task in sexual offence trials. These trials can be complicated and confusing for people without legal training.<sup>3</sup> Jurors can find it hard to understand how to apply the law to the facts, especially when the law is complex. They can also find it hard to understand some concepts, like the meaning of the standard of proof required in criminal trials ('beyond reasonable doubt').<sup>4</sup>
- 20.5 These issues are not unique to sexual offence trials. But they are likely to be more important in these trials. As we discuss in Chapter 3, misconceptions about sexual violence are widespread – everybody has their own beliefs and experiences, often deeply held.<sup>5</sup> In Chapter 14, we discuss past efforts to make sexual offence laws less complex.
- 20.6 Sexual offending requires proof that someone did not consent and also often happens in private. This means there is more focus on interpreting how people behaved, and there is less likely to be other evidence to help jurors decide what happened (see Chapter 19).
- 20.7 For criminal trials in sexual offence cases to result in just outcomes, juries must have the information and tools they need to make the right decisions.

## Jurors need help to deal with misconceptions

- 20.8 In the issues paper, we suggested four different ways to address concerns about misconceptions in jury trials:
- changing the role or nature of the jury by replacing juries with judges ('judge-alone trials') or with specialised ('professional') jurors
  - improving jury education when someone becomes a juror
  - improving the use of jury directions
  - improving the use of expert evidence.<sup>6</sup>
- 20.9 We are not recommending any change to the role or nature of the jury. There was also relatively little support for improving jury education about sexual violence before jurors sat on trials.<sup>7</sup> This chapter briefly addresses not changing the role or nature of the jury below. The rest of the chapter focuses on jury directions and expert evidence.

## The role or nature of the jury should not change

- 20.10 Victoria introduced judge-alone trials for six months in 2020, due to coronavirus (COVID-19) restrictions. But these were not used often.<sup>8</sup>

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3 Submission 42 (Greg Byrne PSM); Jane Goodman-Delahunty and Ryan Essex, 'Judicial Directions and the Criminal Standard of Proof: Improving Juror Comprehension' (2014) 24(2) *Journal of Judicial Administration* 75, 76–7.

4 Greg Byrne and Chris Maxwell, 'Putting Jurors First: Legislative Simplification of Jury Directions' (2019) 43(3) *Criminal Law Journal* 180, 191; Criminal Law Review, Department of Justice and Regulation (Vic), *Jury Directions: A Jury-Centric Approach* (Report, March 2015) 124–5 <<https://www.justice.vic.gov.au/jury-directions-reports>>; Jane Goodman-Delahunty and Ryan Essex, 'Judicial Directions and the Criminal Standard of Proof: Improving Juror Comprehension' (2014) 24(2) *Journal of Judicial Administration* 75.

5 See, eg, Kim Webster et al, *Australians' Attitudes to Violence against Women and Gender Equality: Findings from the 2017 National Community Attitudes towards Violence against Women Survey (NCAS)* (Research Report No 03/2018, ANROWS Australia's National Research Organisation for Women's Safety, 2018) 8–9 <<https://www.anrows.org.au/publication/australians-attitudes-to-violence-against-women-and-gender-equality-findings-from-the-2017-national-community-attitudes-towards-violence-against-women-survey/>>; Violeta Politoff et al, *Young Australians' Attitudes to Violence against Women and Gender Equality: Findings from the 2017 National Community Attitudes towards Violence against Women Survey (NCAS)* (Insights No 01/2019, ANROWS Australia's National Research Organisation for Women's Safety, 2019) 28 <<http://ncas.anrows.org.au/wp-content/uploads/2019/05/2017NCAS-Youth-SubReport.pdf>>; Fiona Leverick, 'What Do We Know about Rape Myths and Juror Decision Making?' (2020) 24(3) *The International Journal of Evidence & Proof* 255.

6 Victorian Law Reform Commission, *Sexual Offences: Key Issues in the Criminal Justice System* (Issue Paper B, October 2020) [5]–[12], [18]–[24], Questions 1, 4; Victorian Law Reform Commission, *Sexual Offences: The Trial Process* (Issues Paper E, October 2020) [32]–[35], Question 4.

7 Submissions 10 (Carolyn Worth AM and Mary Lancaster), 45 (Victims of Crime Commissioner); Consultation 6 (Dr Emma Henderson and Dr Kirsty Duncanson).

8 Ten applications for judge-only trials in the County Court of Victoria related to sexual offence cases during this period (as at 2 December 2020): Data provided by the County Court of Victoria to the Victorian Law Reform Commission, 20 January 2021. See also Adam Cooper and David Estcourt, 'Victoria to Hold First Judge-Only Trial, but Lawyers Favour Jury System', *The Age* (online, 5 July 2020) <<https://www.theage.com.au/national/victoria/victoria-to-hold-first-judge-only-trial-but-lawyers-favour-jury-system-20200705-p5594e.html>>; *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic) s 32.

- 20.11 In our issues paper, we suggested that trials by judges alone could avoid the concern that jurors hold misconceptions about sexual violence because of their experience, especially if judges have expertise in hearing sexual offence cases. There might be other benefits. For example, a complainant may also find a trial by a judge less frightening.
- 20.12 Judge-alone trials have been considered elsewhere. The New Zealand Law Commission considered alternatives to juries (such as professional jurors) in a model for a specialist court. However, it did not recommend shifting away from jury trials.<sup>9</sup> The New Zealand Government is looking to study this further.<sup>10</sup> A recent review in Scotland also recognised there may be merit in judge-alone trials but thought this needed further study.<sup>11</sup>
- 20.13 Most of the submissions to this inquiry opposed changing the role or nature of the jury system.<sup>12</sup> They told us that:
- Judges had their own beliefs and understandings that may include misconceptions.<sup>13</sup>
  - Juries play an important role in representing the community within the justice system – it would send the wrong signal to remove their role in these cases.<sup>14</sup>
  - Research indicates that jurors take their role seriously and that a properly instructed and supported jury makes better decisions than a single judge.<sup>15</sup>
  - there is no evidence that judge-alone trials result in better experiences for complainants or fewer acquittals and there is not enough evidence about their use in Victoria.<sup>16</sup>
- 20.14 Some people supported the use of professional jurors as a way to address misconceptions and the complexity of sexual offence trials.<sup>17</sup> The Criminal Bar Association strongly opposed their use because these jurors could be biased in favour of complainants, which would 'undermine the fundamental importance of having an impartial and representative jury'.<sup>18</sup>
- 20.15 Some features of Victoria's criminal justice system, such as the jury system, serve fundamental purposes. Changes require caution and strong evidence that they will achieve their aims (see Chapter 19). We are persuaded that it is not clear that replacing the jury, either with a judge or with professional jurors, would deal with juror misconceptions. There are serious risks that would require further study, such as the impacts of this change on a fair trial. We see juries as an important feature of the criminal justice system. They represent the community and contribute to public trust in the system. At this stage, the case for a major change has not been made.

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9 Law Commission (New Zealand), *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (Report No 136, December 2015) [6.40]–[6.48] <<https://www.lawcom.govt.nz/our-projects/alternative-models-prosecuting-and-trying-criminal-cases?id=1270>>.

10 Office of the Under-Secretary to the Minister for Justice (Domestic and Sexual Violence Issues) (NZ), *Improving the Justice Response to Victims of Sexual Violence* (Cabinet Paper, 2 July 2019) [87] <<https://www.justice.govt.nz/assets/Documents/Publications/7236-Proactive-release-SV-response-final.pdf>>.

11 Lord Justice Clerk's Review Group, *Improving the Management of Sexual Offence Cases* (Report, Scottish Courts and Tribunal Service, March 2021) [5.52] <<https://www.scotcourts.gov.uk/docs/default-source/default-document-library/reports-and-data/Improving-the-management-of-Sexual-Offence-Cases.pdf?sfvrsn=6>>.

12 Submissions 7 (Dr Bianca Fileborn, Dr Rachel Loney-Howes, Dr Tully O'Neill and Sophie Hinds), 40 (Law Institute of Victoria), 47 (Criminal Bar Association), 59 (County Court of Victoria), 63 (Office of Public Prosecutions); Consultation 26 (Greg Byrne PSM, Legal Policy Consultant, Greg Byrne Law).

13 Submissions 7 (Dr Bianca Fileborn, Dr Rachel Loney-Howes, Dr Tully O'Neill and Sophie Hinds), 45 (Victims of Crime Commissioner); Consultations 6 (Dr Emma Henderson and Dr Kirsty Duncanson); 26 (Greg Byrne PSM, Legal Policy Consultant, Greg Byrne Law).

14 Submissions 41 (Office of the Public Advocate), 59 (County Court of Victoria); Consultations 4 (Judicial College of Victoria), 27 (Juries Commissioner).

15 Submission 59 (County Court of Victoria); Consultations 4 (Judicial College of Victoria), 27 (Juries Commissioner). See also Fiona Leverick, 'What Do We Know about Rape Myths and Juror Decision Making?' (2020) 24(3) *The International Journal of Evidence & Proof* 255, 273–4.

16 Submissions 7 (Dr Bianca Fileborn, Dr Rachel Loney-Howes, Dr Tully O'Neill and Sophie Hinds), 45 (Victims of Crime Commissioner).

17 Submission 14 (Gatehouse Centre, Royal Children's Hospital); Consultation 10 (Professor Jane Goodman-Delahunty). Dr Emma Henderson also expressed support: Consultation 6 (Dr Emma Henderson and Dr Kirsty Duncanson).

18 Submission 47 (Criminal Bar Association). See also Submission 53 (Liberty Victoria).

## Jury directions could be strengthened to counter misconceptions about sexual violence

### What are jury directions?

- 20.16 In a trial, the judge gives directions to a jury to help them understand the law before they reach a verdict. Victoria has made many recent reforms to jury directions.<sup>19</sup>
- 20.17 Jury directions are found in the *Jury Directions Act 2015* (Vic). The Victorian Criminal Charge Book provides further guidance.<sup>20</sup> Judges may express jury directions in their own way.<sup>21</sup>
- 20.18 In trials for sexual offences, one aim of jury directions is to counter the misconceptions that jurors might hold.<sup>22</sup> Jurors may make decisions, or be encouraged by lawyers to make decisions, based on these misconceptions.<sup>23</sup> A recent transcript analysis of rape trials in the County Court of Victoria (see Chapter 1 for details) found cases where these misconceptions were called on by the prosecution and defence.<sup>24</sup>
- 20.19 The jury directions for sexual offences, which are based on research,<sup>25</sup> cover:
- consent
  - why people might not report or 'delay' reporting
  - the effects of trauma and memory on the evidence given by people who have experienced sexual offending (see Table 20).<sup>26</sup>
- 20.20 The Act also prohibits, or requires a judge to correct, specific statements or suggestions made by counsel or in jury questions. For example, statements or suggestions that a complainant is 'less credible' or 'require[s] more careful scrutiny' because they did not report the incident earlier.<sup>27</sup>
- 20.21 We note the Royal Commission into Institutional Responses to Child Sexual Abuse recommended each state and territory should develop jury directions about children and the impact of child sexual abuse. The Victorian Government accepted this recommendation.<sup>28</sup>

19 See, eg, Criminal Law Review, Department of Justice and Regulation (Vic), *Jury Directions: A Jury-Centric Approach* (Report, March 2015) <<https://www.justice.vic.gov.au/jury-directions-reports>>; *Jury Directions and Other Acts Amendment Act 2017* (Vic).

20 Judicial College Victoria, '3.1 Directions Under Jury Directions Act 2015', *Criminal Charge Book* (Online Manual, 14 May 2021) <<https://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#46024.htm>>.

21 *Jury Directions Act 2015* (Vic) s 6.

22 Greg Byrne and Chris Maxwell, 'Putting Jurors First: Legislative Simplification of Jury Directions' (2019) 43 *Criminal Law Journal* 180, 194; Emma Henderson and Kirsty Duncanson, 'A Little Judicial Direction: Can the Use of Jury Directions Challenge Traditional Consent Narratives in Rape Trials?' (2016) 39(2) *University of New South Wales Law Journal* 750; John Willis and Marilyn McMahon, 'Educating Juries or Telling Them What to Think? Credibility, Delay in Complaint, Judicial Directions and the Role of Juries' (2017) 41(1) *Criminal Law Journal* 27.

23 For example, asking the victim survivor why she did not resist or fight back in any way. See Judicial College (UK), *Crown Court Compendium (Compendium Part I, December 2020)* 20-3 <<https://www.judiciary.uk/publications/crown-court-compendium-published/>>; Sarah Zydervelt et al, 'Lawyers' Strategies for Cross-Examining Rape Complainants: Have We Moved beyond the 1950s?' (2017) 57(3) *The British Journal of Criminology* 551, 3.

24 Dr Julia Quilter and Luke McNamara, *Qualitative Analysis of County Court of Victoria Rape Trial Transcripts* (Report to the Victorian Law Reform Commission) (forthcoming).

25 Chris Maxwell and Greg Byrne, 'Making Trials Work for Juries: Pathways to Simplification' [2020] (11) *Criminal Law Review* 1034, 1047.

26 *Jury Directions Act 2015* (Vic) pt 5.

27 *Ibid* ss 7, 51(1)(c).

28 *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report* (Parts VII to X and Appendices, 2017) Recommendation 70; Victorian Government, 'Victorian Government Response to the Royal Commission into Institutional Child Sexual Abuse', VIC.GOV.AU (Web Page, 20 July 2021) <<https://www.vic.gov.au/victorian-government-response-royal-commission-institutional-responses-child-sexual-abuse>>.

**Table 20: Jury directions about sexual violence**

Type of direction	Description	Process	When the direction is given
Corrective directions	Corrects certain statements or suggestions, <sup>29</sup> including statements about the reliability of children <sup>30</sup> or complainants in sexual offence cases as a class <sup>31</sup>	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) <sup>32</sup>	Made on request by parties	After the close of evidence
Directions on delay and credibility	Explains relevance of delay on the credibility of the complainant, including that delay is common, and that there may be good reasons for not complaining or delays in complaining <sup>33</sup>	Given by judge if 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) <sup>34</sup> or explains the language and cognitive skills of child witnesses <sup>35</sup>	Given by judge if criteria are met	May be given before evidence

### Jury directions can counter misconceptions

- 20.22 There is evidence that jury directions have some effect on the use of misconceptions, but it is unclear how much.<sup>36</sup> For example, jurors may settle on a story of what happened early in the trial, based on misconceptions.<sup>37</sup> Jury directions can restore a complainant's credibility 'from a debit balance' because of misconceptions 'back to a ... neutral balance.'<sup>38</sup> Jury directions may correct some misconceptions more effectively than others.<sup>39</sup>
- 20.23 Researchers face many challenges in this work. It is hard to identify the effect of attitudes and jury directions on a verdict because there are many other factors involved, such as the facts, the parties and what was discussed. As jurors in trials cannot be interviewed for secrecy reasons, studies must rely on mock jurors.<sup>40</sup>

<sup>29</sup> *Jury Directions Act 2015* (Vic) s 7.

<sup>30</sup> *Ibid* s 33.

<sup>31</sup> *Ibid* s 51.

<sup>32</sup> *Ibid* ss 46–47.

<sup>33</sup> *Ibid* s 52.

<sup>34</sup> *Ibid* s 54D.

<sup>35</sup> *Ibid* s 44N.

<sup>36</sup> Fiona Leverick, 'What Do We Know about Rape Myths and Juror Decision Making?' (2020) 24(3) *The International Journal of Evidence & Proof* 255, 274; Jonathan Clough et al, 'The Judge as Cartographer and Guide: The Role of Fact-Based Directions in Improving Juror Comprehension' (2018) 42(5) *Criminal Law Journal* 278, 297.

<sup>37</sup> Fiona Leverick, 'What Do We Know about Rape Myths and Juror Decision Making?' (2020) 24(3) *The International Journal of Evidence & Proof* 255, 272–3.

<sup>38</sup> Suzanne Blackwell, Fred Seymour and Sarah Mandeno, *Expert Evidence about Memory in New Zealand Sexual Violence Trials and Appellate Courts 2001 to 2020* (Report, New Zealand Law Foundation, June 2020) 31–2 <<https://apo.org.au/node/306776>>.

<sup>39</sup> Fiona Leverick, 'What Do We Know about Rape Myths and Juror Decision Making?' (2020) 24(3) *The International Journal of Evidence & Proof* 255, 272–3.

<sup>40</sup> James Chalmers, Fiona Leverick and Vanessa E Munro, 'The Provenance of What Is Proven: Exploring (Mock) Jury Deliberation in Scottish Rape Trials' (Scottish Jury Research Working Paper No 2, 2019) 1–2 <[https://www.gla.ac.uk/media/Media\\_704446\\_smxx.pdf](https://www.gla.ac.uk/media/Media_704446_smxx.pdf)>.

- 20.24 There are gaps in what we know about jury directions. For example, we need more research on:
- the extent to which jurors understand the language used in jury directions<sup>41</sup>
  - whether the structure of setting out what is wrong and then correcting it may be counterproductive, and even reinforce the misconceptions<sup>42</sup>
  - how misconceptions are used and circulated in trials and discussions by jurors<sup>43</sup>
  - whether jury directions are more effective than other ways of correcting misconceptions, such as expert evidence—there are mixed views on whether jury directions are as effective as expert evidence (discussed later).<sup>44</sup>
- 20.25 The timing of jury directions may also be important. It can help to give jury directions earlier in the trial and repeat them during the trial.<sup>45</sup>
- 20.26 More research on jury directions and how to make them effective is needed. While we think legislation should allow these directions to be given, it is important to evaluate them (discussed below).

### More jury directions are needed

- 20.27 The County Court of Victoria, Victoria Police and others submitted there was a need for more jury directions concerning sexual violence.<sup>46</sup> Some referred to a widely accepted resource on challenging misconceptions by the Australian Institute of Family Studies and Victoria Police: *Challenging Misconceptions about Sexual Offending: Creating an Evidence-based Resource for Police and Legal Practitioners*.<sup>47</sup>
- 20.28 The New South Wales Law Reform Commission (NSWLRC) also recently made recommendations for jury directions (see box).

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41 Jennifer Temkin, "And Always Keep a-Hold of Nurse, for Fear of Finding Something Worse": Challenging Rape Myths in the Courtroom' (2010) 13(4) *New Criminal Law Review* 710, 721–4; Submission 42 (Greg Byrne PSM).

42 Jennifer Temkin, "And Always Keep a-Hold of Nurse, for Fear of Finding Something Worse": Challenging Rape Myths in the Courtroom' (2010) 13(4) *New Criminal Law Review* 710, 725–6.

43 Louise Ellison and Vanessa E Munro, 'Better the Devil You Know? "Real Rape" Stereotypes and the Relevance of a Previous Relationship in (Mock) Juror Deliberations' (2013) 17(4) *The International Journal of Evidence & Proof* 255, 299; Louise Ellison and Vanessa E Munro, 'A Stranger in the Bushes, or an Elephant in the Room? Critical Reflections Upon Received Rape Myth Wisdom in the Context of a Mock Jury Study' (2010) 13(4) *New Criminal Law Review: An International and Interdisciplinary Journal* 781.

44 Jane Goodman-Delahunty, Annie Cossins and Kate O'Brien, 'A Comparison of Expert Evidence and Judicial Directions to Counter Misconceptions in Child Sexual Abuse Trials' (2011) 44(2) *Australian & New Zealand Journal of Criminology* 196; Fiona Leverick, 'What Do We Know about Rape Myths and Juror Decision Making?' (2020) 24(3) *The International Journal of Evidence & Proof* 255, 270–3; 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.

45 Annie Cossins, 'Expert Witness Evidence in Sexual Assault Trials: Questions, Answers and Law Reform in Australia and England' (2013) 17(1) *The International Journal of Evidence & Proof* 74, 94–5; Emma Henderson and Kirsty Duncanson, 'A Little Judicial Direction: Can the Use of Jury Directions Challenge Traditional Consent Narratives in Rape Trials?' (2016) 39(2) *University of New South Wales Law Journal* 718, 727–31; Fiona Leverick, 'What Do We Know about Rape Myths and Juror Decision Making?' (2020) 24(3) *The International Journal of Evidence & Proof* 255, 272–3.

46 Submissions 22 (knowmore legal service), 42 (Greg Byrne PSM), 59 (County Court of Victoria), 68 (Victoria Police); Consultation 41 (Individual views of the Honourable Justice Chris Maxwell AC and Judicial Registrar Tim Freeman).

47 Australian Institute of Family Studies (Cth) and Victoria Police, *Challenging Misconceptions about Sexual Offending: Creating an Evidence-based Resource for Police and Legal Practitioners* (Report, 2017) <<https://www.police.vic.gov.au/sites/default/files/2019-01/For-Internet--Challenging-Misconceptions-Report.pdf>>.



### New South Wales Law Reform Commission recommendations for new jury directions

The New South Wales Law Reform Commission recently recommended introducing new jury directions stating that:

- Non-consensual sexual activity can occur in many different kinds of circumstances and between different kinds of people, including people who know, are married to, or are in a relationship with each other.
- Trauma may affect people differently, and the presence or absence of emotion or distress does not necessarily mean a person is not telling the truth.
- It should not be assumed that a person consented to a sexual activity because the person wore particular clothing or had a particular appearance, consumed alcohol or drugs, or was present in a particular location.<sup>48</sup>

It also recommended introducing two jury directions that already exist in Victoria, stating that:

- There is no typical or normal response to non-consensual sexual activity and people may respond in different ways, and jurors must avoid making assessments based on how people will respond to such activity.
- People who do not consent to a sexual activity may not be physically injured or subjected to violence, or threatened with physical injury and violence, and the absence of these does not mean a person is not telling the truth.<sup>49</sup>

20.29 A victim survivor told us, in relation to potential jury directions to correct misconceptions about flirtation and clothing:

I could not believe these are not already in jury directions in Victoria. It needs to be put in.—Penny<sup>50</sup>

20.30 The Criminal Bar Association stated that there was no need for further reform.<sup>51</sup> Victoria Legal Aid said that certain jury directions may not be needed if forensic medical evidence could be provided instead.<sup>52</sup>

20.31 While we recognise there has already been significant reform, we agree that there is value in extending the jury directions on sexual violence. The directions available do not cover all the misconceptions that play out in sexual offence trials. We later discuss how the transcript analysis revealed lines of questioning that 'inferred' consent to later sexual activity from things such as flirting and the complainant's clothing.<sup>53</sup>

20.32 We have identified below the topics that should be further addressed in jury directions, based on what we heard in this inquiry as well as the NSWLRC recommendations and overseas practice. Jury directions on these topics should be introduced under the *Jury Directions Act 2015* (Vic).

48 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) Recommendations 8.3, 8.6, 8.7 <<https://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report%20148.pdf>>.

49 Ibid Recommendations 8.4, 8.5. See also *Jury Directions Act 2015* (Vic) s 46(3)(c)(ii), (d).

50 Consultation 59 (Ashleigh Rae, Nicole Lee, Penny).

51 Submission 47 (Criminal Bar Association).

52 Consultation 49 (Victoria Legal Aid).

53 Julia Quilter and Luke McNamara, *Qualitative Analysis of County Court of Victoria Rape Trial Transcripts* (Report to the Victorian Law Reform Commission) (forthcoming).



## Jury directions should cover the diverse contexts of, and responses to, sexual violence

- 20.33 We endorse and recommend the NSWLRC recommendations (see box) to use jury directions to counter misconceptions related to:
- the presence or absence of emotion or distress when a person reports or gives evidence
  - the relevance of a person's appearance (including their clothing), their use of drugs and alcohol, and their presence at a location (for example, a nightclub).<sup>54</sup>
- 20.34 In addition, we recommend a new direction to address the misconception that perceived flirtatious or sexual behaviour (such as holding hands or kissing) implies consent to later sexual activity.
- 20.35 In New Zealand, the Sexual Violence Legislation Bill seeks to allow jury directions to address misconceptions about the complainant 'dressing provocatively, acting flirtatiously, or drinking alcohol or taking drugs'.<sup>55</sup>
- 20.36 Dr Bianca Fileborn and colleagues submitted:
- an accused's subjective interpretation of the survivors' 'everyday' behaviour (such as clothing, tone of voice, being 'friendly' ...) is used to establish that the accused held a 'reasonable' belief in consent. This is at odds with a communicative model, under which consent is actively and continually conveyed by all parties involved in a sexual encounter.<sup>56</sup>
- 20.37 Rape & Sexual Assault Research & Advocacy submitted an example from a case where:
- By his own evidence, the defendant's belief in consent was entirely tied to the complainant's alleged 'invitation' to 'kneel down' next to her, and her 'flirting,' which he described as 'just talking' and rubbing his leg.<sup>57</sup>
- 20.38 The transcript analysis highlighted examples of questions related to these misconceptions. An example of questions related to flirtation is provided in the box below.

### Transcript analysis example: questions related to flirtation

DEFENCE COUNSEL: You certainly weren't flirting with him?

COMPLAINANT: I wasn't flirting with him.

DEFENCE COUNSEL: You didn't flirt with him whilst you were down at the 7-Eleven?

COMPLAINANT: I didn't flirt with him. I don't think I did.

DEFENCE COUNSEL: All right. Do you call the two of you taking some photographs together at the 7-Eleven?

COMPLAINANT: Yes, I do. ...

DEFENCE COUNSEL: [name of complainant], would you agree with me that that series of photographs appear to show that, at least at that moment, you were engaged in flirting behaviour with [name of accused]?

54 There are similar directions in England and Wales: Judicial College (UK), *Crown Court Compendium* (Compendium Part I, December 2020) 20-8, Examples 7-8 <<https://www.judiciary.uk/publications/crown-court-compedium-published/>>.

55 Sexual Violence Legislation Bill 2019 (NZ) cl 16.

56 Submission 7 (Dr Bianca Fileborn, Dr Rachel Loney-Howes, Dr Tully O'Neill and Sophie Hinds).

57 Submission 34 (Rape & Sexual Assault Research & Advocacy). See also Rachael Burgin and Asher Flynn, 'Women's Behavior as Implied Consent: Male "Reasonableness" in Australian Rape Law' (2021) 21(3) *Criminology & Criminal Justice* 334.

COMPLAINANT: No. 'Cause the photos look, they don't look like they're flirting pictures. I always take photos, even when I go to nightclubs, sometimes with randoms. It's just photos. Random people at the nightclub when the photographer's there, they were like 'photo', everyone gets close to each other. I just recently went on holiday and I met a bunch of people and we all took photos and we were quite close. I don't see that to be flirting. There's no kissing, there's no flirtatious looks. Most of the photos it's just me posing and just posing for the photo. A laugh. On the second last one, the second last one's blurry. The third last one I'm just smiling away. He's not even looking at me and I'm just looking away towards him.

DEFENCE COUNSEL: All right?

COMPLAINANT: I wouldn't call them flirtatious photos. Or flirtatious moves ...

DEFENCE COUNSEL: All right. [Name of accused] says that you were flirting with him that night. You disagree with that?

COMPLAINANT: I do disagree with that.

DEFENCE COUNSEL: That you were flirting with him at the 7-Eleven, you disagree with that?

COMPLAINANT: I disagree with that.

DEFENCE COUNSEL: That you were flirting with him in a similar manner whilst you were at the [bar name redacted] and afterwards, you disagree with that?

COMPLAINANT: I disagree with that.<sup>58</sup>

- 20.39 The transcript analysis revealed that the complainant's clothing is not highlighted in 'explicit or outrageous' ways to shame women about what they were wearing at the time of the assault. But it can still be brought up in sexual offence trials to suggest implied consent to sexual activity.<sup>59</sup> Examples are provided below in the next box.

### Transcript analysis examples: questions related to clothing

#### Example 1

DEFENCE COUNSEL: But you change into shorts knowing you're going to get on the bed with him next to you, is that right?

COMPLAINANT: Yes.

DEFENCE COUNSEL: I understand from your interview it was a hot night?

COMPLAINANT: Yes, there was four of us in the room.

DEFENCE COUNSEL: You couldn't simply leave your leggings on?

COMPLAINANT: Um, they were my pyjama shorts and I didn't know I wasn't allowed to wear them.

DEFENCE COUNSEL: It didn't cross your mind, you've got this guy who's trying it on, on the airbed, and you're giving him perhaps easier access to legs, your upper thighs, whatever else?

COMPLAINANT: That was not my intention.

58

Julia Quilter and Luke McNamara, *Qualitative Analysis of County Court of Victoria Rape Trial Transcripts* (Report to the Victorian Law Reform Commission) (forthcoming).

59

Ibid.

**Example 2**

DEFENCE COUNSEL: You descended the stairs, and you split your jeans?

COMPLAINANT: I did, yes.

DEFENCE COUNSEL: And that was as a result of them being so tight on you. Correct?

COMPLAINANT: Are you suggesting I was overweight?

DEFENCE COUNSEL: No, I'm not suggesting that, Ms [name of complainant]. I'm just putting ... ?

COMPLAINANT: Sorry?

DEFENCE COUNSEL: Correction, Ms [name of complainant]. I'm putting to you exactly what I said to you. Please answer the question. You split your jeans descending the stairs because they were so tight?

COMPLAINANT: They were fitted jeans.

DEFENCE COUNSEL: That's why they split?

COMPLAINANT: Because they fit me. The button was able to be done up, and the zip was able to be done up.

DEFENCE COUNSEL: You weren't expecting them to split, were you, as you descended the staircase?

COMPLAINANT: No one would expect their pants to split, but it was an unfortunate event. ...

DEFENCE COUNSEL: In that descent, walking down the stairs, the pants that you were wearing were split—are split. You've already given that evidence?

COMPLAINANT: Correct.

DEFENCE COUNSEL: You were not wearing underwear at that time, were you?

COMPLAINANT: No.

DEFENCE COUNSEL: Is this the case that you were not wearing underwear at that time because your pants were so tight that you did not want the outline of underwear to be visible?

COMPLAINANT: That's incorrect. I very rarely wear underwear. I find it uncomfortable.

DEFENCE COUNSEL: But nevertheless, you believed your pants split because they were firm-fitting. Yes?

COMPLAINANT: They split—they split because they were an old pair of pants. Pants split all the time. It wasn't because they were way too tight.<sup>60</sup>

- 20.40 We also endorse and recommend the NSWLRC proposed direction that 'non-consensual sexual activity can occur in many different circumstances and between different kinds of people'.<sup>61</sup> The comparable Victorian direction states that people who do not consent to a sexual act with a particular person on one occasion may have had consensual sexual activity with that person or another person.<sup>62</sup> This would take jury directions on the meaning of consent further by providing more specific examples of relationships and contexts.

60

Ibid.

61

New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) Recommendation 8.3.

62

*Jury Directions Act 2015* (Vic) s 46(3)(e).

- 20.41 The NSWLRC jury direction specifies that this direction should include people who know, are married to, or are in a relationship with one another. This would address common misconceptions about intimate partner and family violence.<sup>63</sup>
- 20.42 Based on feedback we received in consultations and submissions, we recommend extending this jury direction to two other commonly misunderstood contexts raised in this inquiry:
- *The sex industry.* The direction should address the relationship between a consumer of sexual content or services and the worker providing the content or services.<sup>64</sup>
  - *LGBTIQ+ people.* The direction should address relationships between people of the same or different sexual orientations or gender identities.<sup>65</sup>
- 20.43 Finally, we recommend a jury direction to make it clear that people who have experienced sexual violence may continue a relationship or communication after the sexual violence. Maintaining a relationship with the person who has perpetrated the sexual violence is an example of 'counterintuitive behaviour'.<sup>66</sup> This jury direction would aim to counter juror beliefs that if a complainant maintained a relationship or communication with the accused then the alleged sexual violence must not have occurred.

### Jury directions in other contexts could be explored in the future

- 20.44 Victoria already has a jury direction regarding the lack of physical injury.<sup>67</sup> However, the Victorian Institute of Forensic Medicine (VIFM) also proposed the need for a jury direction to address the absence of genital injury being identified by a forensic medical examination of a person who had experienced sexual assault. They said there was a risk that, without a direction, jurors may place too much weight on the absence of injury, even though genital injury is not common in sexual assault and sexual assault can occur without genital injury.<sup>68</sup>
- 20.45 The VIFM also noted that its research had indicated that people were experiencing sexual violence at the first meeting set up through a dating app.<sup>69</sup> There may be value in countering a belief that the use of dating apps did not of itself imply consent to sexual activity in person.
- 20.46 Victoria has jury directions to counter misconceptions about family violence—for example, that people may not report or seek help for family violence. These jury directions apply only if self-defence or duress are in issue.<sup>70</sup> The County Court of Victoria suggested that removing this requirement would help address the misconception about complainants staying with an abusive partner.<sup>71</sup> We note that our recommendation on counterintuitive behaviours should achieve this aim as well.

63 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) Recommendation 8.3. A similar recommendation was made in Law Commission (New Zealand), *The Second Review of the Evidence Act 2006* (Report No 142, February 2019) [12.78] <<https://www.lawcom.govt.nz/our-projects/second-review-evidence-act-2006/>>.

64 Submission 50 (Project Respect); Consultations 33 (Rebecca, a member of the Victim Survivors' Advisory Council); 45 (Sex Work Law Reform Victoria).

65 Consultation 40 (Roundtable consultation with Transgender Victoria, Bisexual Alliance and Drummond Street Services). For a discussion of myths in this context: see, eg, Shaez Mortimer, Anastasia Powell and Larissa Sandy, "Typical Scripts" and Their Silences: Exploring Myths about Sexual Violence and LGBTQ People from the Perspectives of Support Workers' (2019) 31(3) *Current Issues in Criminal Justice* 333; Meredith GF Worthen, 'Rape Myth Acceptance Among Lesbian, Gay, Bisexual, and Mostly Heterosexual College Students' (2021) 36(1–2) *Journal of Interpersonal Violence* NP232 <<https://pubmed.ncbi.nlm.nih.gov/29294932/>>.

66 Australian Institute of Family Studies (Cth) and Victoria Police, *Challenging Misconceptions about Sexual Offending: Creating an Evidence-based Resource for Police and Legal Practitioners* (Report, 2017) 12 <<https://www.police.vic.gov.au/sites/default/files/2019-01/For-Internet--Challenging-Misconceptions-Report.pdf>>.

67 *Jury Directions Act 2015* (Vic) s 46(3)(c)(ii).

68 Consultation 42 (Victorian Institute of Forensic Medicine).

69 Submissions 61 (Victorian Institute of Forensic Medicine), 71 (Victorian Institute of Forensic Medicine and Victorian Forensic Paediatric Medical Service). See also Janine Rowse, Caroline Bolt and Sanjeev Gaya, 'Swipe Right: The Emergence of Dating-App Facilitated Sexual Assault. A Descriptive Retrospective Audit of Forensic Examination Caseload in an Australian Metropolitan Service' (2020) 16(1) *Forensic Science, Medicine, and Pathology* 71.

70 *Jury Directions Act 2015* (Vic) ss 58–60.

71 Submission 59 (County Court of Victoria).

- 20.47 In our issues paper, we asked if there should be a jury direction that a doubt based on an established misconception cannot be a 'reasonable doubt'.<sup>72</sup> The County Court of Victoria and Criminal Bar Association cautioned against such a direction.<sup>73</sup>
- 20.48 These areas could be explored as subjects for jury directions in the future. But given the limited feedback we received, and the concerns expressed, we have not recommended they should be addressed in a jury direction.

## Recommendation

- 78 New jury directions should be introduced in the *Jury Directions Act 2015* (Vic) to address misconceptions about sexual violence on:
- a. an absence or presence of emotion or distress when reporting or giving evidence
  - b. a person's appearance (including their clothing), use of drugs and alcohol, and presence at a location
  - c. behaviour perceived to be flirtatious or sexual
  - d. the many different circumstances in which non-consensual sexual activity may take place, including between:
    - i. people who know one another
    - ii. people who are married
    - iii. people who are in an established relationship
    - iv. a consumer of sexual content or services and the worker providing the content or services
    - v. people of the same or different sexual orientations or gender identities
  - e. counterintuitive behaviours, such as maintaining a relationship or communication with the perpetrator after non-consensual sexual activity.

## Jury directions should be given early in the trial

- 20.49 In our issues paper we asked if the timing or frequency of jury directions could be improved.<sup>74</sup> Jury directions are usually given near the end of a trial during the judge's charge to the jury. This is in line with the request procedure in the *Jury Directions Act* which requires parties to request directions to be given after the close of all evidence.<sup>75</sup>
- 20.50 Some directions, on the other hand, can or must be given early in the trial (or 'mid-trial'). These include jury directions related to differences in the complainant's account and delay in reporting.<sup>76</sup> The transcript analysis revealed that the most common mid-trial direction was related to delay in reporting.<sup>77</sup>
- 20.51 Professor Jane Goodman-Delahunty explained that jurors start deliberating early and throughout the trial: 'If you only give them the rules of the game right at the end, it's difficult to retrospectively undo the process of the decision.'<sup>78</sup>

<sup>72</sup> Victorian Law Reform Commission, *Sexual Offences: The Trial Process* (Issues Paper E, October 2020) Question 4.

<sup>73</sup> Submissions 47 (Criminal Bar Association), 59 (County Court of Victoria).

<sup>74</sup> Victorian Law Reform Commission, *Sexual Offences: The Trial Process* (Issues Paper E, October 2020) Question 4.

<sup>75</sup> *Jury Directions Act 2015* (Vic) ss 11–12.

<sup>76</sup> Ibid ss 52, 54D.

<sup>77</sup> Julia Quilter and Luke McNamara, *Qualitative Analysis of County Court of Victoria Rape Trial Transcripts* (Report to the Victorian Law Reform Commission) (forthcoming).

<sup>78</sup> Consultation 10 (Professor Jane Goodman-Delahunty).

- 20.52 The County Court of Victoria said that judges were giving jury directions throughout the trial more often. It told us:
- There are different views about the advantages and disadvantages of the timing of directions: if a direction is given before the evidence is led, it is in a bit of a vacuum. If you give it immediately afterwards, it has some context, but it's possible that the jury has already formed a view as a result of hearing the evidence.<sup>79</sup>
- 20.53 The NSWLRC recently highlighted the value of earlier jury directions, as is also the practice in England and Wales.<sup>80</sup> The NSWLRC recommended that judges should be able to repeat directions at any time in the trial, such as when summing up.<sup>81</sup>
- 20.54 We agree with research that suggests that hearing a jury direction early in the trial would mean jurors have an informed position in their minds before they hear the complainant's evidence and before they form any opinions based on misconceptions.<sup>82</sup>
- 20.55 We recommend that jury directions should be given before or during the evidence, and that judges should be able to repeat them at any time in the trial. This can be done if counsel requests, or if the judge considers that there is evidence in the trial that requires the direction to be given. A similar model to the timing of the current direction on delay or lack of reporting could be adopted.
- 20.56 This new procedure should apply both to existing and the proposed new directions for addressing misconceptions.

## Recommendation

- 79 The *Jury Directions Act 2015* (Vic) should be amended so that existing jury directions and jury directions on topics in Recommendation 78 can be:
- a. given by the judge to the jury at the earliest opportunity, such as before the evidence is adduced or as soon as practicable after it features in the trial, and
  - b. repeated by the judge at any time during the trial, and
  - c. in addition to the judge's own motion, requested by counsel before the trial or any time during the trial.

## The use of expert evidence could improve

### How is expert evidence used now?

- 20.57 In Victoria, experts can give evidence in sexual offence trials. They can, for example, give their expert opinion about the impact of child sexual abuse on the development and behaviour of children.<sup>83</sup> This use of expert evidence was recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse.<sup>84</sup>

<sup>79</sup> Submission 59 (County Court of Victoria).

<sup>80</sup> Judicial College (UK), *Crown Court Compendium* (Compendium Part I, December 2020) 1-17 <<https://www.judiciary.uk/publications/crown-court-compedium-published/>>. See also Law Commission (New Zealand), *The Second Review of the Evidence Act 2006* (Report No 142, February 2019) [12.103] <<https://www.lawcom.govt.nz/our-projects/second-review-evidence-act-2006/>>.

<sup>81</sup> New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [8.79]–[8.84] Recommendation 8.8 <<https://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report%20148.pdf>>.

<sup>82</sup> Fiona Leverick, 'What Do We Know about Rape Myths and Juror Decision Making?' (2020) 24(3) *The International Journal of Evidence & Proof* 255, 272–3. See also Jane GoodmanDelahunty, Annie Cossins and Kate O'Brien, 'Enhancing the Credibility of Complainants in Child Sexual Assault Trials: The Effect of Expert Evidence and Judicial Directions' (2010) 28(6) *Behavioral Sciences & the Law* 769, 780. Cf 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.

<sup>83</sup> *Criminal Procedure Act 2009* (Vic) s 388; *Evidence Act 2008* (Vic) ss 79, 108C.

<sup>84</sup> *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report* (Parts VII to X and Appendices, 2017) Recommendation 69.



- 20.58 The prosecution usually decides if experts are needed in each case. We heard in this inquiry that expert evidence could be used more often. Expert evidence could be used to counter misconceptions. It could reduce the risk of jurors using their own biases to reach conclusions that are not supported by the evidence.<sup>85</sup>
- 20.59 Researchers who undertook the transcript analysis stated that the cases they analysed rarely used expert evidence. They said that because of:
- the frequency with which rape myths were engaged, and the prevalence of assertions and implications that the complainant had not behaved in the manner 'expected' of rape victims, consideration should be given to more active use of this form of expert evidence.<sup>86</sup>
- 20.60 Expert evidence may address the same topics as jury directions, as well as:
- how memory works (including when and how people repress or recover memories)
  - behaviours that may seem counterintuitive, such as a victim survivor maintaining a relationship with the accused
  - the power dynamics and characteristics of family violence.<sup>87</sup>
- 20.61 Research suggests that expert evidence can be an effective alternative to jury directions. It can reduce juror misconceptions about sexual violence, especially when carefully prepared and timed.<sup>88</sup>
- 20.62 Expert evidence has some advantages over jury directions. It can be called when there is a topic that does not have a jury direction, and it can add context and detail beyond a jury direction. It can adapt to emerging research more quickly than jury directions, which require legislation. Leverick notes that:
- expert testimony might be more memorable as the expert will only be testifying about a single issue and jurors will be less likely to switch off and miss important information.<sup>89</sup>
- 20.63 However, expert evidence may not be effective where, for example, the evidence does not relate closely to the facts of the case; is given too late; or where the expert is not well prepared to appear in court.<sup>90</sup>
- 20.64 Expert evidence about sexual offending is commonly used in New Zealand, and is given by medical practitioners, clinical psychologists, academics and scientists.<sup>91</sup>
- 20.65 Judges on New Zealand's pilot sexual violence court (see Chapter 18) told us that expert evidence on counterintuitive behaviour was:
- enormously valuable, and counsel accept that. There's rarely an arm wrestle over counter-intuitive evidence coming in – often now it will be admitted in agreed fact form and becomes part of the landscape of the trial.<sup>92</sup>

85 See, eg, Jacqueline Horan and Jane Goodman-Delahunty, 'Expert Evidence to Counteract Jury Misconceptions about Consent in Sexual Assault Cases: Failures and Lessons Learned' (2020) 43(2) *UNSW Law Journal* 707, 711. This was supported by a judge of the County Court: Consultation 24 (County Court of Victoria).

86 Julia Quilter and Luke McNamara, *Qualitative Analysis of County Court of Victoria Rape Trial Transcripts* (Report to the Victorian Law Reform Commission) (forthcoming).

87 Consultations 10 (Professor Jane Goodman-Delahunty), 25 (CASA senior counsellor/advocates), 37 (New Zealand District Court judges with experience on the sexual violence court pilot). See also Suzanne Blackwell, Fred Seymour and Sarah Mandeno, *Expert Evidence about Memory in New Zealand Sexual Violence Trials and Appellate Courts 2001 to 2020* (Report, New Zealand Law Foundation, June 2020) <<https://apo.org.au/node/306776>>; *Family Violence Protection Act 2008* (Vic) s 73.

88 Annie Cossins, 'Expert Witness Evidence in Sexual Assault Trials: Questions, Answers and Law Reform in Australia and England' (2013) 17(1) *The International Journal of Evidence & Proof* 74; Jane Goodman-Delahunty, Annie Cossins and Kate O'Brien, 'Enhancing the Credibility of Complainants in Child Sexual Assault Trials: The Effect of Expert Evidence and Judicial Directions' (2010) 28(6) *Behavioral Sciences & the Law* 769; Jacqueline Horan and Jane Goodman-Delahunty, 'Expert Evidence to Counteract Jury Misconceptions about Consent in Sexual Assault Cases: Failures and Lessons Learned' (2020) 43(2) *UNSW Law Journal* 707, 711; Fiona Leverick, 'What Do We Know about Rape Myths and Juror Decision Making?' (2020) 24(3) *The International Journal of Evidence & Proof* 255, 270–4.

89 Fiona Leverick, 'What Do We Know about Rape Myths and Juror Decision Making?' (2020) 24(3) *The International Journal of Evidence & Proof* 255, 273.

90 Jacqueline Horan and Jane Goodman-Delahunty, 'Expert Evidence to Counteract Jury Misconceptions about Consent in Sexual Assault Cases: Failures and Lessons Learned' (2020) 43(2) *UNSW Law Journal* 707, 716, 733–5.

91 Suzanne Blackwell, Fred Seymour and Sarah Mandeno, *Expert Evidence about Memory in New Zealand Sexual Violence Trials and Appellate Courts 2001 to 2020* (Report, New Zealand Law Foundation, June 2020) 28 <<https://apo.org.au/node/306776>>.

92 Consultation 37 (New Zealand District Court judges with experience on the sexual violence court pilot).



## People supported increasing the use of expert evidence

- 20.66 Many stakeholders supported greater use of expert evidence in sexual offence trials than is currently the case.<sup>93</sup> The County Court of Victoria told us:
- Expert witnesses in criminal proceedings assist in addressing misconceptions about sexual offending. More regular use of expert witnesses could help address cultural change. The use of more expert witnesses in sexual offence matters could also inform the advice that defence counsel provides to an accused, which could lead to more matters resolving.<sup>94</sup>
- 20.67 The County Court of Victoria suggested a panel of experts available to both the prosecution and defence:
- an expert panel is able to be more quickly and more flexibly applied to sexual offence proceedings [than jury directions]. The amendments or creation of jury directions can be a lengthy process.<sup>95</sup>
- 20.68 Victoria Police also supported using expert evidence more often:
- a jury may hear expert evidence and may accept or reject it. This is appropriate in increasing jury awareness and understanding of the nature and effects of sexual offending.<sup>96</sup>
- 20.69 A victim survivor of institutional child sexual abuse in the 1970s explained that expert evidence could have supplied historical context helping jurors to understand her situation. She explained that, in those days, girls were brought up to be 'good little girls' and not make trouble. Sex was never discussed, and gender roles were much more about girls taking care of boys and men. Present-day jurors might not have understood this.<sup>97</sup>
- 20.70 Researchers who undertook the transcript analysis of cases involving intoxication found that medical or scientific expert evidence about alcohol or other drug consumption was rarely presented to juries. They stated that:
- it would be preferable for the jury to receive better guidance on the relationship between [alcohol or other drugs] consumption and cognitive functions like consent formation, and the ways in which intoxication does (and does not) impact on memory and recall of events.<sup>98</sup>
- 20.71 The Office of Public Prosecutions expressed concerns that using expert evidence more often could lead to more appeals, in cases where the expert evidence is found to be inadmissible.<sup>99</sup>
- 20.72 Conflicts may also arise between the use of expert evidence and a jury direction.<sup>100</sup> For example, a judge can direct the jury that there may be 'good reasons' why a person did not report, or delayed in reporting, a sexual offence, such as threats or being sworn to secrecy. But if the judge's explanation falls within what could qualify as expert evidence, there could be grounds for an appeal<sup>101</sup>

## We recommend an expert panel on sexual violence

- 20.73 We agree that expert evidence should be used widely in sexual offence trials. Expert evidence complements jury directions, especially if a topic is not addressed in jury directions, and it can provide context and detail.

93 Submission 68 (Victoria Police). This was also supported by a judge of the County Court: Consultations 24 (County Court of Victoria), 25 (CASA senior counsellor/advocates).

94 Submission 59 (County Court of Victoria).

95 Ibid.

96 Submission 68 (Victoria Police).

97 Consultation 69 (Deborah, a victim survivor of sexual assault).

98 Julia Quilter and Luke McNamara, *Qualitative Analysis of County Court of Victoria Rape Trial Transcripts* (Report to the Victorian Law Reform Commission) (forthcoming).

99 Submission 63 (Office of Public Prosecutions): see, eg, *Jacobs (a Pseudonym) v The Queen* [2019] VSCA 285.

100 Submissions 63 (Office of Public Prosecutions), 66 (Supreme Court of Victoria).

101 See, eg, *Jacobs (a Pseudonym) v The Queen* [2019] VSCA 285; *Ford (a pseudonym) v The Queen* [2020] VSCA 162, (2020) 283 A Crim R 17, [67].

- 20.74 The best way to make using experts accessible is through a panel drawn from a pool of approved experts. This could be modelled on the intermediaries scheme (see Chapter 15).<sup>102</sup> It is important that whoever maintains the panel is independent in order to maintain the neutrality of the courts. In Chapter 22 we recommend introducing a Commission for Sexual Safety. This Commission could work with the Department of Justice and Community Safety to establish and maintain such a panel. This is discussed more in that chapter.
- 20.75 Experts will need to be approved and reviewed from time to time to ensure the evidence is of high quality.<sup>103</sup> We recommend that the expert panel should be available for sexual offence cases in the Magistrates' Court of Victoria and the County Court of Victoria.
- 20.76 We also recommend that, as the County Court of Victoria suggested, the prosecution, defence and, if there are good reasons to do so, the judge should be able to call on the expert panel.<sup>104</sup> There is a similar model in the Federal Court of Australia where, in some circumstances, an expert may be appointed as an independent adviser to the court.<sup>105</sup> The judge should have the power to call independent expert evidence on a relevant issue, such as counterintuitive behaviour. This may be useful where a party (usually the prosecution) has not called expert evidence but it would assist jurors and ensure a fair trial.
- 20.77 Expert evidence should be given efficiently and flexibly, building on current practices.<sup>106</sup> For example, it could be given through joint expert reports, or statements of differing expert opinions relied on by each party.<sup>107</sup> If the experts agreed, their evidence could be given through 'signed notices to admit evidence' rather than in person.<sup>108</sup>
- 20.78 As with jury directions, expert evidence may be more effective when introduced early in the trial. For example, in New Zealand an expert can give an opinion on counterintuitive behaviour even before the complainant has given evidence.<sup>109</sup>
- 20.79 We still need more research and evaluation to better understand how effectively expert evidence counters misconceptions in the Victorian context, what could make it more effective and how it compares to jury directions.<sup>110</sup> We discuss research below and evaluations of these recommendations in Chapter 6.
- 20.80 It is also important that people working in the criminal justice system know when and how to call expert evidence and are aware of the risks about using expert evidence. We discuss training on this in Chapter 18.

## Recommendation

- 80 The Victorian Government should set up and maintain an independent expert panel for sexual offence trials to be used by the prosecution, defence and the court. The Commission for Sexual Safety should have a role (Recommendation 90) in setting up and maintaining the panel. To maintain experts of a high calibre, this expert panel should be subject to an approval and periodic review process.

<sup>102</sup> *Criminal Procedure Act 2009* (Vic) s 389H.

<sup>103</sup> Consultation 95 (Victoria Legal Aid (No 2)).

<sup>104</sup> Submission 59 (County Court of Victoria).

<sup>105</sup> Federal Court of Australia, *Practice Note GPN-EXPT: Expert Evidence*, 25 October 2016, [2.1] <<https://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-expt>>.

<sup>106</sup> For example, where different parties call experts for the same issue, evidence may be given by the experts one after the other or with all of the experts present in court at the same time: County Court of Victoria, *Practice Note PNCR 1-2014: Expert Evidence in Criminal Trials*, 24 June 2014, [11.1] <<https://www.countycourt.vic.gov.au/files/documents/2018-08/practice-note-expert-evidence-criminal-trialsfinal-june-20140.pdf>>.

<sup>107</sup> See, eg. Law Commission (New Zealand), *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (Report No 136, December 2015) Recommendation 29 <<https://www.lawcom.govt.nz/our-projects/alternative-models-prosecuting-and-trying-criminal-cases?id=1270>>.

<sup>108</sup> Submission 59 (County Court of Victoria).

<sup>109</sup> Consultation 37 (New Zealand District Court judges with experience on the sexual violence court pilot).

<sup>110</sup> Fiona Leverick, 'What Do We Know about Rape Myths and Juror Decision Making?' (2020) 24(3) *The International Journal of Evidence & Proof* 255, 274.

## The tasks of jurors should be made easier

### Integrated jury directions should be used more

- 20.81 Reforms in Australia and other countries have supported jurors to make decisions. Resources supplied to jurors include checklists, flowcharts, jury guides and plain English directions.<sup>111</sup>
- 20.82 The most novel of these are integrated jury directions, also known as 'fact-based directions', 'route to verdict', 'pinpoint instruction' or 'question trails'. They combine legal and factual issues into questions the jury must decide. They can be complemented by written aids and tools.<sup>112</sup>
- 20.83 In its review of jury directions, the Victorian Department of Justice and Regulation (as it was then) provided an example of question trails:
- For example, the element 'the touching is sexual' in the offence of sexual assault is easily converted into the jury question 'Are you satisfied that the touching was sexual?' or 'Are you satisfied that when Albert touched Betty's buttocks, that the touching was sexual?'<sup>113</sup>
- 20.84 There is promising research suggesting the effectiveness of integrated directions.<sup>114</sup> They can assist jurors by giving them a starting point for deliberations, focus decision making, and reduce the time taken to reach a decision.<sup>115</sup> Their use was also supported in the Victorian Department of Justice and Regulation review of jury directions.<sup>116</sup>
- 20.85 The law allows judges to give integrated jury directions.<sup>117</sup> However, we heard that they were not used as often as they could be because judges were unfamiliar with them and some thought that they took up too much time.<sup>118</sup>
- 20.86 In Victoria, judges mostly deliver jury directions orally, and each judge decides how to use any written aids. This approach has been described as 'ad hoc'.<sup>119</sup> As Greg Byrne PSM explains:
- A significant amount of responsibility for ensuring that jury directions effectively guide jurors has been placed in the hands of the trial judge: it is the trial judge's duty to tailor jury directions to the specific circumstances of each case.<sup>120</sup>

111 Jonathan Clough et al, 'The Judge as Cartographer and Guide: The Role of Fact-Based Directions in Improving Juror Comprehension' (2018) 42(5) *Criminal Law Journal* 278, 279; Benjamin Spivak et al, 'The Impact of Factbased Instructions on Juror Application of the Law: Results from a TransTasman Field Study' (2020) 101(1) *Social Science Quarterly* 346, 349.

112 Criminal Law Review, Department of Justice and Regulation (Vic), *Jury Directions: A Jury-Centric Approach* (Report, March 2015) 135 <<https://www.justice.vic.gov.au/jury-directions-reports>>; Benjamin Spivak, James RP Ogloff and Jonathan Clough, 'Asking the Right Questions: Examining the Efficacy of Question Trails as a Method of Improving Lay Comprehension and Application of Legal Concepts' (2019) 26(3) *Psychiatry, Psychology & Law* 441, 442–3.

113 Criminal Law Review, Department of Justice and Regulation (Vic), *Jury Directions: A Jury-Centric Approach* (Report, March 2015) 84 <<https://www.justice.vic.gov.au/jury-directions-reports>>.

114 Jonathan Clough et al, 'The Judge as Cartographer and Guide: The Role of Fact-Based Directions in Improving Juror Comprehension' (2018) 42(5) *Criminal Law Journal* 278, 295–6; Chris Maxwell and Greg Byrne, 'Making Trials Work for Juries: Pathways to Simplification' [2020] (11) *Criminal Law Review* 1034, 199; Benjamin Spivak et al, 'The Impact of Factbased Instructions on Juror Application of the Law: Results from a TransTasman Field Study' (2020) 101(1) *Social Science Quarterly* 346.

115 Jonathan Clough et al, 'The Judge as Cartographer and Guide: The Role of Fact-Based Directions in Improving Juror Comprehension' (2018) 42(5) *Criminal Law Journal* 278, 295–6; Benjamin Spivak et al, 'The Impact of Factbased Instructions on Juror Application of the Law: Results from a TransTasman Field Study' (2020) 101(1) *Social Science Quarterly* 346; Benjamin Spivak, James RP Ogloff and Jonathan Clough, 'Asking the Right Questions: Examining the Efficacy of Question Trails as a Method of Improving Lay Comprehension and Application of Legal Concepts' (2019) 26(3) *Psychiatry, Psychology & Law* 441.

116 See Criminal Law Review, Department of Justice and Regulation (Vic), *Jury Directions: A New Approach* (Report, January 2013) xvi <<https://www.justice.vic.gov.au/jury-directions-reports>>.

117 *Jury Directions Act 2015* (Vic) s 67.

118 Submission 42 (Greg Byrne PSM). See also Jonathan Clough et al, *The Jury Project 10 Years On—Practices of Australian and New Zealand Judges* (Report, Australasian Institute of Judicial Administration, April 2019) 51 <<https://research.monash.edu/en/publications/the-jury-project-10-years-on-practices-of-australian-and-new-zeal>>; Benjamin Spivak, James RP Ogloff and Jonathan Clough, 'Asking the Right Questions: Examining the Efficacy of Question Trails as a Method of Improving Lay Comprehension and Application of Legal Concepts' (2019) 26(3) *Psychiatry, Psychology & Law* 441, 454.

119 Jonathan Clough et al, *The Jury Project 10 Years On—Practices of Australian and New Zealand Judges* (Report, Australasian Institute of Judicial Administration, April 2019) 1 <<https://research.monash.edu/en/publications/the-jury-project-10-years-on-practices-of-australian-and-new-zeal>>.

120 Submission 42 (Greg Byrne PSM).

- 20.87 In New Zealand integrated directions are standard practice and judges have become good at delivering these directions. Its courts have produced supporting materials, including 140 model question trails.<sup>121</sup>
- 20.88 The Juries Commissioner and other jury experts supported integrated jury directions being more widely used.<sup>122</sup> We agree that such directions should be used more often, and recommend that the Judicial College of Victoria, in consultation with the County Court of Victoria, should develop supporting material along the New Zealand model, and training in its use.

## Recommendation

- 81 The Judicial College of Victoria, in consultation with the County Court of Victoria, should develop written materials and training to encourage the use of integrated jury directions in sexual offence trials.

## Jurors should have guidance on 'beyond reasonable doubt'

### Jurors find it hard to understand 'beyond reasonable doubt'

- 20.89 The standard of proof is one of the most important aspects of the criminal trial. To convict someone, jurors must find that the prosecution has proved its case 'beyond a reasonable doubt'.
- 20.90 The High Court of Australia has decided that the meaning of 'beyond reasonable doubt' is 'understood well enough by the average [person] in the community'.<sup>123</sup> The Victorian *Criminal Charge Book* instructs that it is an error for a judge to 'intrude upon the jury's function by attempting to define it, unless the jury seeks further assistance'.<sup>124</sup>
- 20.91 If the judge is asked, the law states that the judge can give a jury direction to explain this by:
- referring to the presumption of innocence and the prosecution's obligation to prove the accused is guilty
  - indicating that it is not enough for the prosecution to persuade the jury that the accused is probably guilty or very likely to be guilty
  - indicating that it is almost impossible to prove anything with absolute certainty when reconstructing past events and the prosecution does not have to do so
  - indicating that the jury cannot be satisfied that the accused is guilty if the jury has a reasonable doubt about whether the accused is guilty, or
  - indicating that a reasonable doubt is not an imaginary or fanciful doubt or an unrealistic possibility.<sup>125</sup>
- 20.92 The Victorian Department of Justice and Regulation took this approach in its review of jury directions.<sup>126</sup> It considered that requiring the judge to make a direction may cause problems where there was no issue about the meaning of 'beyond reasonable doubt', and that integrated jury directions would be more helpful in addressing this concern.<sup>127</sup>

121 Jonathan Clough et al, 'The Judge as Cartographer and Guide: The Role of Fact-Based Directions in Improving Juror Comprehension' (2018) 42(5) *Criminal Law Journal* 278, 279; 'Question Trails', *Courts of New Zealand* (Web Page) <<https://www.courtsofnz.govt.nz/for-lawyers/question-trails/>>.

122 Submission 42 (Greg Byrne PSM); Consultation 10 (Professor Jane Goodman-Delahunty).

123 *Dawson v The Queen* (High Court of Australia, Dixon CJ, Taylor and Owen JJ, 23 November 1961), (1961) 106 CLR. See also *Darkan v The Queen* [2006] HCA 34, (2015) 227 CLR 373, [69].

124 Judicial College Victoria, '1.7 Onus and Standard of Proof', *Criminal Charge Book* (Online Manual, 21 July 2020) [55] <<https://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#1291.htm>>.

125 *Jury Directions Act 2015* (Vic) s 64. The judge can adapt the explanation to respond to the question asked by the jury.

126 Criminal Law Review, Department of Justice and Regulation (Vic), *Jury Directions: A New Approach* (Report, January 2013) [7.1] <<https://www.justice.vic.gov.au/jury-directions-reports>>.

127 Ibid [7.5.1].

- 20.93 Jurors can find it hard to understand what 'beyond reasonable doubt' means. While juries can ask the judge to explain what this means, they may be reluctant to do so.<sup>128</sup> Similar concerns prompted us to recommend in our 2020 inquiry on contempt of court that there should be more guidance materials to encourage juries to ask questions earlier and more often.<sup>129</sup>
- 20.94 For example, some studies have found that, when asked to explain what this standard means in numbers, jurors range widely in their understanding of what is needed. One study found that jurors thought the standard varied from needing to be 50 per cent sure to 99 per cent sure, with an average of 90 per cent.<sup>130</sup> Their understanding of the standard of proof may also depend on how much they understand jury directions and the type of offence and sentence, as well as their language and communication skills.<sup>131</sup>
- 20.95 The High Court of Australia has recently acknowledged that today, 'views might reasonably differ' on how well understood the term 'beyond reasonable doubt' is. As it notes, juries do 'with relative frequency' ask judges to explain its meaning, and experience overseas shows that 'more is required by way of explication'.<sup>132</sup>
- 20.96 How jurors understand 'beyond reasonable doubt' is important because it is a critical step to deciding if the accused is guilty or not guilty. If they believe that there should be no doubt or have different interpretations of how much doubt is reasonable, this raises questions about the fairness of verdicts. If jurors differ on the standard, this can also lead jurors to disagree and 'in the most extreme case, to a hung jury'.<sup>133</sup>

### Judges should always direct juries on the meaning of 'beyond reasonable doubt'

- 20.97 Jury experts told us the standard of proof should be explained clearly.<sup>134</sup> Our recommendation in this chapter for using integrated jury directions will help jurors apply the standard more appropriately.
- 20.98 We also see value in using jury directions to improve jurors' understanding of the meaning of 'beyond reasonable doubt'. A study in New South Wales using mock jurors found that directions did encourage them to lower their stringent standards. However, each person still differed on where they set the standard, and some people still held on to their high standards.<sup>135</sup>
- 20.99 Understanding the standard of proof is a key part of a criminal trial. While these concerns apply to all criminal trials, this factor may have a greater effect in sexual offence cases. As the County Court of Victoria told us, the standard of 'beyond reasonable doubt' 'is a high bar for cases that are more likely to involve "word on word" evidence' such as sexual offences.<sup>137</sup>

128 Greg Byrne and Chris Maxwell, 'Putting Jurors First: Legislative Simplification of Jury Directions' (2019) 43(3) *Criminal Law Journal* 180, 192.

129 Victorian Law Reform Commission, *Contempt of Court* (Report No 40, February 2020) Recommendation 73. We also recommended changing the law to make it clear that the jury foreperson could ask questions in writing on behalf of the jury: Recommendation 72.

130 Jane Goodman-Delahunty and Ryan Essex, 'Judicial Directions and the Criminal Standard of Proof: Improving Juror Comprehension' (2014) 24(2) *Journal of Judicial Administration* 75, 79. See also Katrin Mueller-Johnson, Mandeep K Dhami and Samantha Lundrigan, 'Effects of Judicial Instructions and Juror Characteristics on Interpretations of Beyond Reasonable Doubt' (2018) 24(2) *Psychology, Crime & Law* 117; Lily Trimboli, 'Juror Understanding of Judicial Instructions in Criminal Trials' (2008) 119 *Crime and Justice Bulletin* 1.

131 Lily Trimboli, 'Juror Understanding of Judicial Instructions in Criminal Trials' (2008) 119 *Crime and Justice Bulletin* 1, 4; Jane Goodman-Delahunty and Ryan Essex, 'Judicial Directions and the Criminal Standard of Proof: Improving Juror Comprehension' (2014) 24(2) *Journal of Judicial Administration* 75, 90.

132 *R v Dookheea* [2017] HCA 36, (2017) 262 CLR 402, [27].

133 Katrin Mueller-Johnson, Mandeep K Dhami and Samantha Lundrigan, 'Effects of Judicial Instructions and Juror Characteristics on Interpretations of Beyond Reasonable Doubt' (2018) 24(2) *Psychology, Crime & Law* 117, 118. See also Blake M McKimmie, Emma Antrobus and Chantelle Baguley, 'Objective and Subjective Comprehension of Jury Instructions in Criminal Trials' (2014) 17(2) *New Criminal Law Review: An International and Interdisciplinary Journal* 163.

134 Consultations 10 (Professor Jane Goodman-Delahunty), 26 (Greg Byrne PSM, Legal Policy Consultant, Greg Byrne Law).

135 Jane Goodman-Delahunty and Ryan Essex, 'Judicial Directions and the Criminal Standard of Proof: Improving Juror Comprehension' (2014) 24(2) *Journal of Judicial Administration* 75, 92.

136 The phrase 'word on word' (or 'she said/he said') has been said to be 'often inaccurate' and a 'loaded concept': Julia Quilter and Luke McNamara, *Qualitative Analysis of County Court of Victoria Rape Trial Transcripts* (Report to the Victorian Law Reform Commission) (forthcoming).

137 Submission 59 (County Court of Victoria).

20.100 The climate has shifted since Victorian jury directions were last reviewed. There seems to be a greater acceptance that such a direction would be useful. As the Victorian Court of Appeal has stated:

In due course, consideration should be given to removing the precondition to the power of explanation in the *Jury Directions Act*. It is not clear to us why, as a matter of policy, the power of a judge to assist a jury in this respect should depend for its exercise upon the jury first having asked a question.<sup>138</sup>

20.101 We agree with this view. Some jurors may not realise that they are interpreting the standard too strictly or too loosely, and so will not think to ask. Others might be reluctant to ask. Given how crucial the question is to verdicts, we do not think that whether the direction is given should depend on whether the jurors happen to ask for it. Consistency could lead to informed and fairer jury decisions.

20.102 We are not convinced that explaining the meaning of 'beyond reasonable doubt' is likely to confuse jurors. However, it makes sense for this area to be tested and researched further (discussed below).

20.103 Our terms of reference limit our review to trials of sexual offences. As noted above, the problem of 'beyond reasonable doubt' is likely to be more serious in these cases, but further research would be useful in considering whether a requirement to explain the meaning of 'beyond reasonable doubt' should apply to other criminal trials as well.

## Recommendation

82 Section 63 of the *Jury Directions Act 2015* (Vic) should be amended to require that, in all sexual offence trials, explanations of 'beyond reasonable doubt' should be given as set out under section 64 of that Act.

## Jury reforms need to be implemented well and evaluated

20.104 People working in the criminal justice system reported that jury reforms to date have been successful. For example, they have made jury directions simpler to understand, improved juror attitudes and reduced appeals based on misdirection.<sup>139</sup>

20.105 While there have been positive advances, we heard that jury directions may continue to be difficult for jurors to understand because of the concepts or the language used.<sup>140</sup> We heard there were opportunities to modernise the language of jury directions to remove any actual or perceived stigma. For example, a judge of the County Court of Victoria told us the word 'delay' is 'pejorative' and the phrase 'passage of time' could be used instead.<sup>141</sup>

20.106 As explained in this chapter, ongoing research is also needed to better understand:

- how jurors approach their task and understand all the evidence
- how they are affected by misconceptions about sexual violence
- how effective jury directions and expert evidence are, and when to use one or the other.

<sup>138</sup> *Dookheea v The Queen* [2016] VSCA 67, [91].

<sup>139</sup> Submissions 42 (Greg Byrne PSM), 44 (Dr Patrick Tidmarsh and Dr Gemma Hamilton), 47 (Criminal Bar Association), 59 (County Court of Victoria), 66 (Supreme Court of Victoria). See also Greg Byrne and Chris Maxwell, 'Putting Jurors First: Legislative Simplification of Jury Directions' (2019) 43(3) *Criminal Law Journal* 180, 200; Jonathan Clough et al, *The Jury Project 10 Years On—Practices of Australian and New Zealand Judges* (Report, Australasian Institute of Judicial Administration, April 2019) <<https://research.monash.edu/en/publications/the-jury-project-10-years-on-practices-of-australian-and-new-zealand-judges>>; Chris Maxwell and Greg Byrne, 'Making Trials Work for Juries: Pathways to Simplification' [2020] (11) *Criminal Law Review* 1034.

<sup>140</sup> Submissions 10 (Carolyn Worth AM and Mary Lancaster), 42 (Greg Byrne PSM), 44 (Dr Patrick Tidmarsh and Dr Gemma Hamilton).

<sup>141</sup> Consultation 24 (County Court of Victoria).



- how to improve juror understanding of 'beyond reasonable doubt'
  - the effectiveness of integrated jury directions.<sup>142</sup>
- 20.107 Given how important juries are to sexual offence trials, it is critical that reform work in this area is done well and we continue to build our understanding of 'what works' for jurors.
- 20.108 Greg Byrne PSM pointed to the need for regular review of jury directions, including as science and research advanced.<sup>143</sup> Previously, the Jury Directions Advisory Group (JDAG) developed jury directions by bringing together representatives of the justice system. But this body is not permanent.<sup>144</sup> We heard that a similarly collaborative and multi-disciplinary model for implementation and evaluation would be beneficial for improving the jury system.<sup>145</sup>
- 20.109 Greg Byrne PSM submitted a proposal for an ongoing and permanent advisory body for juries, set up as an independent statutory agency. This would be a collaborative and multi-disciplinary body, and include judges and lawyers, academics with expertise in jury research, former jurors and the Juries Commissioner.<sup>146</sup>
- 20.110 The functions of such a body could include:
- developing and implementing evidence-informed ways to educate jurors and dispel misconceptions, including through jury directions and expert evidence
  - developing and implementing evidence-informed strategies and materials to improve the understanding of jurors
  - researching and evaluating these measures
  - advising the government, judiciary, courts, legal profession and other bodies on jury directions and other functions of the jury
  - promoting understanding of juries through public information and education.<sup>147</sup>
- 20.111 We see the value of a body like this to achieving the best jury system possible for sexual offence trials. The justice system relies on a jury that is able to understand the evidence and is properly equipped to make decisions that support a fair trial. Evidence-informed reforms are critical so that jurors are effectively assisted with their important task.
- 20.112 While a permanent jury advisory body is a sensible suggestion for implementation and evaluation, it extends beyond the terms of reference for this inquiry. Recommending such a body for sexual offence trials would be overly narrow since the proposal could benefit all jury trials. However, the Victorian Government should consider the proposal as a potential way of implementing these reforms.
- 20.113 To ensure jury trials for sexual offences become more evidence-informed, we recommend that the Victorian Government should commission ongoing research on improving juror understanding, countering misconceptions and supporting the jury's task in sexual offence trials. The research should assess the effectiveness of jury directions, expert evidence and other measures that aim to support the jury's task in deciding if the accused is guilty or not guilty. It should find ways to improve these measures.
- 20.114 In Chapter 6, we recommend that the impact of reforms coming out of this report should be evaluated. This should include any reforms relating to juries.

<sup>142</sup> The secrecy of jury deliberations limits access to real jurors for research: see *Juries Act 2000* (Vic) s 78.

<sup>143</sup> Submission 42 (Greg Byrne PSM).

<sup>144</sup> Its membership comprises judges of the Court of Appeal, trial judges from the Supreme Court and County Court, representatives of the Office of Public Prosecutions, Criminal Bar Association, Victoria Legal Aid and the Judicial College of Victoria, and academics with expertise in jury research: Greg Byrne and Chris Maxwell, 'Putting Jurors First: Legislative Simplification of Jury Directions' (2019) 43(3) *Criminal Law Journal* 180, 185–6.

<sup>145</sup> Submissions 42 (Greg Byrne PSM), 66 (Supreme Court of Victoria).

<sup>146</sup> Greg Byrne PSM did not see this body as replacing the functions of the Juries Commissioner or the Judicial College of Victoria, although they may be involved in implementing reforms: Submission 42 (Greg Byrne PSM).

<sup>147</sup> *Ibid.*



## Recommendation

- 83 The Victorian Government should commission ongoing research into improving juror understanding, countering misconceptions about sexual violence and supporting the jury's task in sexual offence trials.
- The research should assess the effectiveness of, and identify ways to improve, jury directions, expert evidence and other measures that aim to support the jury's task of deciding if the accused is guilty or not guilty.



# CHAPTER 21

## Respecting victim survivors in sexual offence trials

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## 21. Respecting victim survivors in sexual offence trials

### Overview

- Trials are often traumatic for people who have experienced sexual violence.
- Too often, complainants feel their rights and interests are not given enough weight. These include being treated with respect and not being re-traumatised, their needs when they participate in a hearing and their right to privacy.<sup>1</sup>
- These rights and interests should be considered as part of the process for planning a trial.
- Rights should include more flexible arrangements for taking evidence, including pre-recording their evidence.
- Changes also need to be made to court design and arrangements to make sure people feel safe and respected.
- Their rights to privacy need to be protected. They need to know if the defence wants to introduce evidence about their confidential communications or sexual history, and they need to be given legal advice and representation to protect those rights.

### Victim survivors need respect during the trial process

- 21.1 Victims of crime expect and deserve to be treated with respect in the criminal justice system. As we said in our 2016 report *The Role of Victims of Crime in the Criminal Trial Process* (the Victims of Crime report), they are participants in criminal proceedings who have an inherent interest in the response of the criminal justice system.<sup>2</sup> This is reflected in the *Victims' Charter Act 2006* (Vic).<sup>3</sup>
- 21.2 Treating victims of crime with respect for their dignity is more likely than anything else to influence whether they are satisfied with the criminal justice system.<sup>4</sup> This is especially important at the trial stage. For most victims of crime, attending court is the main event in their experience of the criminal process.
- 21.3 A trial is the most visible part of the criminal justice system. It reflects how society responds to the crime. What happens in the courtroom, and the way victim survivors are treated, is a public signal of how society regards sexual violence.

<sup>1</sup> *Victims' Charter Act 2006* (Vic) ss 4, 14.

<sup>2</sup> Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 141.

<sup>3</sup> *Victims' Charter Act 2006* (Vic) ss 4(ba), 7A.

<sup>4</sup> Malini Laxminarayan et al, 'Victim Satisfaction with Criminal Justice: A Systematic Review' (2013) 8(2) *Victims & Offenders* 119, 131. See generally Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) ch 5.

- 21.4 Trials are often distressing for victims (sometimes referred to, in the language of the court, as 'complainants'). The law and language are complex and unfamiliar. Courts can be daunting places. There is more emphasis on the roles of the judge or magistrate, lawyers and the accused than on the victim. Courts may not provide an environment in which people feel comfortable talking about intimate details, let alone being challenged about them.
- 21.5 In the Victims of Crime report, we recommended that courts should acknowledge and respect the role of victims of crime, and improve the ways that victims of crime were questioned.<sup>5</sup> These were also central concerns of our previous inquiry into sexual offences, in 2004.<sup>6</sup>
- 21.6 Despite the reforms, we have continued to hear similar concerns about a lack of respect and dignity, and of 'brutal' experiences in court during cross-examination (see box).

The barrister who cross-examined me was quite brutal and old school. His questioning was aggressive and confrontational. He called me 'witness' instead of my name, or he would just use my last name. ... The questioning forced me into the defensive. It felt like he was taking uneducated, cheap shots. There needs to be parameters surrounding the cross-examination of the witness, with less pedestrian accusation creating deliberate confusion for the witness, and more educated professional questioning. The judge at my trial was good natured, but he did not take control of the questioning. At times he asked the defence barrister to move on. But he did not tackle him over it as some people would have liked.—Mark<sup>7</sup>

- 21.7 We heard that alternative arrangements such as giving evidence from a remote location, designed to make the experience of complainants more comfortable, are not working as well as they could be.
- 21.8 We also heard that, while the law protected the privacy of complainants, these rights needed to be stronger and put into practice.
- 21.9 In this chapter we set out the reforms that could address these concerns. They aim to provide more of what victim survivors deserve: respect.

## There is a strong base of reform that can be built on

### Reforms have aimed to bring about a culture of respect and dignity

The court experience replicated my experience as a child victim almost exactly. Once again I felt non-existent as though there was no one on my side. I felt as though I was set up to shut up. There was no opportunity to say what I wanted to say. The questions asked in cross-examination set me up to answer yes or no only. I felt done over all over again, this time by strangers. I left the court feeling devastated, I wanted to die. There was no follow up. No one cared if I was dead or alive.<sup>8</sup>

For me, the trial process is the hardest part of the whole experience. Even though I am the victim and leading witness, it feels like I am the one on trial.<sup>9</sup>

<sup>5</sup> Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) ch 5.

<sup>6</sup> Victorian Law Reform Commission, *Sexual Offences* (Report No 5, July 2004).

<sup>7</sup> Consultation 62 (Mark, a person who has experienced sexual harm).

<sup>8</sup> Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021).

<sup>9</sup> Ibid.

- 21.10 Everyone working in the criminal justice system should treat people with respect, informed by an understanding of the effects of trauma. We heard this concern expressed in our previous inquiries, and again in this one.
- 21.11 Since our Victims of Crime report, the Judicial College of Victoria has published a guide that sets out what everyone in the courtroom should do to improve the experience of victims of crime in the courtroom. It includes guidance notes on sexual offences and on how to get the best evidence.<sup>10</sup>
- 21.12 Our Victims of Crime report included recommendations on improving training within the criminal justice system. We discuss this, and our further recommendations for training, in Chapter 18.
- 21.13 In this report, we have made other recommendations that would improve the experiences of complainants, including:
- improving the use of jury directions and expert evidence (in Chapter 20)
  - expanding access to communication support, including interpreters (in Chapter 15)
  - introducing a model of victim advocates and separate legal representation (in Chapter 12).

### There are already limits on cross-examination

- 21.14 For most complainants, giving evidence and being cross-examined is one of the most challenging parts of the criminal trial process. Cross-examination aims to test the accuracy of their version of events and their credibility.
- 21.15 The law limits what the defence can ask during cross-examination.<sup>11</sup> It rules out 'improper' questions or questioning, that is 'a question or sequence of questions put to a witness that is one of the following:
- misleading or confusing
  - unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive
  - put to a witness in a manner or tone that is belittling, insulting or otherwise inappropriate
  - has no basis other than a stereotype (for example a stereotype based on the witness's sex, race, culture, ethnicity, age or mental, intellectual or physical disability).<sup>12</sup>
- 21.16 Even with these limits, complainants may be asked such questions by defence counsel in cross-examination. A court must not allow an improper question. If this sort of question is asked, a court must tell the complainant that they do not need to answer the question.<sup>13</sup> In cases involving sexual offences, there are also limits on asking complainants about their sexual history.

[The experience of cross-examination] stops a lot of people coming forward. ... I don't know how unscrupulous a defence lawyer can be in their questioning, but in my case he was fixating on my behaviour as a kid; painting me as a truant, a trouble-maker. That's what the defence bar was about; trying to paint me out to be an unreliable kid. My emotion was based on that focus. He fixated on little details about doors, but what's the point? What's the nexus?—Witness J<sup>14</sup>

<sup>10</sup> Judicial College of Victoria, *Victims of Crime in the Courtroom: A Guide for Judicial Officers* (Guide, 2019) <<https://www.judicialcollege.vic.edu.au/resources/victims-crime-courtroom>>.

<sup>11</sup> *Evidence Act 2008* (Vic) pt 2.1 div 5. See also *Legal Profession Uniform Conduct (Barristers) Rules 2015* rr 62–3.

<sup>12</sup> *Evidence Act 2008* (Vic) s 41(3).

<sup>13</sup> *Ibid* s 41(1).

<sup>14</sup> Consultation 77 (Witness J).

- 21.17 The court's power to intervene to disallow improper questioning was recently strengthened following the recommendations of our Victims of Crime report.<sup>15</sup> The court must intervene to prevent the questioning rather than it just being an option.<sup>16</sup>
- 21.18 The nature of cross-examination involves drawing out inconsistencies and inaccuracies in the complainant's version of events. Therefore, cross-examination may not be 'improper' in law, but may still make a complainant feel offended, humiliated or distressed.<sup>17</sup>

### Ground rules hearings have been a successful reform

- 21.19 A key recommendation of our Victims of Crime report was to introduce a pilot program of intermediaries for witnesses who are children or have a cognitive impairment (see Chapter 15). Intermediaries provide communication assistance so that the court receives the witness's best evidence.<sup>18</sup>
- 21.20 This scheme has involved changes to the law to enable 'ground rules hearings'. These hearings may be held in sexual offences and other cases with a child or person with a cognitive impairment who is a witness. They must be held if an intermediary is appointed.<sup>19</sup> They can also be held without an intermediary.
- 21.21 The ground rules hearing is held before the witness gives evidence.<sup>20</sup> It is focused on getting communication right between the witness and those questioning them, and it helps structure that interaction in a way that is respectful of their needs and abilities.
- 21.22 Before a ground rules hearing, the court may direct the police informant to fill in a questionnaire, and direct counsel to provide in writing questions that they wish to ask the witness.<sup>21</sup>
- 21.23 At a ground rules hearing, a court can set the 'ground rules' that will apply at the trial, including:
- the style of questioning (for example, they can prevent the use of leading or complex questions, or allow the use of more free-flowing 'narrative' evidence)
  - the time taken to question a witness (for example, they can set the timing of breaks, and the start and end times of questioning)
  - the questions that may or may not be put to a witness (for example, they can suggest other ways of dealing with inconsistencies, or prevent complex questions about the timing of events)
  - if a party must put all evidence contradicting or challenging the witness in cross-examination.<sup>22</sup>
- 21.24 We heard that ground rules hearings and intermediaries have been working well. They ensure that questioning is fair, appropriate and easier on complainants.<sup>23</sup> The Office of Public Prosecutions (OPP) told us they help judges and lawyers better understand the effects of sexual abuse on complainants. The OPP saw significant benefits where prosecution and defence counsel work together, workshoping proposed questions.<sup>24</sup>

15 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) Recommendation 18; *Justice Legislation Miscellaneous Amendment Act 2018* (Vic).

16 *Evidence Act 2008* (Vic) s 41.

17 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) [5.49]–[5.52].

18 *Ibid* Recommendations 30–1, [7.197]–[7.326].

19 *Criminal Procedure Act 2009* (Vic) pt 8.2A.

20 *Ibid* s 389C.

21 County Court of Victoria, *Multi-Jurisdictional Court Guide for the Intermediary Pilot Program: Intermediaries and Ground Rules Hearings* (Guide No 2/2021, 22 March 2021) [5.2] <<https://www.judicialcollege.vic.edu.au/sites/default/files/2021-04/Multi-jurisdictional%20Court%20Guide%20for%20IPP%20%20-%20final%20202321.pdf>>.

22 *Ibid* [5.31]–[5.6].

23 Submissions 59 (County Court of Victoria), 63 (Office of Public Prosecutions), 68 (Victoria Police); Consultation 71 (Magistrates' Court of Victoria (No 1)).

24 Submission 63 (Office of Public Prosecutions).



- 21.25 The County Court of Victoria said that the use of intermediaries had led to more appropriate questioning and resulted in complainants being able to 'provide their best evidence' and, in some cases, to provide evidence when they might not have otherwise done so. The court also gave us case studies of complainants who had felt a sense of satisfaction after giving this evidence.<sup>25</sup>
- 21.26 We heard that the effectiveness of ground rules hearings depends on the complainant and whether an intermediary is appointed. Sometimes there may only be 'modest improvements'<sup>26</sup> in the complainant's experience of giving evidence, such as when there is no intermediary because, for example, the complainant is in their late teens and has no communication difficulties.<sup>27</sup>

## Cross-examination needs more reform

- 21.27 We heard in this inquiry that although there has been a shift towards a respectful style of cross-examination in some cases, there remain issues with the style of cross-examination being used by defence barristers.<sup>28</sup> The OPP told us:
- In our view there remains occasional issues with excessive or inappropriate cross-examination of complainants in sexual offence matters. Recently, a complainant in a matter involving a single incident of rape was cross-examined over the course of three and a half days, primarily in relation to peripheral matters.<sup>29</sup>
- 21.28 Similar concerns were expressed by Sexual Assault Services Victoria and the Victims of Crime Commissioner, as well as people who told us of their experience of being cross-examined.<sup>30</sup>

### What people told us about cross-examination

I was blamed and spoken of as being riddled with problems and a burden due to my disability. [The accused] is a man charged with 10 years' worth of sexual assault. He was portrayed as a hard working and loving husband who had just got fed up with a problematic wife... The judge did stop his barrister from going completely off track in some instances.—Nicole<sup>31</sup>

The experience of being cross-examined was so hard. I felt like my brain just shut down, and this must happen to everyone in that position. ... I was asked ridiculously detailed questions, like, 'What colour were the bathroom tiles when that happened?'; or 'What was on the bed when he did that?' ... At one point the defence barrister suggested that I had made everything up because I was jealous of my sister's relationship with the perpetrator.—Cecilia<sup>32</sup>

- 21.29 The Criminal Bar Association stated that there had been a major cultural shift over the years in defending sexual offences at trial. They described an 'old style' approach to questioning that 'is long gone and can no longer occur, as the law simply does not permit it'.<sup>33</sup>

25 Submission 59 (County Court of Victoria).

26 Submission 68 (Victoria Police).

27 Submission 63 (Office of Public Prosecutions).

28 Submissions 17 (Sexual Assault Services Victoria), 18 (In Good Faith Foundation), 26 (Northern CASA), 39 (Rape & Domestic Violence Services Australia), 45 (Victims of Crime Commissioner); Consultations 11 (Family violence and sexual assault practitioners focusing on disability inclusion), 56 (Cecilia, a victim survivor of sexual assault), 62 (Mark, a person who has experienced sexual harm), 69 (Deborah, a victim survivor of sexual assault), 77 (Witness J); Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021).

29 Submission 63 (Office of Public Prosecutions).

30 Submissions 17 (Sexual Assault Services Victoria), 26 (Northern CASA), 45 (Victims of Crime Commissioner); Consultations 56 (Cecilia, a victim survivor of sexual assault), 62 (Mark, a person who has experienced sexual harm), 69 (Deborah, a victim survivor of sexual assault), 77 (Witness J); Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021).

31 Consultation 59 (Ashleigh Rae, Nicole Lee, Penny).

32 Consultation 56 (Cecilia, a victim survivor of sexual assault).

33 Submission 47 (Criminal Bar Association).

- 21.30 They told us that, if there was improper questioning, it was used only by a 'small minority' and was not well received by jurors. It also said that judicial officers 'simply will not countenance that type of [improper] questioning'.<sup>34</sup>
- 21.31 Liberty Victoria agreed, stating that in its experience:
- the courts take the duty to protect witnesses very seriously and the stereotype of the barrister challenging a complainant through confusing and/or belittling cross-examination is very much the exception and not the rule.<sup>35</sup>
- 21.32 The Law Institute of Victoria pointed out that cross-examination of a complainant was needed and was of considerable use 'to elicit essential facts and context'. It 'strongly opposed' attempts to erode the ability to cross-examine, given its role in ensuring a fair trial.<sup>36</sup>
- 21.33 Others told us that prosecutors may find it difficult to object to improper questions, and judicial officers may not be clear about when to stop improper questions,<sup>37</sup> for example when they are not sure if a question is improper or not, and there is a risk that intervention could lead to an appeal.<sup>38</sup>
- 21.34 Some recent cases seem to indicate that problems with cross-examination continue. In one case defence counsel called the complainant a 'bare-faced liar'<sup>39</sup> and in another case, the complainant was asked about her figure and the size of female genitalia.<sup>40</sup>

### What our transcript analysis indicated

Our transcript analysis of rape trials in the County Court of Victoria suggests that judges, counsel and other court room participants made efforts to ensure 'a less foreign, hostile, daunting and intimidating place for complainants'.<sup>41</sup> This was achieved through a variety of ways, including politeness, being sensitive to the emotional state of complainants, and calling for breaks.

Judges also intervened when cross-examination was inappropriate, confusing, repetitive or irrelevant. This resulted in counsel rephrasing questions or, giving up on the problematic line of questioning.

Good practices by court room participants were not consistent. Sometimes they fell short of what should be expected. This included:

- not knowing how to pronounce people's names
- discussing routine house-keeping or administrative matters in a way that is insensitive or could be misunderstood<sup>42</sup>
- using problematic tones, even if the substance was reasonable
- not giving warnings or contextualising evidence before recounting graphic details
- judges failing to intervene when they should have.

34 Ibid.

35 Submission 53 (Liberty Victoria).

36 Submission 40 (Law Institute of Victoria).

37 Submissions 17 (Sexual Assault Services Victoria), 45 (Victims of Crime Commissioner), 63 (Office of Public Prosecutions); Consultation 71 (Magistrates' Court of Victoria (No 1)).

38 Consultation 71 (Magistrates' Court of Victoria (No 1)).

39 *Nenna (a Pseudonym) v The Queen* [2021] VSCA 183, [37].

40 Adam Cooper, "We Put Our Trust in the Law": Craig McLachlan Not Guilty on All Charges, *The Sydney Morning Herald* (online, 15 December 2020) <<https://www.smh.com.au/national/verdict-handed-down-in-craig-mclachlan-indecent-assault-trial-20201215-p56nj2.html>>.

41 Julia Quilter and Luke McNamara, *Qualitative Analysis of County Court of Victoria Rape Trial Transcripts* (Report to the Victorian Law Reform Commission) (forthcoming).

42 'Such as a judge saying "we will turn you off for a moment" when advising a complainant that the AVL link is about to be temporarily closed or counsel saying "we are not going to finish her today" when discussing the anticipated completion of examination or cross-examination of a witness': *ibid*.

Another feature of the trials analysed was deliberate use of cross-examination questions to confuse or 'shake' the complainant's account. These included questions on peripheral or irrelevant details. They expected a high level of precision in recalling the events.<sup>43</sup> Sometimes they were based on confusing 'puttage'<sup>44</sup> or to highlight differences in accounts given by complainants.<sup>45</sup> If a complainant gave unclear, uncertain or confused answers, these were used to undermine their reliability and credibility.

As discussed in Chapter 20, misconceptions about sexual violence—for example, that 'delay' suggests a complainant is lying—also featured in the transcripts analysed.

Researchers also found examples of CCTV footage showing alleged rapes being used in evidence. In one case a complainant was so distressed by the footage that a bucket was provided in case she needed to vomit.<sup>46</sup> Complainants may find it even more distressing when they are required to view or listen to such material for the first time before a jury.<sup>47</sup>

## Every sexual offence trial needs a discussion about cross-examination and respect

- 21.35 Reforms to protect complainants during the trial have made the criminal justice system kinder, but there is still work to be done to ensure that complainants feel respected throughout the criminal trial process. While the culture of cross-examination is shifting, it is plain that at least for some people, the risk of re-traumatisation is real.
- 21.36 Recent cases and a transcript analysis of rape trials in the County Court of Victoria (see box above) show that practices are not consistent. Feedback from victim survivors with recent experience of cross-examination also shows there is room for improvement. More must be done to give complainants respect and reduce re-traumatisation. These are some of the aims of the Victims' Charter Act.<sup>48</sup>
- 21.37 This problem is also about more than respecting complainants. It is unclear if cross-examining in a way that focuses on minute and irrelevant details actually gets the best evidence from the complainant or results in fair verdicts. A process that gets the most relevant and clear responses from complainants is likely to achieve the aims of a trial in establishing the facts of a case and improve its efficiency.
- 21.38 Building on the work of the Judicial College of Victoria's guide, courtroom culture can be shifted further by requiring that respect and dignity are built into the design of a trial.
- 21.39 Ground rules hearings have been effective in setting the style and parameters for questioning children and people with a cognitive impairment. Researchers from our transcript analysis found that in a case involving a ground rules hearing, 'the dynamic of the complainant's cross-examination was noticeably different to that of other cases, including by virtue of being more logical and clear in the sequencing of questions, and less adversarial.'<sup>49</sup>

43 For example, 'the location of clothes and underwear; the position of hands, arms and legs (at multiple time points); the number of fingers used to effect penetration; the angle of her leg at the time of penetration; the duration of penetration etc': *ibid*.

44 These are 'questions that are assertions put to the complainant, as distinct from questions designed to adduce evidence'. The law allows for such questions. However, they may be confusing or insensitive when they do not 'appear to fit chronologically or logically in the sequence of questions that preceded them'. This is made worse when 'puttage' questions are 'not always sign-posted' and 'sometimes followed by a rapid shift back to confronting questions about the specific details of the alleged rape': *ibid*. See also Judicial College Victoria, '4.12 Failure to Challenge Evidence (Browne v Dunn)', *Criminal Charge Book* (Online Manual, 26 April 2021) <<https://www.judicialcollege.vic.edu.au/eManuals/CCB/19672.htm>>.

45 This strategy was common: Julia Quilter and Luke McNamara, *Qualitative Analysis of County Court of Victoria Rape Trial Transcripts* (Report to the Victorian Law Reform Commission) (forthcoming).

46 *Ibid*.

47 *Ibid*.

48 *Victims' Charter Act 2006* (Vic) s 4.

49 Julia Quilter and Luke McNamara, *Qualitative Analysis of County Court of Victoria Rape Trial Transcripts* (Report to the Victorian Law Reform Commission) (forthcoming). This ground rules hearing was held because the complainant in the case had a cognitive impairment.

- 21.40 This kind of discussion is currently not required in Victoria for other complainants in sexual offence trials. In Scotland, the Lord Justice Clerk's Review Group recommended ground rules procedures for all complainants in sexual offence cases.<sup>50</sup>
- 21.41 We recommend that, before a complainant gives evidence, the prosecutor, defence counsel and judge or magistrate should discuss what needs to be done to ensure the proper and respectful treatment of the complainant at trial. This discussion should cover the nature and style of cross-examination, as well as any other ways to create a courteous and sensitive environment. Although these discussions may already happen informally on a case-by-case basis, they should be required in all cases.
- 21.42 This process should be set out in the *Criminal Procedure Act 2009* (Vic). Processes for setting out what is to occur in the trial already exist at law—these processes can inform the legislative design of the discussion we are proposing. For example, discussions are a part of the procedure for jury directions, where counsel discuss with the judge what jury directions should be given.<sup>51</sup> We discuss jury directions in Chapter 20.
- 21.43 Such discussions will help shift courtroom culture by putting into practice the kind of guidance found in the Judicial College of Victoria's guide on victims of crime. It will be easier for the court to intervene if counsel takes a course during trial that was not agreed as part of the discussion and is improper. There will also be benefits for prosecutors in developing better ways to question and interact with complainants.
- 21.44 Such a discussion for setting the rules and tone of cross-examination was supported by the Magistrates' Court of Victoria, the Office of Public Prosecutions, Victoria Legal Aid and a representative of the Criminal Bar Association.<sup>52</sup>

### What should the discussion cover?

- 21.45 The topics for existing ground rules hearings and what is listed in the Judicial College of Victoria's guide provide a good starting point for identifying the issues for discussion.<sup>53</sup> Another potential source is a guide to the cross-examination of vulnerable witnesses developed by the Inns of Court College in England.<sup>54</sup>
- 21.46 The same issues discussed in a ground rules hearing often apply to adult complainants in sexual offence cases. The discussion could therefore cover similar issues, as well as those identified in our transcript analysis (see box above). They could include:
- avoiding complex and confusing questions
  - disallowing repetitive questions
  - the need for breaks and time limits to questioning.
- 21.47 Depending on the facts in issue and evidence, discussion could cover the appropriateness of questions and the scope of questioning to limit irrelevant lines of questioning, confusing 'puttage', as well as how certain evidence could be used and presented in a respectful way.
- 21.48 For example, the researchers who conducted our transcript analysis suggested making it standard practice for complainants to view or listen to CCTV footage in advance. The option of advance viewing or listening is currently decided by the judge.<sup>55</sup>

50 Lord Justice Clerk's Review Group, *Improving the Management of Sexual Offence Cases* (Report, Scottish Courts and Tribunal Service, March 2021) 40–1, Recommendation 1(c) <<https://www.scotcourts.gov.uk/docs/default-source/default-document-library/reports-and-data/Improving-the-management-of-Sexual-Offence-Cases.pdf?sfvrsn=6>>.

51 *Jury Directions Act 2015* (Vic) pt 3.

52 Consultations 86 (Magistrates' Court of Victoria (No 2)), 90 (Criminal Bar Association (No 2)), 95 (Victoria Legal Aid (No 2)).

53 County Court of Victoria, *Multi-Jurisdictional Court Guide for the Intermediary Pilot Program: Intermediaries and Ground Rules Hearings* (Guide No 2/2021, 22 March 2021) <<https://www.judicialcollege.vic.edu.au/sites/default/files/2021-04/Multi-jurisdictional%20Court%20Guide%20for%20IPP%20-%20final%2020321.pdf>>; Judicial College of Victoria, *Victims of Crime in the Courtroom: A Guide for Judicial Officers* (Guide, 2019) chs 3–4 <<https://www.judicialcollege.vic.edu.au/resources/victims-crime-courtroom>>.

54 The Inns of Court College of Advocacy, *The 20 Principles of Questioning: A Guide to the Cross-Examination of Vulnerable Witnesses* (Guide, 2019) <<https://www.icca.ac.uk/revised-20-principles/>>. These principles include: asking questions in a way that follows the chronology of events; signposting new topics; not repeating questions to confuse a witness; and not using questions that are statements with a short question tagged on the end which invites a witness to agree or disagree. Some of these rules feature in the existing Victorian ground rules procedure for children and people with a cognitive impairment.

55 Julia Quilter and Luke McNamara, *Qualitative Analysis of County Court of Victoria Rape Trial Transcripts* (Report to the Victorian Law Reform Commission) (forthcoming).

- 21.49 The discussion should also include setting rules for any questions related to sexual history evidence, where leave has been granted, or the boundaries around lines of questioning that might be prohibited by law.<sup>56</sup>
- 21.50 The discussion should not limit legitimate questions relevant to the facts of the case. We have also not included in the discussion process a requirement to submit questions to the court in advance of the discussion. The focus of the discussion is about respecting complainants, reducing traumatisation and getting the best quality evidence from complainants.
- 21.51 There should be some discussion of the preferences and needs of the complainant. This could be achieved through a questionnaire to be completed by the complainant, victim advocate (recommended in Chapter 12) or (as is currently the case) the police informant. It could address issues such as:
- familiarising people with the courtroom and other ways to make the environment less daunting
  - judicial officers introducing themselves and the process, and helping the complainant feel settled<sup>57</sup>
  - the preferred way of addressing the complainant, such as the use of their name or preferred pronouns<sup>58</sup>
  - the needs of complainants, including supports or arrangements for giving evidence (for example, interpreters).<sup>59</sup>
- 21.52 The victim advocate we recommend in Chapter 12 should be present when the discussion takes place, to assist the court to understand the complainant's rights, interests and needs. The victim advocate would inform the complainant about the rules.
- 21.53 The aims and benefits of this process are to:
- ensure a fair and efficient trial, by enabling complainants to give their best evidence
  - ensure that complainants are treated respectfully and with dignity
  - recognise the role of complainants as participants in the trial, by considering their rights, interests and preferences
  - set clear expectations for everyone about what will not be tolerated by the court, which should reduce the need for judges or prosecutors to intervene or object during the trial and make it easier for them to intervene or object
  - clarify for the complainant at an early stage what to expect from the trial, reducing their anxiety about the process and how they might be questioned
  - prevent improper and inappropriate questioning.
- 21.54 Judges of the County Court of Victoria suggested strengthening the judge's power to intervene to disallow improper questioning.<sup>60</sup> We are of the view that the discussion process will be more effective than strengthening the judge's power to intervene. The feedback we received suggests that in practice some judges and magistrates may still find it hard to intervene.

### What should the discussion look like in practice?

- 21.55 The discussion does not need to be lengthy, depending on the needs of the complainant and the likely questions. It may be that as this practice becomes widely used, the discussions become shorter because the culture of cross-examination changes for the better.

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<sup>56</sup> *Criminal Procedure Act 2009* (Vic) pt 8.2 div 2; *Evidence Act 2008* (Vic) s 41.

<sup>57</sup> Submission 59 (County Court of Victoria).

<sup>58</sup> Consultation 62 (Mark, a person who has experienced sexual harm).

<sup>59</sup> See, eg, Judicial College of Victoria, *Victims of Crime in the Courtroom: A Guide for Judicial Officers* (Guide, 2019) 10 <<https://www.judicialcollege.vic.edu.au/resources/victims-crime-courtroom>>.

<sup>60</sup> Consultation 87 (County Court of Victoria (No 2)).

- 21.56 The discussion should take place before the complainant gives evidence at the hearing. The process should include counsel who will be doing the cross-examination. The discussion should therefore take place very close to or during the trial.
- 21.57 Victoria Legal Aid, the Office of Public Prosecutions and a representative from the Criminal Bar Association agreed that such a process should be timed close to when the complainant gives evidence, because it is common for counsel to change and a lot of preparation is done at the last minute 'on the door of the court'.<sup>61</sup> The process can also be repeated as needed.
- 21.58 The discussion should take place before the complainant gives evidence in cases involving sexual offences in the Magistrates' Court of Victoria, including before a committal hearing,<sup>62</sup> and the County Court of Victoria.
- 21.59 Judicial officers and legal practitioners will need training to implement this process effectively. We discuss education and training in Chapter 18.

## Recommendation

- 84 To ensure complainants are respected when giving evidence in the Magistrates' Court of Victoria and County Court of Victoria, and are able to provide the best quality evidence, the *Criminal Procedure Act 2009* (Vic) should be amended to require, in the absence of the jury and before the complainant is called to give evidence, that the judicial officer, prosecution and defence counsel discuss and agree to:
- the style and parameters of questioning so that questioning is not improper or irrelevant
  - the scope of questioning including questioning on sensitive topics and evidence to reduce re-traumatisation
  - the preferences and needs of complainants.
- The treatment of complainants and their questioning should be in line with what the judicial officer determines following the discussion.
- The process can be repeated until the conclusion of the complainant's evidence.

## How can alternative arrangements be improved?

### Special protections exist for victim survivors

- 21.60 In Victoria, there are procedures designed to minimise the trauma and distress involved in giving evidence.<sup>63</sup> We refer to these as 'special protections'. The law allows:
- a recording of interviews with police to be used in court ('Visual and Audio Recorded Evidence' or VAREs)
  - cross-examination through a special hearing (special hearings)
  - the use of physical arrangements such as allowing complainants to give evidence outside the courtroom in special 'remote witness facilities', using support people and screens (alternative arrangements).<sup>64</sup>

61 Consultations 90 (Criminal Bar Association (No 2)), 94 (Office of Public Prosecutions (No 2)), 95 (Victoria Legal Aid (No 2)).

62 The defence must apply for leave to cross-examine a witness at a committal hearing: *Criminal Procedure Act 2009* (Vic) s 124.

63 See Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) [8.6]–[8.23].

64 *Criminal Procedure Act 2009* (Vic) pt 8.2 div 4.



- 21.61 The law prohibits witnesses who are children or have a cognitive impairment from being cross-examined at a committal proceeding before a trial involving sexual offences.<sup>65</sup>
- 21.62 VAREs and special hearings are only available for witnesses who are children or have a cognitive impairment. VAREs are used as the main evidence (evidence-in-chief) of a complainant. The complainant can then be cross-examined and re-examined in a remote witness facility in a 'special hearing'.<sup>66</sup> The special hearing is also recorded and played with the VARE at trial, and in any retrial or related civil proceeding.<sup>67</sup> The complainant can only be examined again in limited circumstances.<sup>68</sup>
- 21.63 In our Victims of Crime report we recommended extending these 'special protections' to 'protected victims'. 'Protected victims' include people who are likely to 'suffer severe emotional trauma', or 'be so intimidated or distressed' that they cannot give evidence or give evidence fairly.<sup>69</sup> This recommendation has not been implemented.
- 21.64 The Royal Commission into Institutional Responses to Child Sexual Abuse recommended pre-recording evidence and making alternative arrangements available for all complainants in child sexual abuse prosecutions and other witnesses.<sup>70</sup> These recommendations were accepted by the government in principle.<sup>71</sup>
- 21.65 In our recent inquiry into committals, we considered whether the protection against cross-examination at committal should be extended to other witnesses, including adult complainants in sexual offence cases.<sup>72</sup> As stated above, the protection covers complainants in sexual offence cases who are children or have a cognitive impairment. As a result, they can only be cross-examined once at trial, usually in a special hearing.
- 21.66 We concluded that there should be a formal evaluation before extending the protection to other classes of witness, as special hearings require significant time and resources. We did, however, recommend expanding the section to include witnesses in cases where the complainant was a child or a person with a cognitive impairment in family violence cases.<sup>73</sup>

## There were concerns about alternative arrangements

JUDGE: Yes, thanks, members of the jury. Apologies for the delay. How shall I describe it?

TIPSTAFF: Technical (indistinct), Your Honour.

JUDGE: Technical problems. Put a man on the moon in when, 1968 and we've all watched him and we heard him. It is now 2018. One would think we'd be able to have the equipment necessary, but there you go.<sup>74</sup>

65 Ibid s 123.

66 Ibid pt 8.2 div 6.

67 Ibid ss 367–68, 370, 372, 374.

68 Ibid s 376.

69 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) Recommendations 37–8. This is similar to the definition of 'vulnerable adult' used in the Australian Capital Territory: *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 42.

70 *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report* (Parts VII to X and Appendices, 2017) Recommendations 53, 56, 61. It recommended these provisions apply to other witnesses who are children or vulnerable adults, and any other prosecution witness that the prosecution considers necessary.

71 Victorian Government, 'Victorian Government Response to the Royal Commission into Institutional Child Sexual Abuse', VIC.GOV.AU (Web Page, 20 July 2021) <<https://www.vic.gov.au/victorian-government-response-royal-commission-institutional-responses-child-sexual-abuse>>.

72 Victorian Law Reform Commission, *Committals* (Report No 41, March 2020) [11.12]–[11.82].

73 Ibid Recommendations 42–4.

74 Julia Quilter and Luke McNamara, *Qualitative Analysis of County Court of Victoria Rape Trial Transcripts* (Report to the Victorian Law Reform Commission) (forthcoming).



- 21.67 Alternative arrangements aim to reduce the trauma, intimidation and distress associated with giving evidence. Any recording of the victim survivor's evidence may be used in a re-trial, in an appeal and in another related proceeding or civil proceedings.<sup>75</sup>
- 21.68 While we heard general support for alternative arrangements, some people raised concerns about how well these were working in practice. For example, we heard:
- There was a need to improve the space and technology in remote witness facilities.<sup>76</sup>
  - Victim survivors could not have support while giving evidence because of a lack of resources.<sup>77</sup>
  - Practices of placing 'screens' between complainants and the accused could be ad hoc, such as using a whiteboard or having a court officer standing between them.<sup>78</sup>
- 21.69 Sexual Assault Services Victoria also stated that remote witness facilities need to be more carefully monitored for their camera angles so that accused people do not appear on the victim survivor's screen.<sup>79</sup>
- 21.70 The Victims of Crime Commissioner told us the law providing for alternative arrangements are comprehensive, but that sometimes these arrangements were not used and there was no access to data about how consistently they were used.<sup>80</sup> The Criminal Bar Association and Office of Public Prosecutions, however, said that the arrangements were working well.<sup>81</sup>

### Example from our transcript analysis

In our transcript analysis, researchers observed several instances where practical, technical and logistical aspects of the trial fell short. This is one example.

JUDGE: I don't know where we're linked to but it's a terrible remote witness room. Can that be conveyed to the Crown. Having people wander past like ...

CROWN PROSECUTOR: I know, I saw that Your Honour, I thought it was ...

JUDGE: Just hopeless, terrible.

CROWN PROSECUTOR: ... outrageous even. I got distracted by seeing someone ...

JUDGE: It looks like a shopping mall. It's just not appropriate.

CROWN PROSECUTOR: No.

JUDGE: So I simply say that. These are serious matters, the complainant herself is—I simply put it on the transcript—entitled to an environment that is free from these distractions.

CROWN PROSECUTOR: Yes and also puts off counsel, not that that's a major thing, and probably distracts the jury as well Your Honour. And I totally agree.

JUDGE: Yes, so it shouldn't be used.<sup>82</sup>

<sup>75</sup> *Criminal Procedure Act 2009* (Vic) s 379.

<sup>76</sup> Submission 17 (Sexual Assault Services Victoria); Consultation 77 (Witness J).

<sup>77</sup> Consultation 54 (Lucille Kent, a victim survivor of sexual assault).

<sup>78</sup> Submission 7 (Dr Bianca Fileborn, Dr Rachel Loney-Howes, Dr Tully O'Neill and Sophie Hindes).

<sup>79</sup> Submission 17 (Sexual Assault Services Victoria).

<sup>80</sup> Submission 45 (Victims of Crime Commissioner). See also Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) [4.226].

<sup>81</sup> Submissions 47 (Criminal Bar Association), 63 (Office of Public Prosecutions).

<sup>82</sup> Julia Quilter and Luke McNamara, *Qualitative Analysis of County Court of Victoria Rape Trial Transcripts* (Report to the Victorian Law Reform Commission) (forthcoming).

- 21.71 The County Court of Victoria told us that alternative arrangements will be easier to arrange now than before the COVID-19 pandemic, because more remote witness facilities have been established.<sup>83</sup> Sexual Assault Services Victoria reported that, during this time, complainants could give evidence remotely from a police location and found this to be a 'supportive and safe' process.<sup>84</sup> Sexual Assault Services Victoria continued:

Not having to be present physically at the court proved beneficial to recovery and healing. [COVID-19] showed that remote witness facilities could operate from a variety of settings, not only at the court building. Regional and rural victims would benefit from a range of other options.<sup>85</sup>

### Some concerns related to courtroom design and facilities

- 21.72 Some aspects of alternative arrangements are linked to the physical design of courtrooms and the availability of facilities. Victim survivors reported feeling disconnected in remote witness facilities, and that remote witness facilities were uncomfortable and not appropriate to spend long hours in.<sup>86</sup>

I was cross-examined for nearly three days with three or four breaks each day. When court breaks everyone convenes at a similar area within visual sight of the perpetrator—this is unacceptable. You might even end up in the same bathroom. It defeats the purpose of having a whiteboard in court.—Mark<sup>87</sup>

- 21.73 Another issue identified was the need for separate entrances and exits in courts. Complainants who attend court to give evidence in person or in a remote witness facility within the court risk coming face-to-face with the accused when entering or exiting the court, or going to the bathroom, especially in regional areas.<sup>88</sup>

Lucille told us that, when she went to the Magistrates' Court of Victoria, 'it was an eye-opener that everyone uses the same entrance for courts'. She explained she had to be 'almost hidden' by the SOCIT Investigator at opening time in case she ran into the accused. She found this daunting. She described the room she had to sit in as 'disgusting', small and with limited seating. The room she was in also contained old children's toys, which unsettled her and reminded her of her trauma.

During the lunch break, the SOCIT Investigator warned her that she may see the accused outside because he had gone for lunch too. The only option she had was to stay in the room to avoid running into the accused. She stayed in the room for nine hours with no food and only water. Her support worker was also in another room. She suggested these rooms could be better designed to create a more comfortable environment and stocked with tea and coffee.<sup>89</sup>

83 Consultation 24 (County Court of Victoria).

84 Submission 17 (Sexual Assault Services Victoria).

85 Ibid.

86 Consultations 54 (Lucille Kent, a victim survivor of sexual assault), 77 (Witness J).

87 Consultation 62 (Mark, a person who has experienced sexual harm).

88 Submissions 17 (Sexual Assault Services Victoria), 45 (Victims of Crime Commissioner); Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Summary of Responses to Online Feedback Form from People with Experience of Sexual Assault* (Report, April 2021).

89 Consultation 54 (Lucille Kent, a victim survivor of sexual assault).

21.74 The Magistrates' Court of Victoria told us:

Some of the aspects of a specialist court around design, how [specialist family violence courts] spaces are designed—if we could have some of these sorts of improvements in our court buildings, so complainants don't have to face the accused—that would be really significant.<sup>90</sup>

### **There is room to improve alternative arrangements and courtroom design**

21.75 These issues were also addressed in our Victims of Crime report. In that report, we observed that the design and physical infrastructure of courts can make it difficult to minimise contact between a complainant and the accused.<sup>91</sup>

21.76 We recommended that, in indictable trials, there should be:

- separate and safe entrances and exits
- separate rooms for victim survivors to wait in
- remote witness facilities that are off-site or accessible through a separate entrance
- appropriate means to screen victim survivors from the accused when giving evidence in the courtroom.<sup>92</sup>

21.77 Some progress has been made. For example, the Victorian Budget 2021–22 includes upgrades of technology in the courts.<sup>93</sup>

21.78 Specialist Family Violence Courts 'have been designed with victims' wellbeing and safety in mind, providing separate court entrances for victim survivors, safe waiting spaces and interview rooms, remote witness facilities, child-friendly spaces and culturally safe spaces.'<sup>94</sup> This followed a recommendation by the Royal Commission into Family Violence.<sup>95</sup>

21.79 In recent years, more off-site remote witness facilities have been developed,<sup>96</sup> with family violence reforms also expanding remote witness facilities.<sup>97</sup> Some Orange Doors already have remote witness facilities. The use of these remote witness facilities by complainants in sexual offence cases could be considered in the review of multi-disciplinary centres, including their collaboration with Orange Doors, that we recommend in Chapter 5.

21.80 The Children's Court of Victoria in Melbourne has also developed court attendance safety plans. This includes staggered departure times and support when entering court rooms and taking part in proceedings.<sup>98</sup> These safety plans should be used for complainants in sexual offence cases too.

21.81 We commend these efforts but consider more can and needs to be done. We recommend extending many of the efforts in the family violence context to complainants in the Magistrates' Court of Victoria and the County Court of Victoria. This includes making entering and exiting court safer and extending more off-site remote witness facility locations. While we recognise some changes require more work, a priority that seems easy to achieve is to ensure that complainants have proper screens when giving evidence in the courtroom.

90 Consultation 71 (Magistrates' Court of Victoria (No 1)).

91 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) [8.112]–[8.116].

92 Ibid Recommendation 43.

93 Daniel Andrews (Premier of Victoria), 'Supporting Our Courts To Drive Down COVID-19 Backlogs' (Media Release, 13 May 2021) <<http://www.premier.vic.gov.au/supporting-our-courts-drive-down-covid-19-backlogs>>.

94 Submission 45 (Victims of Crime Commissioner). See also Victorian Government, 'Courts—Reforming the Court Response to Family Violence', VIC.GOV.AU (Web Page, 19 April 2021) <<http://www.vic.gov.au/family-violence-reform-rolling-action-plan-2020-2023/priorities-for-2020-2023/courts>>.

95 *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016) Recommendation 70 <<http://rcfv.archive.royalcommission.vic.gov.au/Report-Recommendations.html>>.

96 See, eg, Office of Public Prosecutions (Vic), 'Victims' Facilities Improved, *The Prosecutor* (Web Page, March 2016) <<https://www.opp.vic.gov.au/News-and-Media/Newsletters/March-2016/Victims-facilities-improved>>.

97 Victorian Government, *Family Violence Reform Rolling Action Plan 2020–2023: Activities Index* (Combined Activity Summary) 2 <<https://www.vic.gov.au/family-violence-reform-rolling-action-plan-2020-2023>>.

98 Ibid.

- 21.82 In Chapter 4, we recommend strengthening the rights in the Victims Charter Act to improve the consistency of practice and keep people accountable for their obligations. We recommend that this should include the right to alternative arrangements, consistently with the aim in that Act of minimising a victim's contact with the accused and their supporters, and protecting them from intimidation.<sup>99</sup>
- 21.83 In Chapter 14 we discuss ensuring that alternative arrangements are available for image-based sexual abuse offences.
- 21.84 Court infrastructure and facilities should be equipped with technology that provides for the best quality evidence and, as a result, a fair trial. These measures would also help complainants feel safe and respected.

## Recommendation

- 85 The Victorian Government should fund the courts to strengthen measures to protect complainants in sexual offence cases by:
- ensuring that they can enter and leave courthouses safely, including, where possible, allowing them to use a separate entrance and exit
  - using appropriate means to screen complainants from the accused when giving evidence in the courtroom
  - ensuring technology is reliable to support complainants to present their best evidence.

## There were concerns about the quality of Visual and Audio Recorded Evidence (VAREs)

- 21.85 In this and previous inquiries we heard general support for the aims of special protections. But responses were divided on whether VAREs and special hearings should be extended beyond children and people with cognitive impairment.
- 21.86 The Magistrates' Court of Victoria and Victims of Crime Commissioner supported extending special protections to all complainants in sexual offences,<sup>100</sup> as did Sexual Assault Services Victoria and knowmore legal service.<sup>101</sup> Knowmore said this would reduce the stress and trauma of court proceedings and ensure that victim survivors could pursue a criminal justice response.<sup>102</sup>
- 21.87 Cecilia, a victim survivor of sexual assault, described how a properly conducted VARE would have helped improve her experience at court.<sup>103</sup>
- 21.88 The feedback we heard and research tells us that VAREs may have the following benefits:
- They avoid complainants having to repeat their story.<sup>104</sup>
  - They limit the time a complainant must spend in court.<sup>105</sup>
  - They allow an account to be captured near the time of the offending, resulting in more complete and accurate information.<sup>106</sup>

99 *Victims' Charter Act 2006* (Vic) s 12.

100 Submission 45 (Victims of Crime Commissioner); Consultation 71 (Magistrates' Court of Victoria (No 1)).

101 Submissions 17 (Sexual Assault Services Victoria), 22 (knowmore legal service).

102 Submission 22 (knowmore legal service).

103 Consultation 56 (Cecilia, a victim survivor of sexual assault).

104 Nicole Bluett-Boyd and Bianca Fileborn, *Victim/Survivor-Focused Justice Responses and Reforms to Criminal Court Practice* (Research Report No 27, Australian Institute of Family Studies (Cth), April 2014) 36 <<https://aifs.gov.au/publications/victim-survivor-focused-justice-responses-and-reforms-criminal-court-practice>>.

105 Submission 63 (Office of Public Prosecutions); Nicole Bluett-Boyd and Bianca Fileborn, *Victim/Survivor-Focused Justice Responses and Reforms to Criminal Court Practice* (Research Report No 27, Australian Institute of Family Studies (Cth), April 2014) 49 <<https://aifs.gov.au/publications/victim-survivor-focused-justice-responses-and-reforms-criminal-court-practice>>.

106 Submission 63 (Office of Public Prosecutions).

- They are taken in a distraction-free and less stressful environment, more conducive to a free-flowing narrative account.<sup>107</sup>
- 21.89 The Magistrates' Court of Victoria reported that special hearing procedures are not available for summary matters in the court even though these cases:
- can still have deleterious effects on complainants and still raise fair process issues for accused. ... The [Magistrates' Court of Victoria] has for years raised that it is the only jurisdiction where there is no provision for special hearings: hearings where the evidence of a child or complainant with a cognitive impairment is audio-visually recorded. If the [Magistrates' Court of Victoria] had special hearings, the recording of the complainant's evidence would then be available to be played in any County Court appeal.<sup>108</sup>
- 21.90 While supporting the aims of the special protections, others including the Office of Public Prosecutions and the Law Institute of Victoria did not support their expansion. They noted issues such as the quality of VAREs and the disruption to the 'normal flow' of proceedings which meant that they may not benefit a complainant's case.<sup>109</sup>
- 21.91 The Criminal Bar Association told us that there was no need for any changes to special hearings.<sup>110</sup> A representative from the Criminal Bar Association also said it is difficult to produce VAREs in a neat and chronological way.<sup>111</sup>
- 21.92 It appears that the challenge stems from the 'dual purpose' of VAREs.<sup>112</sup> The Magistrates' Court of Victoria explained:
- VAREs are used in contested hearings in the [Magistrates' Court of Victoria] as evidence in chief, so the quality of the VARE is very important; it is both an investigative and a forensic tool.<sup>113</sup>
- 21.93 Judges from the County Court of Victoria stated there could be more training to improve the quality of VAREs. It is challenging to have to investigate and take evidence-in-chief at the same time.<sup>114</sup>
- 21.94 For example, we heard that:
- VAREs sometimes included irrelevant or inadmissible matters, which could result in all or part of the VARE not being admitted as evidence.<sup>115</sup>
  - As they were taken earlier in the process, they may not address everything needed for the trial.<sup>116</sup>
- 21.95 VAREs and special hearings also require more time and resources, as we discussed in our *Committals* report.<sup>117</sup>

## Special protections should be expanded to include pre-recorded evidence

- 21.96 When done well, VAREs are a valuable procedure for complainants who are children or have a cognitive impairment. However, we recognise the concerns about their quality. We do not recommend expanding VAREs to more complainants in sexual offence cases at this stage. In Chapter 17 we recommend that Victoria Police consider professional development to improve the quality of VAREs before the issue of expanding VAREs is considered again.

107 Martine Powell et al, *An Evaluation of How Evidence Is Elicited from Complainants of Child Sexual Abuse* (Report for the Royal Commission into Institutional Responses to Child Sexual Abuse, August 2016) 12 <[https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/research\\_report\\_-\\_an\\_evaluation\\_of\\_how\\_evidence\\_is\\_elicited\\_from\\_complainants\\_of\\_child\\_sexual\\_abuse\\_and\\_supplementary\\_-\\_government\\_responses.pdf](https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/research_report_-_an_evaluation_of_how_evidence_is_elicited_from_complainants_of_child_sexual_abuse_and_supplementary_-_government_responses.pdf)>.

108 Consultation 71 (Magistrates' Court of Victoria (No 1)).

109 Submissions 40 (Law Institute of Victoria), 63 (Office of Public Prosecutions).

110 Submission 47 (Criminal Bar Association).

111 Consultation 90 (Criminal Bar Association (No 2)).

112 Mark R Kebbell and Nina J Westera, 'Promoting Pre-Recorded Complainant Evidence in Rape Trials: Psychological and Practice Perspectives' (2011) 35(6) *Criminal Law Journal* 376.

113 Consultation 71 (Magistrates' Court of Victoria (No 1)).

114 Consultation 87 (County Court of Victoria (No 2)).

115 See generally Judicial College of Victoria, '13.5.1 VARE Procedure', *Victorian Criminal Proceedings Manual* (Online Manual, 1 November 2019) [37]–[39] <<https://www.judicialcollege.vic.edu.au/eManuals/VCPM/27695.htm>>.

116 Submission 63 (Office of Public Prosecutions).

117 Ibid. See also Victorian Law Reform Commission, *Committals* (Report No 41, March 2020) [11.79].

- 21.97 Many of the aims of VAREs can be achieved at a later stage of the process, but before the trial, using 'pre-recorded evidence'. There is currently a procedure for pre-recording evidence before trial. This is allowed if the court considers it appropriate and is satisfied that it is in the interests of justice to do so.<sup>118</sup>
- 21.98 Unlike VAREs, this pre-recorded evidence records all the complainant's evidence (not just evidence-in-chief). It is a more streamlined process than giving evidence-in-chief using a VARE and cross-examination in a special hearing later.
- 21.99 Pre-recording evidence would avoid the issue of the recording happening too early, before the main issues are identified. It focuses on the evidence for the trial, not the investigation. Pre-recording evidence would still give complainants the option of giving evidence in a familiar and supportive environment (such as a remote witness facility), and would reduce the time they spend in court. In cases where there are delays in the criminal process, complainants could give their evidence without having to wait for the trial date. This might give them some relief.
- 21.100 The recording could be used in any retrial or appeal, as with VAREs and evidence given remotely via a recorded audio-visual link.
- 21.101 We recommend amendments to the Criminal Procedure Act to allow complainants in sexual offence trials and contested hearings to give their evidence in the form of a pre-recording. This should be available as a standard protection for complainants. It could be achieved by introducing an entirely new procedure or amending the existing procedures that allow pre-recording of the whole of the evidence.
- 21.102 The process should be developed to ensure continuity of counsel and judge or magistrate through the pre-recorded evidence procedure and trial. Strong case management should ensure matters are resolved as much as possible before the complainant completes their pre-recorded evidence.
- 21.103 The procedure should apply and operate in similar ways to procedures for 'alternative arrangements'. The court should order pre-recording of evidence and its use in trial if the complainant wishes. The recording should be made available for appeals and any re-trials.
- 21.104 We note our earlier concerns in our previous inquiry into committals about the resource implications of expanding pre-recorded evidence procedures like special hearings. However, our view has changed due to an increase in remote witness facilities and a general shift in practice towards a greater use of technology (for example, due to coronavirus (COVID-19)).
- 21.105 This still leaves a gap in the Magistrates' Court of Victoria, where special hearings for children and people with a cognitive impairment cannot be held. These hearings are only available in the County Court of Victoria.<sup>119</sup> We agree with the Magistrates' Court of Victoria that giving evidence in its jurisdiction can be difficult and traumatising. The current special hearing procedures should be extended to the Magistrates' Court of Victoria for children and people with a cognitive impairment.
- 21.106 In Chapter 4 we recommend including in the Victims' Charter Act the right to special protections, including the recommended right to pre-recorded evidence.



## Recommendation

- 86 The *Criminal Procedure Act 2009* (Vic) should be amended so that
- special hearings under Part 8.2 Division 6 for children and people with a cognitive impairment are available in the Magistrates' Court of Victoria
  - all other complainants in sexual offence trials in the County Court of Victoria and contested hearings in the Magistrates' Court of Victoria are entitled to provide the whole of their evidence as pre-recorded evidence.

### Should the accused be removed from the courtroom?

- 21.107 The County Court of Victoria and the Victims of Crime Commissioner suggested an alternative arrangement: for the accused to be removed from the courtroom while the complainant gives evidence before the jury.<sup>120</sup> This could address the concern that the complainant feels disconnected from the trial process when they give evidence using an alternative arrangement like a remote witness facility.<sup>121</sup>
- 21.108 Some complainants may want to give evidence in the courtroom, especially when they believe it will be better for their case if the jury can see them in person.
- 21.109 At this stage, we are not convinced that this removing of the accused from the courtroom during the complainant's evidence should be available. A criminal trial, unlike a civil trial, is a trial by the state against the accused. There is a risk that removing the accused could result in an unfair trial, even if they listen to the proceedings from a remote location. It may give the jury a sense of 'presumptive guilt' instead of 'presumptive innocence'.<sup>122</sup> We note Victoria Legal Aid and a representative of the Criminal Bar Association expressed concerns about this proposal.<sup>123</sup>

### Victim survivors have rights to privacy

- 21.110 A trial makes public the private lives of people who have experienced sexual violence. A fundamental feature of our criminal justice system is that justice is administered in open court.<sup>124</sup> The prosecution or the defence may seek access to the complainant's records. The accused is entitled to access all material relevant to the case so that they can make a full defence.<sup>125</sup>
- 21.111 Complainants have a right not to have their privacy 'unlawfully or arbitrarily interfered with'<sup>126</sup> and to expect measures to protect their privacy interests.<sup>127</sup> This section focuses on restrictions on:
- the right of the accused to access the complainant's 'confidential communications' and other private information
  - introducing information about their sexual history into evidence.

<sup>120</sup> Submissions 45 (Victims of Crime Commissioner), 59 (County Court of Victoria).

<sup>121</sup> Submission 59 (County Court of Victoria); Consultation 77 (Witness J). See also Nicole Bluett-Boyd and Bianca Fileborn, *Victim/Survivor-Focused Justice Responses and Reforms to Criminal Court Practice* (Research Report No 27, Australian Institute of Family Studies (Cth), April 2014) 50 <<https://aifs.gov.au/publications/victim-survivor-focused-justice-responses-and-reforms-criminal-court-practice>>.

<sup>122</sup> Law Council of Australia, *Courts and Tribunals (Part 2)* (Report, August 2018) 78–9 <<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Courts%20and%20Tribunals%20%28Part%20%29.pdf>>.

<sup>123</sup> Consultations 90 (Criminal Bar Association (No 2)), 95 (Victoria Legal Aid (No 2)).

<sup>124</sup> See, eg, Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (Report No 129, December 2015) [8.53]–[8.56] <<https://www.alrc.gov.au/publication/traditional-rights-and-freedoms-encroachments-by-commonwealth-laws-alrc-report-129/>>. However, provisions exist to close courts in sexual offence cases to avoid causing undue distress or embarrassment to a complainant or witness: *Open Courts Act 2013* (Vic) s 30(2).

<sup>125</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(2).

<sup>126</sup> *Ibid* s 13.

<sup>127</sup> *Victims' Charter Act 2006* (Vic) s 14.



## What are confidential communications and how does the law protect them?

My mental health history was subpoenaed and used against me. I had disclosed a previous sexual assault to my psychologist for the first time just two days before the assault which was the subject of the trial. The defence lawyer kept questioning me about this as if it was no coincidence but rather, an attempt to get more attention/sympathy. It felt like I was going through the assault all over again, but this time I was being mocked. ...

There was no-one standing up for me and asking about the relevance of my mental health history. Surely, given the prevalence of mental health issues in our society, many people with these issues are assaulted. In fact, I have learned subsequently that pre-existing issues could even make one more susceptible to sexual assault as offenders tend to target the vulnerable. ...

Why did the offender get to hear all about my personal health history (he was a stranger to me) and yet he didn't have to answer one single question to assist the jury to determine what had happened that night? I felt like I was the criminal and I was the one on trial.—Tabitha<sup>128</sup>

- 21.112 In general, an accused is entitled to seek access to a complainant's personal records and, if they are relevant, introduce those records into evidence. Seeking access usually involves filing a subpoena to force individuals or organisations to produce documents or to appear in court.<sup>129</sup>
- 21.113 Personal records of a complainant include their medical records, psychological or psychiatric notes, dealings with government departments or bank records. In general, the documents must be handed over if they have evidentiary value.<sup>130</sup>
- 21.114 Confidential communications are communications made in confidence by a victim survivor to a medical practitioner or counsellor, either before or after the alleged sexual offending occurred.<sup>131</sup>
- 21.115 Reforms in Victoria have reduced access to records about confidential communications. These reforms aim to:
- promote the public interest in victim survivors seeking counselling
  - encourage people to report the crime to police.<sup>132</sup>
- 21.116 Under these laws, the defence can only access confidential communications if a court allows it ('grants leave'). The court can only grant leave if it is satisfied that the records have 'substantial probative value to a fact in issue'; that other sources for the evidence are not available; and that the public interest in 'preserving the confidentiality' of the communication and protecting the person who made the communication from harm, is substantially outweighed by the public interest in allowing the records into evidence because of their 'substantial probative value'.<sup>133</sup> In making this decision, the court must balance the factors listed in the legislation.<sup>134</sup>

<sup>128</sup> Submission 26 (Northern CASA).

<sup>129</sup> Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) [8.131]–[8.133].

<sup>130</sup> Ibid.

<sup>131</sup> *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 32B. This is known in other states by other names, such as 'protected confidences' in New South Wales, 'sexual assault counselling privilege' in Queensland, and 'protected communications' in South Australia and Western Australia.

<sup>132</sup> Victorian Law Reform Commission, *Sexual Offences* (Report No 5, July 2004) 211–12.

<sup>133</sup> *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 32D(1). Harm includes actual physical bodily harm, financial loss, stress, shock, damage to reputation and emotional or psychological harm (such as shame, humiliation or fear): s 32B(1) 'harm'.

<sup>134</sup> Ibid s 32D(2).

- 21.117 Applications must be made in writing over three stages—to subpoena records, to inspect records and then to use a record of a confidential communication as evidence. The party applying, usually the defence, must give at least 14 days notice of the application to the prosecution, the police informant and the person who holds the records. The informant is responsible for giving the complainant a copy of the notice within a 'reasonable time'.<sup>135</sup>
- 21.118 The defence may use confidential communications records to argue that:
- the complainant has cognitive disabilities
  - the sexual offence did not happen
  - the complainant has a motive to lie
  - the decision to report the incident was influenced by a person in authority (for example, in the case of a child).<sup>136</sup>

### We have made recommendations on confidential communications

- 21.119 In our Victims of Crime report we made two recommendations to strengthen the confidential communications scheme (see box).<sup>137</sup> As at June 2021 these recommendations have not been implemented.
- 21.120 The first recommendation addressed concerns that few complainants were participating in the decision making about their confidential records, because:
- Many complainants were not aware of the application and that they were entitled to intervene.
  - Complainants did not have an automatic right to intervene ('standing') and did not have legal representation.
  - Complainants may not want to appear before the court, but would be open to providing a sworn statement to the court.<sup>138</sup>
- 21.121 The second recommendation addressed concerns that a broader range of records under the *Health Records Act 2001* (Vic) needed to be protected, including:
- medical records (other than records already falling within the definition of confidential communications) including psychiatric or psychological records
  - records held by the Department of Health and Human Services
  - records made by social workers
  - records held by specialist family violence services.<sup>139</sup>
- 21.122 There is a risk that these records will be used to unfairly challenge a complainant's reliability. We concluded that these sensitive records should be private and protected against misuse in a criminal trial.<sup>140</sup>
- 21.123 The scope of the confidential communications scheme in Victoria focuses on the public interest in people seeking counselling. But we supported a broad approach that, as in Canada, focuses on the right to privacy.<sup>141</sup> The right to privacy is protected in Victoria's Charter of Human Rights and Responsibilities.<sup>142</sup>
- 21.124 Another recommendation of our Victims of Crime report addressed the need for independent legal representation, modelled on the New South Wales Legal Aid service for sexual assault privilege.<sup>143</sup> We discuss legal representation in Chapter 12.

135 Ibid s 32C. A judge may waive or shorten the notice requirement: s 32C(3). The OPP noted that it had taken on the role of advising complainants in practice, although in law the responsibility rested on the informant: Submission 63 (Office of Public Prosecutions).

136 Australian Law Reform Commission, New South Wales Law Reform Commission, and Victorian Law Reform Commission, *Uniform Evidence Law* (ALRC Report No 102; NSWLRC Report 112, December 2006) [15,73] <<https://www.alrc.gov.au/publication/uniform-evidence-law-alrc-report-102/>>.

137 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016).

138 Ibid [7,67]–[7,86].

139 Ibid [8,140]–[8,153].

140 Ibid Recommendation 44.

141 *Criminal Code*, RSC 1985, c C-46, s 278.1.

142 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 13.

143 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) Recommendation 23.

**Our recommendations on confidential communications from *The Role of Victims of Crime in the Criminal Trial Process* (2016)**

**Recommendation 25:** The confidential communications provisions ... should be amended by:

- (a) requiring the court to be satisfied that a victim whose confidential communications are the subject of an application for access and use is aware of the relevant provisions and has had an opportunity to obtain legal advice in relation to it
- (b) prohibiting judges from waiving the notice requirements, except where the victim cannot be located after reasonable attempts or the victim has provided informed consent to the waiver
- (c) providing victims with standing to appear before the court in relation to confidential communications applications
- (d) requiring the prosecution to inform the victim, when an application is made, of their right to appear and the availability of legal assistance in relation to a confidential communications application ...
- (e) permitting victims to provide a confidential sworn or affirmed statement to the court specifying the harm the victim is likely to suffer if the application is granted.

**Recommendation 45:** The confidential communications provisions in the *Evidence (Miscellaneous Provisions) Act 1958* (Vic) should apply to the victim's health information as defined by the *Health Records Act 2001* (Vic).

**Confidential communications protections still need improvement**

- 21.125 We heard in this inquiry that confidential communications protections needed improvement.
- 21.126 Sexual Assault Services Victoria submitted that the confidential communication scheme is not working as intended in practice:
- In practice, protections relating to a [victim survivor's] confidential medical or counselling records are constantly overridden during sexual offence trials. SAS Vic members say that they are rarely able to stop a subpoena despite evidence of [legislative requirements] being met. The judge can make a decision on what they think is relevant in the file to be shared, and that can include information that is irrelevant and/or detrimental to the client. ... Further protections are needed to practice [and] procedure regarding the protection of records, to prevent defence lawyers from continuing to undertake 'fishing exercises' in relation to gaining access to [victim survivor] counselling records. This provision has not proved effective and further action is required.<sup>144</sup>
- 21.127 Child Protection also told us that its files were subpoenaed in court. They often included descriptions of behavioural challenges that were used to discredit the child in court, although the behaviour was often a result of trauma. It said:
- Child Protection clients' laundry is aired and it's really sad for the victim. There's a misconception around why children have ended up in residential care, and this can be brought up in court. It's not the child's fault and not relevant to the offences.<sup>145</sup>
- 21.128 Dr Mary Iliadis told us that, despite reforms to restrict the use of complainants' sensitive information in trials, research showed that it continues to be used by the defence to undermine the complainant's credibility and claims.<sup>146</sup>

144 Submission 17 (Sexual Assault Services Victoria).  
145 Consultation 57 (Department of Health and Human Services).  
146 Submission 23 (Dr Mary Iliadis).

- 21.129 Sexual Assault Services Victoria pointed to a Tasmanian provision that prevented the introduction of any communications to counsellors into court without the complainant's consent.<sup>147</sup> It also supported access to independent legal representation.<sup>148</sup>
- 21.130 The Victims of Crime Commissioner supported the recommendations in our Victims of Crime report addressing the complainant's participation in decisions about their medical or counselling records, including independent legal representation.<sup>149</sup>
- 21.131 We heard other suggestions on how to strengthen protections. For example:
- restricting access to any records to defence counsel, so the accused would not see the records<sup>150</sup>
  - greater protections for other sensitive or private material, such as bank records<sup>151</sup>
  - allowing the court to order that the material should be produced to the court 'on the papers'.<sup>152</sup>

### How can confidential communications protections be strengthened?

- 21.132 The issues identified in our Victims of Crime report are still with us today. The protection of confidential communications is undermined by the challenges complainants face in participating in the decisions made about their records.
- 21.133 We reaffirm the recommendations in our previous inquiry.
- 21.134 We also recommend in Chapter 4 that the Victims' Charter Act should include a victim survivor's right to be notified about applications to introduce confidential communications and to submit their views to the court, and the right to funded legal representation. This is consistent with the aims of the Charter of informing victim survivors about their cases and rights.<sup>153</sup>
- 21.135 Finally, we note that there has been no improvement in the data that we have about the number of confidential communications applications made since our last inquiry. We discuss the need for better data in Chapter 6.

## Recommendation

- 87 In line with recommendations in the Victorian Law Reform Commission's inquiry on *The Role of Victims of Crime in the Criminal Trial Process*, the *Evidence (Miscellaneous Provisions) Act 1958* (Vic) should be amended to:
- a. strengthen procedural requirements to ensure that complainants can participate in decisions about applications to introduce communications made in confidence by a complainant to a medical practitioner or counsellor, either before or after the alleged sexual offending occurred (confidential communications) and have access to legal assistance
  - b. extend the protection of complainant's records to health information as defined by the *Health Records Act 2001* (Vic).

<sup>147</sup> *Evidence Act 2001* (Tas) s 127B.

<sup>148</sup> Submission 17 (Sexual Assault Services Victoria).

<sup>149</sup> Submission 45 (Victims of Crime Commissioner).

<sup>150</sup> Submission 14 (Gatehouse Centre, Royal Children's Hospital). Restricted access may already be arranged in practice if the accused consents: *Bowers (a pseudonym) v The Queen* [2020] VSCA 246, [51].

<sup>151</sup> Submission 59 (County Court of Victoria).

<sup>152</sup> This means that a decision will be made by a judicial officer in their chambers based on written materials filed by parties, without verbal evidence or oral submissions: 'What Are Decisions Made by Courts and Tribunals "On the Papers"?', *Justice Connect* (Web Page) <<https://justiceconnect.org.au/resources/decisions-made-on-the-papers/>>.

<sup>153</sup> *Victims' Charter Act 2006* (Vic) s 7.

## What are the laws on a complainant's sexual history?

- 21.136 There are legal limits on evidence or questions about a complainant's sexual reputation, history or activities in sexual offence cases.<sup>154</sup> These limits are often called 'rape shield' laws.
- 21.137 These reforms prevent the use of outdated stereotypes to undermine the complainant's credibility. These stereotypes cannot be used to suggest the accused was reasonable in believing that there was consent.<sup>155</sup>
- 21.138 In Victoria, the laws:
- ban questions or evidence relating to a complainant's sexual reputation 'with respect to chastity'<sup>156</sup>
  - ban evidence relating to the complainant's sexual history<sup>157</sup> that is used to support an argument or conclusion that the complainant 'is the type of person who is more likely to have consented to the sexual activity to which the charge relates'
  - prevent questions or evidence about a complainant's consensual or non-consensual sexual activities unless a judge allows them.<sup>158</sup>
- 21.139 The court can only allow questions or evidence about sexual activities if they are 'substantially relevant to a fact in issue' and are 'in the interests of justice'.<sup>159</sup> The law lists factors that must be considered in making that decision.<sup>160</sup>
- 21.140 As with confidential communications, a written application to introduce questions or evidence about a complainant's sexual activities must be filed and served on the informant or Director of Public Prosecutions.<sup>161</sup> This procedure may be waived if it is in the interests of justice to do so ('waiver').<sup>162</sup>
- 21.141 We did not recommend reforming the laws relating to sexual history in our Victims of Crime report. We heard that applications to introduce evidence and questions about sexual history were infrequent and that the provisions were 'generally regarded as working as intended'.<sup>163</sup>

## Sexual history protections could be strengthened

- 21.142 Sexual Assault Services Victoria told us that reforms to limit the use of sexual history were not working well. It told us:
- In reality this is not happening. Clients' sexual history is still being used to diminish their experience, discredit them or cast doubt on their statements and on what has happened.<sup>164</sup>
- 21.143 Rape & Sexual Assault Research & Advocacy (RASARA) told us that the defence still referred to a complainant's past sexual relationships with the accused.<sup>165</sup>

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154 *Criminal Procedure Act 2009* (Vic) ss 341–343. This includes committal proceedings, summary or indictable trials, sentencing hearings and pre-trial cross-examination.

155 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) [5.44]–[5.45].

156 *Criminal Procedure Act 2009* (Vic) s 341.

157 *Ibid* s 343. 'Sexual history' is defined as evidence that 'relates to or tends to establish the fact that the victim survivor was accustomed to engaging in sexual activities; or had freely agreed to engage in sexual activity (other than that to which the charge relates) with the accused person or another person.' *ibid* s 340.

158 'Sexual activities' is not defined.

159 *Criminal Procedure Act 2009* (Vic) ss 342, 349.

160 *Ibid* s 349.

161 *Ibid* s 344.

162 *Ibid* ss 344, 347, 349.

163 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) [5.64]–[5.65]. See also Success Works and Department of Justice (Vic), *Sexual Assault Reform Strategy* (Final Evaluation Report, Department of Justice (Vic), January 2011) 110 <<https://trove.nla.gov.au/version/169811763>>.

164 Submission 17 (Sexual Assault Services Victoria).

165 Submission 34 (Rape & Sexual Assault Research & Advocacy).

- 21.144 It gave as an example a case where the defence had used a dispute about the timing of their past sexual encounter to ask the complainant if she 'had quite an active relationship' with the accused prior to the rape. RASARA explained that the question of an 'active [sexual] relationship' was irrelevant given the definition of consent. But such evidence was still being used to support that the defendant's belief in consent was reasonable.<sup>166</sup>
- 21.145 Child Protection told us it was aware of cases where a child's history of allegations of child sexual abuse had been used to undermine their credibility. It gave an example of the defence requesting the history of the sexual encounters of a 13-year-old, even though children under 16 cannot consent to sexual activity.<sup>167</sup>
- 21.146 The Gatehouse Centre submitted there was a need to consider the use of CCTV recordings as a 'new vector for intimidating complainants in court and creating unjustified doubt amongst jury members'. It gave as an example a recent case where the defence had scrutinised the recording of the complainant at a bar hours before the alleged assault, which was highly distressing for her.<sup>168</sup>
- 21.147 In their view these recordings could be 'as intrusive and humiliating' as questions about one's sexual history and did not provide any evidence about whether she consented hours later. While this evidence should not be prohibited, it suggested it should be considered as sensitive in nature and required 'clear rules around its admissibility', how it is played in court and 'appropriate lines of questioning' if the evidence is introduced.<sup>169</sup>
- 21.148 Rape & Domestic Violence Services Australia suggested the law in New South Wales as a model. The equivalent provision excludes evidence about sexual experience, other than in limited circumstances. It submitted this was better than the 'discretionary regime' in Victoria.<sup>170</sup> The Office of Public Prosecutions (OPP) agreed that the grounds for allowing such evidence could be stricter.<sup>171</sup> On the other hand, Victoria Legal Aid pointed out that there were already processes in place to address sexual history evidence and expressed concerns that a further narrowing of admissibility may be too rigid.<sup>172</sup>
- 21.149 In the transcript analysis, cross-examination or other evidence about a complainant's sexual activities did not feature prominently. When it did come up in trials, 'it was generally subject to careful handling by way of a *voir dire*, rulings by the trial judge and careful questioning by counsel'.<sup>173</sup> In examples where defence counsel went too far with questioning, the judge or prosecutor intervened or objected. The transcript analysis revealed no evidence that sexual history evidence was being used to argue the complainant is the type of person who is more likely to have consented.<sup>174</sup>
- 21.150 Others focused on the need for procedural reforms. The OPP and the Magistrates' Court of Victoria raised a concern that the written notice requirement was too easily waived.
- 21.151 The OPP told us that written notice was not often given and that this could lead to 'questioning which is less confined and potentially more oppressive' than if written notice had been given.<sup>175</sup>

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166 Ibid. Other researchers agreed that there was evidence sexual history was still 'routinely introduced' at trials in subtle ways: Submission 7 (Dr Bianca Fileborn, Dr Rachel Loney-Howes, Dr Tully O'Neill and Sophie Hindes).

167 Consultation 57 (Department of Health and Human Services).

168 Submission 14 (Gatehouse Centre, Royal Children's Hospital) (December 2020).

169 Ibid.

170 Submission 39 (Rape & Domestic Violence Services Australia). The New South Wales law contains six categories of exceptions for admitting sexual experience evidence, and also requires that the value of the evidence outweighs any 'distress, humiliation or embarrassment' that the complainant might suffer as a result of admitting the evidence: *Criminal Procedure Act 1986* (NSW) s 293(4).

171 Consultation 94 (Office of Public Prosecutions (No 2)).

172 Consultation 95 (Victoria Legal Aid (No 2)).

173 Julia Quilter and Luke McNamara, *Qualitative Analysis of County Court of Victoria Rape Trial Transcripts* (Report to the Victorian Law Reform Commission) (forthcoming). A *voir dire* is a hearing in which a court determines questions of fact and law after hearing evidence from witnesses: Judicial College of Victoria, '17 Voir Dire', *Criminal Proceedings Manual* (Online Manual, 1 November 2019) [1] <<https://www.judicialcollege.vic.edu.au/eManuals/VCPM/27799.htm>>.

174 Julia Quilter and Luke McNamara, *Qualitative Analysis of County Court of Victoria Rape Trial Transcripts* (Report to the Victorian Law Reform Commission) (forthcoming). However, the researchers noted the legislation might be having unintended consequences where such evidence could assist the prosecution.

175 Submission 63 (Office of Public Prosecutions). The Office of Public Prosecutions explained that the test for making a late application was whether it was in the interests of justice, and if there was merit in the questioning, this would usually satisfy this test.



- 21.152 The Magistrates' Court of Victoria supported a stricter test for waiving the application process. It observed that the written notice requirement ensured that lawyers had to 'turn their mind' to whether and why such questioning was needed at an early stage. It also avoided delays at the hearing and gave magistrates enough information to decide whether to allow questioning and to control questioning.<sup>176</sup>
- 21.153 However, judges of the County Court of Victoria reported procedural requirements are strictly enforced and rarely waived.<sup>177</sup>
- 21.154 The Magistrates' Court of Victoria, OPP and Victoria Legal Aid agreed that the term 'chastity' under section 341 of the Criminal Procedure Act is outdated.<sup>178</sup>
- 21.155 The Victims of Crime Commissioner suggested that, even if its use was rare, complainants should be heard in applications about their sexual history and have independent legal representation to do so.<sup>179</sup>

### How can sexual history protections be strengthened?

- 21.156 In our Victims of Crime inquiry, we heard these protections were working well. Evidence in this inquiry suggests this is not the case.
- 21.157 Complainants should be able to participate in applications to introduce their sexual history. We received considerable support for providing victim survivors with legal representation for such applications. In Chapter 12 we recommend that there should be independent legal advice and representation for these matters. As we discuss there, the right to legal representation to assist with sexual history evidence also exists in other jurisdictions.
- 21.158 We recommend strong procedural requirements, similar to those for confidential communications records (see above), for complainants in these applications. As with confidential communications, evidence about a person's sexual activities is personal and sensitive. Complainants are likely to find it invasive and distressing having such private matters introduced in court. We recommend changes to the Criminal Procedure Act to:
- require the prosecution (or informant in summary proceedings) to notify the complainant of their right to appear and the availability of legal assistance in relation to an application concerning sexual activities under section 342 of the Criminal Procedure Act
  - require the court to be satisfied that the complainant is aware of the application and has had an opportunity to obtain legal advice
  - prohibit the court from waiving the notice requirements, except where the complainant cannot be found after reasonable attempts, or the complainant has given informed consent to the waiver
  - provide complainants standing to appear
  - allow complainants to provide a confidential sworn or affirmed statement to the court that specifies the harm they are likely to suffer if the application is granted.
- 21.159 Independent legal advice and strong procedural requirements with these applications will allow complainants to have their say in a more informed way. It will also assist judges in making decisions.
- 21.160 Requirements for complainants to have their say may result in better compliance with procedural requirements, such as a waiver for written applications.<sup>180</sup> This is because complainants will need to be notified and provided an opportunity to seek legal assistance. We note, however, that our transcript analysis of rape cases in the County Court of Victoria found that the legislative regime was generally working as intended.

<sup>176</sup> Consultation 71 (Magistrates' Court of Victoria (No 1)).

<sup>177</sup> Consultation 87 (County Court of Victoria (No 2)).

<sup>178</sup> Consultations 71 (Magistrates' Court of Victoria (No 1)), 94 (Office of Public Prosecutions (No 2)), 95 (Victoria Legal Aid (No 2)).

<sup>179</sup> Submission 45 (Victims of Crime Commissioner).

<sup>180</sup> *Criminal Procedure Act 2009* (Vic) s 347.



- 21.161 Rape & Domestic Violence Services Australia suggested that there should be narrower grounds for permitting such evidence, as is the approach in New South Wales.<sup>181</sup> We are persuaded by Victoria Legal Aid that this approach may be too restrictive.<sup>182</sup> It could be unfair to both the complainant (where it would assist the prosecution's case) and the accused, especially for unique situations not contemplated by legislation.
- 21.162 We recommend in Chapter 4 that the Victims' Charter Act should include a right for victims of sexual offences to be notified of sexual history applications and to submit their views to the court, and the right to funded legal representation. This is consistent with the aims of that Act of informing victim survivors about their cases and rights.<sup>183</sup> In Chapter 6 we note the need for better data about how many sexual history applications are made.
- 21.163 We also heard that the word 'chastity' in the prohibition under section 341 of the Criminal Procedure Act is outdated.<sup>184</sup> We agree that this is an outdated word. It should be replaced with a neutral term.

## Recommendations

- 88 Procedures under Part 8.2, Division 2 of the *Criminal Procedure Act 2009* (Vic) should be amended by:
- requiring the prosecution (or informant in summary proceedings) to notify the complainant of their right to appear and the availability of legal assistance in relation to an application concerning sexual activities under section 342 of the *Criminal Procedure Act 2009* (Vic)
  - requiring the court to be satisfied that the complainant is aware of the application and has had an opportunity to obtain legal advice
  - prohibiting the court from waiving the notice requirements except where the complainant cannot be located after reasonable attempts or the complainant has provided informed consent to the waiver
  - providing complainants with standing to appear
  - permitting complainants to provide a confidential sworn or affirmed statement to the court specifying the harm they are likely to suffer if the application is granted.
- 89 The language of section 341 of the *Criminal Procedure Act 2009* (Vic) should be modernised by replacing the word 'chastity' with a neutral term.

181 Submission 39 (Rape & Domestic Violence Services Australia).  
 182 Consultation 95 (Victoria Legal Aid (No 2)).  
 183 *Victims' Charter Act 2006* (Vic) pt 2.  
 184 Consultation 71 (Magistrates' Court of Victoria (No 1)).



# CHAPTER 22

## PART SIX: IMPLEMENTATION

# The path forward: implementing reforms to respond to sexual violence

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## 22. The path forward: implementing reforms to respond to sexual violence

### Overview

- The reforms in this report need to be implemented effectively.
- There are three main ways these reforms could be implemented:
  - by using existing bodies
  - by establishing a new Commission for Sexual Safety
  - by a hybrid model.
- We recommend establishing a new Commission for Sexual Safety.
- The functions of the new Commission for Sexual Safety will span prevention, education and responses to sexual violence. It will provide a 'systems-wide' approach to the implementation of reforms.
- We recommend an annual report on the progress of the implementation of our and other reforms relating to sexual violence.

### How should our proposed reforms be implemented?

- 22.1 The process of reforming the law is 'far from straightforward'. The intention of reforms can be limited or obscured by the way they are implemented.<sup>1</sup> People, institutions and systems can enable or block reform, especially when reforms require changes to attitudes and understanding.<sup>2</sup>
- 22.2 For a reform to succeed, it must be implemented effectively. Reforms should be communicated widely, properly resourced, and should foster good relationships between partners in the sexual assault system.<sup>3</sup> We make recommendations along these lines throughout this report (see Chapters 3, 4, 5 and 18).
- 22.3 This report recommends a range of new functions and initiatives, including:
- public education about sexual violence (see Chapter 3)
  - regular publication of criminal justice data (see Chapter 6)
  - a central website and phonenumber for people to access information and support (see Chapter 7)
  - a new restorative justice scheme (see Chapter 9)
  - a specialised stream for victim survivors of sexual violence in the new financial assistance scheme (see Chapter 10)
  - support for some civil litigation and enforcement of civil settlements and court orders (see Chapter 11)

1 Nicole Bluett-Boyd and Bianca Fileborn, *Victim/Survivor-Focused Justice Responses and Reforms to Criminal Court Practice* (Research Report No 27, Australian Institute of Family Studies (Cth), April 2014) 39 <<https://aifs.gov.au/publications/victim-survivor-focused-justice-responses-and-reforms-criminal-court-practice>>.

2 Ibid 39–42.

3 Ibid x.

- independent victim advocates (see Chapter 12)
  - separate legal representation for victim survivors of sexual violence (see Chapter 12)
  - an independent review of police and prosecution decisions (see Chapter 17)
  - an expert evidence panel (see Chapter 20).
- 22.4 Several different organisational structures could be used to implement these recommendations. Our proposed reforms are also likely to be complemented by other measures developed as part of Victoria's Sexual Assault Strategy (see Chapter 1).
- 22.5 As other recent inquiries have shown, when reforms span government departments and systems, there needs to be:
- clear responsibility for delivering reform
  - a way to keep a 'systems-wide' view of reforms
  - ways to hold people accountable for delivering reforms.
- 22.6 This chapter looks at:
- how our reforms should be implemented
  - who should implement them.
- 22.7 There needs to be a 'systems-wide' approach to implementing reforms. Our preferred model to achieve this is an independent body that is responsible for overseeing the system for preventing, reducing and responding to sexual violence.
- 22.8 Establishing such a body will send a strong signal to the community about the priority the government places on tackling sexual violence and improving responses to it.
- 22.9 This body should work closely with existing organisations within the system responding to sexual violence, and should coordinate the way these organisations work together to drive reforms.
- 22.10 We also recommend that the implementation of our proposed and other reforms relating to sexual violence be monitored, so that the Victorian Government, individual organisations and people are held accountable for the effective implementation of these reforms.

## Who is already working on responding to sexual violence?

- 22.11 To identify who should deliver reforms, we need to know who is already working in the area. Sexual violence reforms overlap with many related reforms, including in family violence. It is a complex and fragmented landscape, with responsibilities across different levels of government and many systems (see Chapters 1 and 4).
- 22.12 These bodies and systems need to be considered in implementing reforms, as they already have roles and responsibilities related to sexual violence. As well, specialist sexual assault services and organisations within the criminal justice system play a key role in our reforms.

## There are bodies established by related reforms

- 22.13 Related reforms, such as family violence reforms, have already set up bodies to coordinate the delivery of system-wide reform. Other organisations focus on promoting primary prevention or improving practice through research (see Table 21).

**Table 21: Key bodies established to implement reforms or to promote evidence-informed practice**

Reform	Body	Role	Type of body
Victoria's family violence reforms	Family Safety Victoria	Drives implementation of key elements of Victoria's family violence strategy and coordinates support <sup>4</sup>	Administrative office in relation to a government department (now the Department of Families, Fairness and Housing)
	Respect Victoria	Drives evidence-informed primary prevention <sup>5</sup>	Independent statutory authority under the <i>Prevention of Family Violence Act 2018</i> (Vic)
National child sexual abuse strategy	National Office for Child Safety	Leads development and implementation of several national priorities, including the National Principles for Child Safe Organisations, Commonwealth Child Safe Framework, and the National Strategy to Prevent Child Sexual Abuse <sup>6</sup>	Office within the federal Department of Prime Minister and Cabinet
	National Centre for the Prevention of Child Sexual Abuse (in the process of being established)	To raise awareness and understanding of the impacts of child sexual abuse, support help seeking, guide best practice advocacy and support therapeutic treatment <sup>7</sup>	Tender process for organisation to establish and deliver National Centre is underway <sup>8</sup>
Commonwealth sexual harassment reforms	Respect@Work Council	To improve coordination, consistency and clarity across legal and regulatory frameworks <sup>9</sup>	Council of representatives and associate members, supported by permanent secretariat

4 Victorian Government, 'Family Safety Victoria', VIC.GOV.AU (Web Page, 17 August 2021) <<http://www.vic.gov.au/family-safety-victoria>>.

5 'About', *Respect Victoria* (Web Page, 2021) <<https://www.respectvictoria.vic.gov.au/about>>.

6 'About Us', *National Office for Child Safety* (Web Page) <<https://childsafety.pmc.gov.au/about-us>>.

7 *Royal Commission into Institutional Responses to Child Sexual Abuse: Final Report* (Report, December 2017) Recommendation 9.9 <<https://www.childabuseroyalcommission.gov.au/final-report>>.

8 'National Centre for the Prevention of Child Sexual Abuse', *Department of Social Services (Cth)* (Web Page, 18 June 2021) <<https://www.dss.gov.au/families-and-children-programs-services-children/national-centre-for-the-prevention-of-child-sexual-abuse>>.

9 Australian Government, *A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces* (Report, 8 April 2021) 7 <<https://www.ag.gov.au/rights-and-protections/publications/roadmap-for-respect>>.

Reform	Body	Role	Type of body
National Plan to Reduce Violence against Women and their Children	Australia's National Research Organisation for Women's Safety Limited	Produces, disseminates and helps apply evidence for policy and practice addressing violence against women and their children <sup>10</sup>	Independent not-for-profit research organisation jointly established by all Australian governments
Victoria's mental health reforms	Mental Health Reform Victoria <sup>11</sup>	Leads the implementation of Recommendations 1–7 of the interim report of Royal Commission into Victoria's Mental Health System	Established as an administrative office in relation to the (then) Department of Health and Human Services, with final report recommending its transfer to the Mental Health and Wellbeing Division in the Department of Health <sup>12</sup>
	Collaborative Centre for Mental Health and Wellbeing <sup>13</sup>	A dedicated knowledge-sharing institute that will bring together people with lived experience and multi-disciplinary researchers and health professionals to develop, translate and share best practice	Stakeholder consultation is underway to deliver the Centre.

22.14 Some of these related reforms, such as Victoria's family violence reforms, have established roles to monitor implementation, such as the Family Violence Reform Implementation Monitor.<sup>14</sup> We discuss this later in the chapter.

22.15 Victoria's family violence reforms have led to the creation of two agencies which have responsibilities directly relevant to sexual violence. Family Safety Victoria is the main agency responsible for family violence reforms and is leading the development of the Sexual Assault Strategy. It funds specialist sexual assault services. It is responsible for delivery of many reforms that intersect with sexual violence, including Orange Doors and the Multi-Agency Risk Assessment and Management Framework (MARAM) (see Chapters 1 and 18).<sup>15</sup>

10 Australia's National Research Organisation for Women's Safety (ANROWS), 'Who We Are', ANROWS (Web Page) <<https://www.anrows.org.au/about/>>.

11 'Our Story', *Mental Health Reform Victoria* (Web Page, 19 November 2020) <<https://www.mhrv.vic.gov.au/our-story>>.

12 Royal Commission into Victoria's Mental Health System (Final Report, 3 February 2021) Recommendation 45(3) <<https://finalreport.rcvmhs.vic.gov.au/>>.

13 Mental Health Reform Victoria, *Victorian Collaborative Centre for Mental Health and Wellbeing* (Web Page, 2020) <<https://www.mhrv.vic.gov.au/our-work/mental-health-systems-innovation/victorian-collaborative-centre-mental-health-and-wellbeing>>.

14 *Family Violence Reform Implementation Monitor Act 2016* (Vic). See also the recent establishment of a similar monitor to oversee the recommendations of the Royal Commission into the Management of Police Informants: Daniel Andrews, Premier of Victoria, 'Government to Act on All Recommendations of Royal Commission into the Management of Police Informants' (Media Release, 30 November 2020) <<http://www.premier.vic.gov.au/government-act-all-recommendations-royal-commission-management-police-informants>>.

15 Victorian Government, Family Safety Victoria, *VIC.GOV.AU* (Web Page, 17 August 2021) <<http://www.vic.gov.au/family-safety-victoria>>; Victorian Government, *Service Delivery* (Budget Paper No 3, 2020) 51 <<http://www.budget.vic.gov.au/budget-papers>>; Victorian Government, *Family Violence Reform Rolling Action Plan 2020–2023: Activities Index* (Combined Activity Summary) <<https://www.vic.gov.au/family-violence-reform-rolling-action-plan-2020-2023>>.



- 22.16 A separate, independent body, Respect Victoria, progresses primary prevention of family violence and violence against women, working with other relevant bodies.<sup>16</sup> The Family Violence Reform Implementation Monitor noted that Family Safety Victoria and Respect Victoria had been 'critical' to driving change.<sup>17</sup>
- 22.17 However, responsibility for family violence reforms was previously split between Family Safety Victoria, the Office for Women, and Respect Victoria. These bodies, together with the Family Violence Branch previously within the Department of Premier and Cabinet, now sit together within the Department of Families, Fairness and Housing.<sup>18</sup>

### Specialist sexual assault services have a major role

- 22.18 Specialist sexual assault services are at the heart of the sexual assault system. They help people to heal through counselling, and they support people by, for example, connecting them to services and advocating for them as they navigate a complex system. They are experts in sexual violence and in the journeys their clients take through legal and service systems.
- 22.19 Centres against sexual assault (CASAs) already perform, or have performed, some functions relevant to our recommendations, including:
- providing information and guidance (see Chapter 7)
  - advocating for victim survivors (see Chapter 12).
- 22.20 In Chapters 4 and 8, we discuss the need to strengthen the capacity of specialist sexual assault services to play a systemic role. This includes as a key partner in governance and collaboration (see Chapters 4 and 5), and in supporting other organisations to respond to sexual violence (Chapter 8).

### Justice agencies have a major role

- 22.21 Our inquiry focuses on the justice system. With previous sexual assault reforms, the Department of Justice (now the Department of Justice and Community Safety) usually took the lead.
- 22.22 This department is responsible for several programs and initiatives related to those that we recommend. For example, it runs the Family Violence Restorative Justice Service (see Chapter 9). It is responsible for victim support programs and the planned Victims' Legal Service, which are relevant to our recommendations for extending victim support (see Chapter 12).
- 22.23 The justice system includes other organisations whose work is directly relevant to our reforms. The Crime Statistics Agency reports on police data. It has developed the family violence data portal that will be extended to sexual violence, and the family violence data collection framework. In Chapter 6, we have recommended extending its work to include reviewing attrition, including through an analysis of police and prosecution files.
- 22.24 We also discuss in Chapter 4 the role of the Victims of Crime Commissioner, including her power to review complaints under the *Victims' Charter Act 2006* (Vic). We recommend extending her powers and duties, and the rights under the Victims' Charter Act, to ensure accountability for some of the reforms needed to improve the experiences of victims of crime.

16 *Respect Victoria* (Web Page, 2021) <<https://www.respectvictoria.vic.gov.au/>>. For example, it aims to work with Our Watch,

17 ANROWS and VicHealth: 'Our Role', *Respect Victoria* (Web Page, 2021) <<https://www.respectvictoria.vic.gov.au/our-role>>.

18 Family Violence Reform Implementation Monitor, *Report of the Family Violence Reform Implementation Monitor* (Fourth Report to Parliament, 1 November 2020) 8 <<http://www.fvrim.vic.gov.au/fourth-report-parliament-1-november-2020-tabled-may-2021>>. Ibid 149.

- 22.25 The Victorian Equal Opportunity and Human Rights Commission (VEOHRC) handles sexual harassment complaints alongside the Australian Human Rights Commission. We recommend giving VEOHRC power to enforce the duty in the *Equal Opportunity Act 2010* (Vic) to take reasonable and proportionate steps to eliminate sexual harassment, as far as possible. We also recommend empowering it to enforce a new duty to take reasonable and proportionate steps to eliminate sexual violence, as far as possible (see Chapter 3).

## What can we learn from the past?

- 22.26 Research has begun to identify best practice in implementation through 'implementation frameworks', which are a set of linked strategies to describe, understand or guide the process of implementation.<sup>19</sup>
- 22.27 A review of best practice concluded:
- Good implementation requires attention to the competencies and skills of both the individuals and the organisations involved. Both individual and organisational capacity must be built for implementation. ... Implementation is a complex endeavour that can be influenced by the nature of the practice, program or policy being introduced; the individuals involved; the inner and outer context of the organisation implementing an intervention; and the quality of the implementation process. Hence, changes should be well planned and considered. ... Implementation takes place in stages, and the effective implementation of practices, programs and policies takes time.<sup>20</sup>

### What are the major factors that contribute to effective implementation?

The Royal Commission into Institutional Responses to Child Sexual Abuse commissioned research to identify the factors that contributed to or impeded the implementation of recommendations made in previous inquiries.

The major factors contributing to effective implementation were:

- establishing processes and structures to facilitate implementation, including governance and coordination mechanisms, and planning for implementation
- strong leadership and stakeholder engagement
- an accountability framework and an independent, transparent and sustainable monitoring process.

The key factors impeding implementation were:

- practical constraints, such as constraints on budget or time
- organisational culture
- structural constraints, such as the time taken to deal with cross-jurisdictional issues or to effect changes across non-government organisations without a centralised authority
- narrow or prescriptive recommendations.

<sup>19</sup> Parenting Research Centre and Robyn Mildon, *Implementation Best Practice: A Rapid Evidence Assessment* (Report, Royal Commission into Institutional Responses to Child Sexual Abuse, May 2016) 14 <<https://apo.org.au/node/64146>>. This report summarises and critically analyses this research.

<sup>20</sup> Ibid 8.

It found that the main policy reasons for not accepting recommendations were concerns about their impact on other policy areas, the lack of an evidence base for the policy, a perception that existing arrangements were adequate, or because another approach was preferred to implement the intent of the recommendation.<sup>21</sup>

- 22.28 After four years of reform, the Family Violence Reform Implementation Monitor has identified six lessons for implementing future reforms. They include the need for dedicated roles to implement reforms both centrally and at local levels, and for reform leaders to be supported to champion and persist in their efforts. The Monitor emphasised the importance of collecting and using data to drive improvement, and of including feedback processes to ensure that reforms stay true to their intent.<sup>22</sup>

## What are possible models for implementation?

- 22.29 These lessons have informed our recommendations and they provide guidance on how best to implement them.
- 22.30 Many different forms of organisations could implement our proposed reforms. The Victorian Government could establish an administrative office to deliver reform, as it has done for family violence and mental health reforms (see Table 21). This model has the advantages of being closely connected to government, including funding and decision making, while still having some independence in its operations.
- 22.31 Another model is to create an independent office, rather than an independent body or organisation. This is done by appointing a person to hold an office, usually by legislation, supported by staff of government departments. This model is used for the Victims of Crime Commissioner (see Chapter 4), who is supported by staff from the Department of Justice and Community Safety.
- 22.32 An advantage of this model is that the office retains its independence but does not require a lot of money and time to set up, as the office shares its administrative resources. Models like this are fluid. 'Commissions' can have a variety of legal structures. 'Commission' can be used as a name for a business unit of the executive government. It can have its existence recognised (and powers given) by statute while still forming part of the executive government. It can also be a separate legal entity from government established by legislation with varying degrees of independence.<sup>23</sup>
- 22.33 In England and Wales, the newly established Domestic Abuse Commissioner is an office under law but is staffed by public servants (see box).<sup>24</sup>

21 Parenting Research Centre, *Implementation of Recommendations Arising from Previous Inquiries of Relevance to the Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report, Royal Commission into Institutional Responses to Child Sexual Abuse, May 2015) xv–xvi <<https://www.parentingrc.org.au/publications/review-for-royal-commission-on-implementation-of-recommendations/>>.

22 Family Violence Reform Implementation Monitor, *Report of the Family Violence Reform Implementation Monitor* (Fourth Report to Parliament, 1 November 2020) 26, 29–31 <<http://www.fvrim.vic.gov.au/fourth-report-parliament-1-november-2020-tabled-may-2021>>.

23 See, eg, the National Mental Health Commission, which is an executive agency that operates under the *Public Governance, Performance and Accountability Act 2013* (Cth): 'About', *National Mental Health Commission* (Web Page) <<https://www.mentalhealthcommission.gov.au/About>>.

24 'Domestic Abuse Commissioner Factsheet', GOV.UK (Web Page) <<https://www.gov.uk/government/publications/domestic-abuse-bill-2020-factsheets/domestic-abuse-commissioner-factsheet>>.

**The Domestic Abuse Commissioner**

The Domestic Abuse Commissioner is ‘an independent voice that speaks on behalf of victims and survivors’. Its role is to raise public awareness and hold agencies and government to account in tackling domestic abuse.<sup>25</sup> Its role is to encourage good practice in preventing, identifying and responding to domestic abuse. To carry this out, she can:

- assess, monitor and publish information about services for people affected by domestic violence
- make recommendations to any public authority
- undertake or support research
- provide information, education or training
- take other steps to increase public awareness of domestic abuse
- consult public authorities, voluntary organisations and other persons
- cooperate with, or work jointly with, other public authorities.<sup>26</sup>

The Commissioner also has powers to publish reports on domestic abuse and to advise and assist the government or any other person in relation to domestic abuse.<sup>27</sup> The office is estimated to cost £1.15 million every year.<sup>28</sup>

22.34 We have considered three models for implementing the proposed reforms:

- build on existing organisations and systems (Option 1)
- create a new organisation, such as a Commission for Sexual Safety (Option 2)
- create a new office within an existing organisation to take on some functions, while building on existing organisations and systems (Option 3, a hybrid of Options 1 and 2).

**Option 1: Build on what is already there**

22.35 There are already many organisations with existing responsibilities for sexual violence. In Option 1, our recommendations would be implemented by the organisation best placed to take on that role (see Table 22).

**Table 22: Existing bodies with responsibility for functions**

Function	Body best placed to take responsibility
Public education	Respect Victoria (working with relevant bodies, such as Our Watch, VicHealth, the Department of Education and Training and others)
Central source of information and referral	The Department of Justice and Community Safety, in collaboration with sexual assault and community services
Oversight of independent victim advocates	Sexual Assault Services Victoria

25 Domestic Abuse Commission (England and Wales) and SafeLives, *Understanding Court Support for Victims of Domestic Abuse* (Report, June 2021) 3 <<https://safelives.org.uk/sites/default/files/resources/Court%20Support%20Mapping%20Report%20-%20DAC%20Office%20and%20SafeLives.pdf>>.

26 *Domestic Abuse Act 2021* (UK) s 7.

27 Ibid ss 8–9.

28 Ministry of Justice (UK), *Domestic Abuse Bill 2020* (Impact Assessment, February 2020) [51] <<https://publications.parliament.uk/pa/bills/cbill/58-01/0096/IAFEB2020.pdf>>.

Function	Body best placed to take responsibility
Support better sexual violence data collection and research	Family Safety Victoria/Department of Families, Fairness & Housing, or combination of Crime Statistics Agency and existing research centres such as ANROWS
Responsibility for restorative justice, including: establishing training standards and accreditation criteria; ensuring outcome agreements are monitored; establishing and managing a complaints process; evaluating programs and collecting data	Department of Justice and Community Safety (as with family violence)
Responsibility for the specialised stream within the new financial assistance scheme, including victim conferences	Victims of Crime Commissioner (as previously recommended by us) who would delegate decision making in the specialised stream to sexual violence experts with standing in the community
Responsibility for civil litigation funding, including providing guidance or criteria for funding decisions; and enforcement proceedings, including bringing proceedings	Department of Justice and Community Safety, which could delegate the day-to-day administration of the civil litigation funding scheme to legal assistance services/a legal assistance provider; the Victorian Government or an agency or authority authorised by it to bring enforcement proceedings
Enforcement of duties to take steps to prevent sexual harassment and sexual violence	Victorian Equal Opportunity and Human Rights Commission
Specialised training in sexual violence for everyone working in the criminal justice system	Family Safety Victoria or organisations delivering MARAM training; Judicial College of Victoria; Victoria Police's Centre for Excellence for Family Violence; legal professional bodies
Expert evidence panel	Independent panel under the Department of Justice and Community Safety
Independent review of police and prosecution decisions	Independent panel under the Department of Justice and Community Safety

- 22.36 In this model, Family Safety Victoria (or an extension of the agency) could remain the coordinator for system-wide reforms, and its existing role could remain as it is for family violence and child sexual abuse reforms. This is also consistent with its role leading the development of the Sexual Assault Strategy. However, the Department of Justice and Community Safety could be responsible for parts of the reform process. Specialist sexual assault services would need to be funded to fulfil a more systemic role.

### Advantages of Option 1

- 22.37 The advantages of this model would be:
- It would strengthen existing models rather than creating new structures, enabling resources to be focused on service delivery and program implementation and evaluation.
  - It would build on existing strengths, functions and expertise.
  - It would align with reforms in related areas by ensuring that family violence, child sexual abuse and sexual violence reforms travel together.
  - It could be achieved rapidly because it would be based on existing functions and powers.
  - It would foster collaboration between organisations.
  - It would be more flexible to implement.

### Disadvantages of Option 1

- 22.38 The main disadvantage of this model is that it leaves the sexual assault system without a body or organisation that takes a system-wide view of sexual violence. This could lead to an uncoordinated and fragmented approach to reform.
- 22.39 Further, there is a risk that, without an organisation with a mandate focused on reform, the momentum for reform could wane. For example, the Statewide Steering Committee to Reduce Sexual Assault (see Chapter 4) disappeared as momentum and high-level support for it faded.

### Option 2: Create a new body

- 22.40 Option 2 would be to establish by law a new Commission for Sexual Safety with a mandate to take a system-wide view.
- 22.41 There are several examples of how such a Commission could be structured. One is the National Mental Health Commission, which 'acts as a catalyst for change' to improve Australia's mental health and suicide prevention system (see box). A Mental Health and Wellbeing Commission will also be established following the Royal Commission into Victoria's Mental Health System.<sup>29</sup>

### The role of the National Mental Health Commission

- provides evidence-based advice to the Australian Government where there is a priority need or emerging issue
- engages and collaborates across sectors, jurisdictions and internationally, and prioritises people with lived experience
- fosters open and collaborative partnerships by taking part in relevant committees and forums
- establishes project advisory groups, with key stakeholders represented, that meet regularly to inform and guide the development of the Commission's work
- consults and engages people through workshops, surveys, public forums and targeted interviews
- monitors and reports on the mental health and suicide prevention system to support continuous improvement.

The Commission does not advocate for individuals or groups. It does not provide services or distribute funds or grants.<sup>30</sup>

22.42 Another relevant model is the Commission for Children and Young People in Victoria, which:

- provides independent scrutiny and oversight of services for children and young people
- advocates for best practice policy, program and service responses to meet the needs of children and young people
- supports and regulates organisations that work with children and young people to prevent abuse and make sure these organisations have child safe practices
- brings the views and experiences of children and young people to the attention of government and the community
- promotes the rights, safety and wellbeing of children and young people.<sup>31</sup>

22.43 This is similar to the model proposed by Carolyn Worth and Mary Lancaster in their submission. Their model would also provide oversight of service delivery and play a stronger role as an advocate for best practice (see Figure 19). They suggested that such a Commission could also lead a statewide Committee (see Chapter 4).<sup>32</sup>

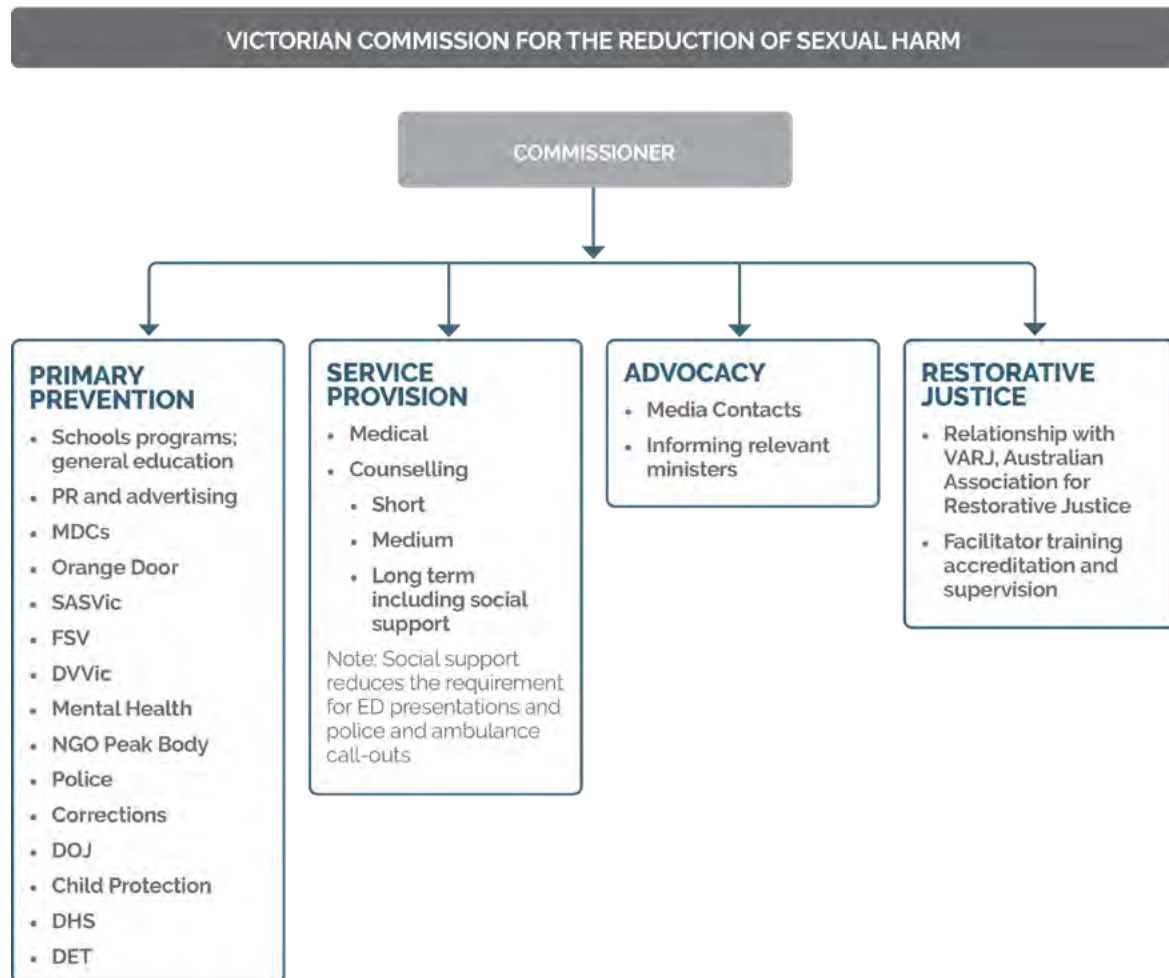
30 'Our Role', *National Mental Health Commission* (Web Page, 2021) <<https://www.mentalhealthcommission.gov.au/about/our-role>>.

31 'Who We Are', *CCYP* (Web Page) <<https://ccyp.vic.gov.au/about-the-commission/who-we-are/>>. See also *Commission for Children and Young People Act 2012* (Vic); *Child Wellbeing and Safety Act 2005* (Vic).

32 Submission 10 (Carolyn Worth AM and Mary Lancaster).



Figure 19: Proposed model for Commission for the Reduction of Sexual Harm<sup>33</sup>



## Advantages of Option 2

- 22.44 The advantages of this model are that it would:
- ensure and entrench a 'systems-wide' view of sexual violence within government
  - highlight the priority placed by the government on tackling sexual violence
  - provide strong and visible leadership and be a focal point in the reform agenda
  - provide a more visible 'front door' for information and guidance about the complex systems for responding to sexual violence, including the justice options recommended in this report
  - raise community awareness and be a part of the public debate
  - provide options beyond the justice system
  - bring specialised focus and expertise
  - act as an advocate within the system for people who have experienced sexual violence.
- 22.45 Such a Commission could have a major role in the primary prevention of sexual offending and breaking down the barriers to reporting. It could also focus on responses after, or beyond, the criminal justice system. For example, the Commission could perform the functions in Table 23, in partnership with any existing agencies.

**Table 23: Possible new functions of a proposed Commission**

Function	Relationship to organisation
Coordinate feedback between partners in the system, such as chair and support the statewide committee (see Chapter 4)	Working with the members of the governance structure, including the Victims of Crime Commissioner (see Chapter 4)
Oversee initiatives to prevent sexual violence through public and community education	Working with Respect Victoria, the primary prevention agency for family violence; and with organisations such as Our Watch and Respectful Relationships Education providers (see Chapter 3)
Oversee the operation of the central website and phoneline	Working with the central website (Chapter 7) and related organisations such as Sexual Assault Services Victoria, community organisations responding to sexual violence and the Victims of Crime Commissioner
Oversee restorative justice for sexual offences, including: establishing training standards and accreditation criteria; ensuring outcome agreements are monitored; establishing and managing a complaints process; evaluating programs and collecting data	Working with the Department of Justice and Community Safety, which would have responsibility for the restorative justice scheme for all offences, including sexual violence
Decide applications for financial assistance and conduct victim conferences in sexual violence cases under the new financial assistance scheme (see Chapter 10)	Working with the Victims of Crime Commissioner (or whatever agency the government has decided will have ultimate responsibility for the new financial assistance scheme)

Function	Relationship to organisation
Oversee civil litigation funding (including making funding decisions or providing guidance or criteria for making funding decisions); oversee enforcement proceedings (including providing guidance or criteria for bringing proceedings)	Working with legal assistance services/a legal assistance provider that could have day-to-day administration of the civil litigation funding scheme; working with the Victorian Government or an agency or authority authorised by it to bring enforcement proceedings
Oversee the independent victim advocates scheme (eg by developing guidelines)	Working with Sexual Assault Services Victoria, which will have responsibility for clinical supervision, capacity building and training (see Chapter 12)
Monitor the effectiveness of victim legal representation for victim survivors of sexual assault	
Support data collection, research and evaluation of the experiences of and responses to sexual violence	Collaborating with others to set research agendas and public evaluations; publishing reports together with data analysed by the Crime Statistics Agency; working with the proposed Working Group on data collection, research and evaluation of the response of the criminal justice system and with the Victims of Crime Commissioner on other data in relation to the criminal justice system (see Chapter 6)
Monitor the number of cases reported to police and not proceeding and, to the extent the data allows, the demographics of those cases	Using the analysis of data by the Crime Statistics Agency (see Chapter 6)
Monitor data on the outcomes and operation of the independent panel reviewing police and prosecution decisions	N/A
Establish the expert evidence panel	Working with the Department of Justice and Community Safety

22.46 We see potential for such a Commission to oversee the future Sexual Assault Strategy.

## Disadvantages of Option 2

- 22.47 There are disadvantages to establishing a new body. A key disadvantage is that it will be necessary to make sure a new body does not add confusion to an already complex landscape or divert resources from under-resourced programs providing access to justice and support.
- 22.48 Many organisations already work to prevent or respond to sexual violence. Existing bodies may be better placed to conduct some of the possible functions of a new body because, for example, of their expertise or experience. The relationship of the Commission to other organisations will need to be carefully defined. Laws would also need to be changed so that existing organisations could share their information with the new body.
- 22.49 It may be challenging to deliver the diverse functions of the proposed Commission—for example, it may be desirable to separate advocacy functions from functions that may require impartiality, such as regulatory functions.<sup>34</sup>
- 22.50 Independent bodies are usually established outside government to hold government accountable or to ensure an independent voice. While independent bodies have influence, the degree of that influence depends upon how well they are funded and supported by the government of the day.
- 22.51 There is also a risk of creating further silos between sexual violence and other intersecting forms of violence, including family violence, child sexual abuse and sexual harassment.
- 22.52 The new Commission could help to direct research and identify research needs. But this function would need to be aligned with similar work being done elsewhere, including through the Victorian whole-of-government research agenda on family violence and the national agenda on reducing violence against women and their children (see Chapter 6).
- 22.53 Such a role would also need to align with the work of research centres, including two national bodies (ANROWS and the National Centre for the Prevention of Child Abuse) whose responsibilities cover sexual violence. Some of the research needs that are discussed in Chapter 6 might be better addressed by strengthening those bodies.
- 22.54 The new Commission would need significant resourcing. There would need to be a consultation process to design the Commission, which would take time.

## Option 3: Adopt a hybrid model

- 22.55 Option 3 would aim to blend the benefits of the first two options by establishing a dedicated office for sexual safety within an existing body or related to an existing office. Some Commissions have specialist Commissioners, such as the Commissioner for Aboriginal Children and Young People which sits within the Commission for Children and Young People. The Australian Human Rights Commission has individual Commissioners representing different aspects of its work, as well as a President.<sup>35</sup>
- 22.56 In Chapter 4, we have recommended strengthening the powers of the Victims of Crime Commissioner and extending the rights of victim survivors under the Victims' Charter Act.<sup>36</sup> These expanded powers would require resourcing and specialist expertise.
- 22.57 In Option 3, these expanded powers could be exercised by a specialist Commissioner responsible for sexual safety whose office is established by legislation and is supported by the Victims of Crime Commissioner's office. The law could also require such a specialist Commissioner to have expertise in sexual safety.

<sup>34</sup> For example, it may be preferred to establish an expert evidence panel or an independent review of prosecutorial decisions separately from the Commission, if there is a perception that the Commission is an advocate for victim survivors.

<sup>35</sup> *Australian Human Rights Commission Act 1986* (Cth) s 8.

<sup>36</sup> In Chapter 6, we note that there may be value in the Victims of Crime Commissioner working with the Crime Statistics Agency to publish regular data on the response of the criminal justice system to sexual violence.

- 22.58 For example, the specialist Commissioner could conduct the more intensive monitoring that we recommend in Chapter 4. They could exercise legal powers, similar to those of the Victims of Crime Commissioner, to access records and provide reports, and publish annual reports on compliance with the protocol we propose in Chapter 4.
- 22.59 As discussed in Chapter 10, the Victorian Government is establishing a new financial assistance scheme. We recommend that a specialised stream in this scheme be introduced for people who have experienced sexual violence.
- 22.60 A specialist Commissioner whose office is supported by the Victims of Crime Commissioner could be the decision maker for this stream, with appropriately qualified staff. This would give the management of financial assistance for sexual violence, including victim conferences, the high profile it deserves, with appropriately specialised and senior officers similar to those appointed as Royal Commissioners.
- 22.61 The specialist Commissioner could perform some functions envisaged for a Commission, such as taking part in public debate and leading collaboration between organisations. They could coordinate feedback from victim survivors to the partners in the sexual assault system.
- 22.62 In this model, a strengthened Sexual Assault Services Victoria could act as a truly independent advocate for the interests of victim survivors. This would ensure that this advocacy would have a strong connection with the experiences of victim survivors. It could also play a central role in managing the victim advocates scheme. Other initiatives could be taken over by existing organisations that are best suited to perform them (see Table 24).

**Table 24: Other functions not covered by a proposed Commissioner**

Function	Body with responsibility
Oversight of independent advocates	Sexual Assault Services Victoria
Support data collection, research and evaluation efforts in relation to sexual violence	Family Safety Victoria/Department of Families, Fairness & Housing, or combination of Crime Statistics Agency and existing research centres such as ANROWS
Responsibility for restorative justice, including for sexual offences	Department of Justice and Community Safety
Central website and phonenumber	Department of Justice and Community Safety in collaboration with sexual assault and community services
Specialised training in sexual violence for criminal justice actors	Family Safety Victoria or organisations delivering MARAM training; Judicial College of Victoria; Victoria Police's Centre for Excellence for Family Violence; legal professional bodies
Expert evidence panel	Independent panel under the Department of Justice and Community Safety
Review of police and prosecution decisions	Independent panel under the Department of Justice and Community Safety

### Advantages of Option 3

- 22.63 Option 3 would offer some benefits of a stand-alone Commission, including increased visibility and a 'system-wide' view of sexual violence.
- 22.64 It would also reduce the practical challenges of setting up a stand-alone Commission, and the risk of undermining and fragmenting existing organisations.

### Disadvantages of Option 3

- 22.65 This option is a midway point which might reduce some of the visibility and symbolic significance of a stand-alone Commission. With Option 3, the relationship between the head of the Commission and the specialist office would need to be defined, to make clear which office is responsible for what area of work.
- 22.66 There is also a risk that these offices can be effectively left vacant,<sup>37</sup> although the strength of this model depends less on the formal structure than on how well the offices are supported and resourced.

### What we heard about the three options

- 22.67 Although our issues paper asked a question on governance and shared outcomes (see Chapter 4), it did not directly raise the issue of implementation, or the models outlined above. Only one submission, by Carolyn Worth and Mary Lancaster, directly addressed this issue.
- 22.68 It is difficult to discuss implementation before knowing what our recommendations will be, or which will be accepted. Even so, we explored the options set out here in consultations with relevant organisations held towards the end of our inquiry.
- 22.69 There were significant limits to these consultations. Most obviously, they did not give many others an opportunity to be heard.
- 22.70 The organisations we consulted were not provided with fully fleshed-out options. The implementation options outlined here were one of many topics discussed. The people we spoke to were asked to indicate their initial views only.
- 22.71 This testing revealed no consensus on a preferred option, including on the value of a new independent body or office.
- 22.72 Several organisations did not see the value of an independent Commission. They expressed concern about the duplication and overlap with existing and proposed bodies, and the risk of further fragmentation. They saw challenges in combining a wide range of diverse functions and observed that it would take time and resourcing to establish such a body.
- 22.73 The Victims of Crime Commissioner preferred the option of strengthening the existing sexual assault sector, including the peak body (SAS Victoria), the Sexual Assault Crisis Line and centres against sexual assault (CASAs). She noted that a strong, independent non-government advocacy body is vital for promoting community awareness, enhancing public policy development and holding governments to account.
- 22.74 She also told us there is value in driving reforms from within government, and that:  
 there needs to be a whole-of-government response given sexual harm crosses the justice, human services, education and gender equality sectors, requiring cooperation and coordination between multiple government departments, statutory entities and community service organisations.<sup>38</sup>

37 See, eg, the experience of the Office of the Australian Information Commissioner, which includes provision for a privacy commissioner that is now fulfilled by the same office holder: Stephen Easton, 'Last Man Standing: Information and Privacy Commissioner Timothy Pilgrim to Retire', *The Mandarin* (online, 20 February 2018) <<https://www.themandarin.com.au/88709-last-man-standing-information-and-privacy-commissioner-timothy-pilgrim-to-retire/>>.

38 Consultation 88 (Victims of Crime Commissioner).

- 22.75 SAS Victoria expressed the view that, if there was robust governance 'with clear collaborative principles and shared leadership' (see Chapter 4), it did not see what further value would be added by an independent Commission. While agreeing that there needed to be stronger oversight and accountability, their preference was for a governance structure that was 'more closely linked to the lived experience of victim survivors and expert practice'.<sup>39</sup>
- 22.76 Victoria Police expressed its concern that there appeared to be 'limited rationale' for creating a new government agency. It expressed its view that:
- directing resources away from reform efforts that would meaningfully improve the capabilities of existing agencies, including police (which provide the interface between the victim and the criminal justice system) may be viewed unfavorably by victim-survivors, or seen as tokenistic.<sup>40</sup>
- 22.77 On the other hand, the Magistrates' Court of Victoria and some judges of the County Court of Victoria welcomed the model of a new body or office. They saw value in recognising that sexual violence is widespread and providing options beyond the justice system. They saw such a Commission as providing leadership and a point of focus on sexual violence, which would promote public education, inform public debate, and advocate for people who have experienced sexual violence.<sup>41</sup>

### **We recommend establishing a new Commission for Sexual Safety**

- 22.78 The question which the recommendation addresses raises a choice of the best structure to implement the reforms. The choice is complex and finely balanced. This was reflected in discussions and debate within the Commission, and also in the views expressed in consultations which we undertook.
- 22.79 On balance, we prefer the option of a stand-alone independent body, such as a new Commission for Sexual Safety. The preferred structure addresses the need:
- for a more systemic approach to overseeing and coordinating the complex landscape of responding to sexual violence
  - to make sure that the intent of sexual violence reforms are realised by taking a systems-wide view.
- 22.80 While we recognise the need to strengthen existing parts of the system and we make recommendations to address this in other chapters (see Chapter 4), we do not consider that building upon existing bodies can achieve this (Option 1).
- 22.81 We see the Commission as a way of connecting different systems. It would act as a 'systems-level governor', ideally placed to chair the statewide governance mechanism recommended in Chapter 4.
- 22.82 A new Commission would recognise the longstanding and unique complexities of sexual violence and the enormous damage it does to our community. It would be a powerful signal of the issue's importance, and the government's commitment to tackling it. It would bring visible and continuing leadership on sexual violence.
- 22.83 We have considered whether an administrative office within a government department could undertake some of these functions, along the lines of Family Safety Victoria. However, the departmental relationship may make it more difficult to coordinate the whole-of-government response that sexual violence requires. We also consider that the Commission should have an advocacy role, which would not be appropriate for an agency within government.
- 22.84 This is especially important because so many people who experience sexual violence have had poor experiences with government agencies, such as Child Protection or the police. Independence is, in our view, critical to ensuring that people trust the new Commission to act in their interests and champion their voices.

39 Consultation 89 (Sexual Assault Services Victoria (No 2)).

40 Consultation 93 (Victoria Police (No 4)).

41 Consultation 86 (Magistrates' Court of Victoria (No 2)); Consultation 87 (County Court of Victoria (No 2)).



## What would be the new Commission's relationship to existing organisations?

- 22.85 In recommending the establishment of a new Commission for Sexual Safety, we acknowledge the need to avoid duplicating the functions of existing bodies. To do this, it is necessary to define the relationships between the Commission for Sexual Safety and existing organisations. While this will require more work and consultation once it is known which reforms are to be implemented, it is possible now to flag some lines of demarcation between functions.
- 22.86 We recognise the vital role of the Victims of Crime Commissioner in relation to monitoring victim services and the response of the criminal justice system to victims (see Chapter 4). We do not expect these functions would be duplicated by the Commission and, indeed, recommend strengthening the powers of the Victims of Crime Commissioner (see Chapter 4).
- 22.87 The work of the Victims of Crime Commissioner would complement the broader work of the new Commission, which extends beyond the criminal justice system and spans prevention and education. The new Commission would use the work of the Victims of Crime Commissioner (for example, its proposed monitoring of the multi-agency protocol and its data on complaints) as part of its broader oversight and coordination role. It would not conduct the same intensive monitoring of victim service agencies or the criminal justice organisations as the Victims of Crime Commissioner.
- 22.88 In Chapter 7, we recommend a central website and phoneline. The Commission would oversee the central gateway to information and support, drawing on leading knowledge on the effective design of help-seeking websites. It would work with Sexual Assault Services Victoria and other community organisations who respond to sexual violence (Chapter 8) to ensure that the website and phoneline provide everyone in the community with the necessary information and access to support. The Commission would ensure the website and phoneline were integrated with existing support service platforms and remain current.
- 22.89 We take a similar view of the role of the Crime Statistics Agency and the proposed working group in Chapter 6 to address data collection, research and evaluation in the criminal justice system. We expect that the Commission here will not duplicate that role, but instead use this work to inform its oversight of the broader picture. For example, we expect that these organisations would supply data and their analyses to the Commission, and that the Commission would identify priorities and needs for data, but that it would not itself be analysing the data or conducting the research. It should also take part in the working group, to ensure that this work is aligned with other parts of the system.
- 22.90 In Chapter 12, we recommend a model of independent victim advocates, which would build on the existing work of counsellor advocates within CASAs and would also extend beyond CASAs. It would include, for example, Victim Assistance Program providers who are managed by the Department of Justice and Community Safety. We expect that the funding would still be administered through this model.
- 22.91 We expect that the role of the Commission here would be to provide high-level oversight to ensure the consistency and quality of the model by, for example, ensuring data is collected about the model and setting out guidelines for advocates. However, the employment, training and clinical supervision of victim advocates should be managed by existing services, with Sexual Assault Services Victoria potentially playing a role in supporting capacity building and training for this model.
- 22.92 We have also identified possible new functions that could be carried out by the Department of Justice and Community Safety. These include responsibility for a new restorative justice scheme for all offences, including sexual offences. The new Commission would play an important role exercising oversight of restorative justice for sexual violence, which, as we discuss in Chapter 9, needs to be managed carefully. The Commission would set accreditation and training standards for restorative justice providers for sexual violence. It would also monitor how well restorative justice for sexual violence was working.

- 22.93 We also suggest that the Commission should have a guiding role in the scheme for supporting civil litigation recommended in Chapter 11. This should include setting priorities and funding criteria. There are already various funding schemes administered by the Department of Justice and Community Safety and Victoria Legal Aid, so these organisations could support the Commission in this work, applying the funding criteria and supporting legal assistance services in their case management.
- 22.94 We recognise that there may be a tension if the Commission was both a strong advocate and responsible for reforms that require a body that is both impartial and seen to be impartial. For this reason, we have excluded it from the role of overseeing the independent panel that we propose should review police and prosecution decisions (see Chapter 17).
- 22.95 We see less of a conflict with the function of establishing an expert evidence panel, as we expect that the expert evidence will focus on non-contentious expert advice (see Chapter 20). If the expert advice is contentious, it can be contested by other experts. While we have suggested that this function could be carried out by the Commission, we recognise that there may still be concerns about partiality. If this appears to be a serious concern upon further consultation, this could be addressed by the panel being established instead by the Department of Justice and Community Safety, with input from the new Commission.

### How to address potential delay in implementation

- 22.96 We recognise that establishing a new Commission will take time. In setting up a Commission there will need to be further consultation about its nature and the scope of its functions. While we have proposed some functions here, they would depend on the extent to which government accepts our recommendations. Other functions may need to be included as part of the Sexual Assault Strategy. There will also need to be consultation about the relationship of the new Commission with existing organisations.
- 22.97 We also recognise the concern that the time taken to do this work could impede the early implementation of valuable reforms. However, some of these reforms, such as restorative justice, will themselves need some time to establish properly, so further consultation and design for them could be sequenced alongside the consultations needed to establish the Commission.
- 22.98 The government could also consider implementing reforms through existing bodies (as identified in Option 1) at first, and then transferring those functions to the Commission when it is established, so that setting up the Commission does not delay reform. For example, an expert evidence panel could be established first by the Department of Justice and Community Safety, with further appointments to be made by the Commission when established.

### What are the costs and benefits of establishing a new Commission?

- 22.99 It is important that the investment in the Commission should be in addition to the further investment into existing services which we recommend in Chapter 4. It is also important that any new Commission be properly funded to discharge its functions. In the end, if the Commission succeeds, we believe its cost will be greatly outweighed by the savings to government through preventing and reducing sexual violence, and through the outcomes of better supporting people who experience sexual violence.

## Recommendation

- 90 The Victorian Government should establish an independent body, such as a Commission for Sexual Safety, following consultation on its nature and functions. This body should be responsible for preventing and reducing sexual violence, and supporting people who experience sexual violence.

## How should the reforms be monitored?

- 22.100 Reforms to the family violence system, among others, have shown the value of an independent monitor to hold people to account. An independent Family Violence Reform Implementation Monitor was established by law.<sup>42</sup>
- 22.101 The Monitor's functions include:
- monitoring and reviewing the progress of an agency against a published implementation plan and the implementation of the recommendations of the Royal Commission on Family Violence
  - consulting and engaging with agencies in performing its functions
  - producing written reports on its findings and conclusions.<sup>43</sup>
- 22.102 Victoria has adopted similar models following recommendations in other inquiries, including most recently the Royal Commission on the Management of Police Informants.<sup>44</sup>
- 22.103 The Family Violence Reform Implementation Monitor has recently published its fourth annual implementation report. The term of the Monitor will continue until the end of 2022.<sup>45</sup>
- 22.104 The Monitor told us that its independence from Family Safety Victoria and its 'whole of system view' had been valuable.<sup>46</sup> We consider that this has been a valuable model which should be considered in the development of a Sexual Assault Strategy.
- 22.105 In Chapter 4, we make recommendations that would bring some monitoring functions within the role of the Victims of Crime Commissioner. Other recommendations in this report could also be brought within that role, such as our recommendations for a restorative justice scheme and in relation to financial assistance (see Chapters 9 and 10).
- 22.106 Some reforms may need different mechanisms to ensure accountability. For example, oversight of advocates would be better placed with those who have expertise in human services. This is especially likely if broader reforms are proposed, such as primary prevention and perpetrator accountability.
- 22.107 We see value in a role that keeps the Victorian Government, organisations and people accountable across all the reforms from this inquiry and related reforms. This monitoring would have to be independent of all those in the system, including the new Commission. It is not, however, within the scope of this inquiry to propose how to do this, especially before we know what future reforms might look like.
- 22.108 One option would be to extend the role and term of the Family Violence Reform Implementation Monitor. This would have the benefit of bringing the expertise developed in that role to sexual assault reforms and help to align sexual violence reform with family violence reforms.
- 22.109 We recommend that the Victorian Government should report annually on the progress of implementing the reforms arising from this report and other sexual violence reforms. Given the value of a formal monitoring function, we also recommend the Victorian Government should consider establishing this function for sexual violence reforms. This would need to be informed by other reforms the government plans to make.

42 *Family Violence Reform Implementation Monitor Act 2016* (Vic).

43 *Ibid* ss 5, 14.

44 Police Informants Royal Commission Implementation Monitor Bill 2021 (Vic); Jaclyn Symes (Attorney-General (Vic)), 'Royal Commission Implementation Monitor Appointed' (Media Release, 1 March 2021) <<https://www.premier.vic.gov.au/sites/default/files/2021-03/210301%20-%20Royal%20Commission%20Implementation%20Monitor%20Appointed.pdf>>. See also Daniel Andrews (Premier of Victoria), 'Fire Services Implementation Monitor Appointed' (Media Release, 16 December 2020) <<http://www.premier.vic.gov.au/fire-services-implementation-monitor-appointed>>; Inspector-General for Emergency Management (Vic), 'Implementation Monitoring', *IGEM* (Web Page, 5 July 2021) <<https://www.igem.vic.gov.au/our-work/assurance-framework-for-emergency-management/implementation-monitoring>>.

45 Family Violence Reform Implementation Monitor, *Report of the Family Violence Reform Implementation Monitor* (Fourth Report to Parliament, 1 November 2020) 152 <<http://www.fvrim.vic.gov.au/fourth-report-parliament-1-november-2020-tabled-may-2021>>.

46 Consultation 8 (Family Violence Reform Implementation Monitor).

## Recommendation

- 91 The implementation of the reforms arising from this report and other sexual violence reforms should be monitored to hold the Victorian Government, people and bodies accountable for their effective implementation. The Victorian Government should:
- a. report annually on the progress of implementing these reforms
  - b. consider establishing a monitoring function for sexual violence reforms, in light of the scope of future reforms.



# Appendices

506 Appendix A: Submissions

509 Appendix B: Consultations

512 Appendix C: Acknowledgments

514 Appendix D: Availability of data about sexual offences in the criminal justice system

519 Appendix E: Restorative justice for sexual offences in Australia and New Zealand where the person responsible is an adult

## Appendix A: Submissions

- 1 Dr Catherine Barrett, Celebrate Ageing
- 2 Dr Kerstin Braun, School of Law and Justice, University of Southern Queensland
- 3 Health Law and Ageing Research Unit, Monash University
- 4 Associate Professor Dr Kelly Richards, School of Justice, Queensland University of Technology;  
Dr Jodi Death, School of Justice, Queensland University of Technology;  
Ms Carol Ronken, Director of Research, Bravehearts;  
Mr Leigh Garrett, CEO, Offenders' Aid and Rehabilitation Service of South Australia;  
Uncle Alfred Smallwood (UAMG) Moonda Baranga Bama (Snake Skin Man);  
Mr Graham Hembrow, State Manager, Prison Fellowship Australia—Queensland;  
Mr Steven Fincham, State Coordinator, UnitingCare Prison Ministry
- 5 The Murdoch Children's Research Institute and Melbourne School of Population and Global Health, University of Melbourne
- 6 Confidential
- 7 Dr Bianca Fileborn, Senior Lecturer in Criminology & ARC DECRA Fellow, School of Social & Political Sciences, University of Melbourne;  
Dr Rachel Loney-Howes, Lecturer in Criminology, School of Health and Society, University of Wollongong;  
Dr Tully O'Neill, Research Assistant, School of Social and Political Sciences, University of Melbourne;  
Sophie Hinde, PhD Candidate, School of Social and Political Sciences, University of Melbourne.
- 8 Stuart Grimley, MP for Western Victoria, State Leader of Derryn Hinch's Justice Party
- 9 Djirra
- 10 Carolyn Worth AM and Mary Lancaster
- 11 Associate Professor John AM Gall, Consultant Forensic Physician, President, International Association of Clinical Forensic Medicine
- 12 Women's Legal Service Victoria
- 13 Australian Association of Social Workers
- 14 Gatehouse Centre, Royal Children's Hospital
- 15 Danielle
- 16 Owen Ormerod
- 17 Sexual Assault Services Victoria (submission endorsed by Safe Steps)
- 18 In Good Faith Foundation
- 19 Anonymous



- 20 Anonymous member of the Aboriginal community
- 21 Victorian Aboriginal Child Care Agency (VACCA)
- 22 knowmore legal service
- 23 Dr Mary Iliadis, Senior Lecturer in Criminology, Deakin University
- 24 Jesuit Social Services
- 25 Dr Steven Tudor, Senior Lecturer, School of Law, La Trobe University
- 26 Northern CASA
- 27 Victoria Legal Aid
- 28 Dr Natalia Antolak-Saper, Lecturer, Faculty of Law, Monash University
- 29 Victorian Pride Lobby
- 30 Red Files Inc.
- 31 Professor Jeremy Gans, Melbourne Law School
- 32 A victim survivor of sexual assault (name withheld)
- 33 Sex Work Law Reform Victoria Inc
- 34 Rape and Sexual Assault Research and Advocacy (RASARA)
- 35 Confidential
- 36 Victorian Forensic Paediatric Medical Service
- 37 Madison
- 38 Bravehearts
- 39 Rape & Domestic Violence Services Australia
- 40 Law Institute of Victoria
- 41 Office of the Public Advocate
- 42 Greg Byrne PSM
- 43 Ffiona Livingstone Clark, PhD Candidate, La Trobe Law School, La Trobe University
- 44 Dr Patrick Tidmarsh and Dr Gemma Hamilton
- 45 Victims of Crime Commissioner
- 46 Name withheld
- 47 Criminal Bar Association
- 48 Victorian Disability Worker Commission
- 49 InTouch Multicultural Centre Against Family Violence
- 50 Project Respect
- 51 PartnerSPEAK
- 52 Centre for Innovative Justice, RMIT University
- 53 Liberty Victoria
- 54 Victorian Multicultural Commission
- 55 Springvale Monash Legal Service
- 56 Domestic Violence Victoria
- 57 Commission for Children and Young People (Vic)
- 58 Law and Advocacy Centre for Women Ltd
- 59 County Court of Victoria
- 60 Associate Professor Georgina Heydon, RMIT University;  
Associate Professor Nicola Henry, RMIT University;  
Dr. Rachel Loney-Howes, University of Wollongong;  
Dr Tully O'Neill, RMIT University

- 61 Victorian Institute of Forensic Medicine
- 62 Shine Lawyers (on behalf of Ms Kim Elzaibak)
- 63 Office of Public Prosecutions
- 64 Victorian Advocacy League for Individuals with Disability (VALID)
- 65 Aboriginal Justice Caucus
- 66 Supreme Court of Victoria
- 67 Victorian Aboriginal Legal Service (VALS)
- 68 Victoria Police
- 69 Victim survivor of sexual assault (name withheld)
- 70 Victorian Institute of Teaching
- 71 Victorian Institute of Forensic Medicine and Victorian Forensic Paediatric Medical Service

## Appendix B: Consultations

The Commission conducted consultations with the individuals and organisations listed below.

- 1 ACT Restorative Justice Unit and restorative justice academics
- 2 Centre for Innovative Justice, RMIT University
- 3 Family Violence Restorative Justice Service, Department of Justice and Community Safety
- 4 Judicial College of Victoria
- 5 Associate Professors Anastasia Powell, RMIT University, and Asher Flynn, Monash University
- 6 Dr Emma Henderson, La Trobe University and Dr Kirsty Duncanson, La Trobe University
- 7 Associate Professor Nicola Henry, RMIT University
- 8 Family Violence Reform Implementation Monitor
- 9 Office of the eSafety Commissioner
- 10 Professor Jane Goodman-Delahunty, University of Newcastle
- 11 A group of family violence and sexual assault practitioners focusing on disability inclusion
- 12 Project Restore
- 13 Intermediary Pilot Program, Department of Justice and Community Safety
- 14 Sexual Assault Services Victoria (formerly CASA Forum)
- 15 Child Witness Service
- 16 Senior sexual assault worker, South Eastern Centre against Sexual Assault (SECASA)
- 17 Roundtable consultation focused on the experience of women with disability
- 18 Rodney Vlasis, Consultant
- 19 Dr Frank Lambrick, University of Melbourne
- 20 Members of Barwon South West Regional Aboriginal Justice Advisory Committee and Barwon South West Dhek Dja Action Group
- 21 Office of Public Prosecutions - Solicitors
- 22 First roundtable on the experience of LGBTIQ+ people (Thorne Harbour Health, Switchboard, Rainbow Health Vic)
- 23 Sexual Assault Services Victoria Specialist Children's Services
- 24 County Court of Victoria
- 25 CASA senior counsellor/advocates
- 26 Greg Byrne PSM, Legal Policy Consultant, Greg Byrne Law
- 27 Juries Commissioner

- 28 Office of Public Prosecutions - Victims and Witness Assistance Service
- 29 Safe Pathways to Healing Working Group (North Metropolitan Aboriginal Sexual Assault Prevention and Healing Advisory Group)
- 30 Djirra
- 31 Geraldine, Deputy Chairperson of the Victim Survivors' Advisory Council
- 32 Anonymous member, Victim Survivors' Advisory Council (VSAC)
- 33 Rebecca, a member of the Victim Survivors' Advisory Council
- 34 Project Respect Women's Advisory Group
- 35 A victim survivor of sexual assault
- 36 Criminal Bar Association
- 37 New Zealand District Court judges with experience on the sexual violence court pilot
- 38 Australian Association for Restorative Justice
- 39 VACRO (Victorian Association for the Care and Resettlement of Offenders) and JSS (Jesuit Social Services)
- 40 Roundtable consultation with Transgender Victoria, Bisexual Alliance and Drummond Street Services
- 41 Individual views of Honourable Justice Chris Maxwell AC and Judicial Registrar Tim Freeman
- 42 Victorian Institute of Forensic Medicine
- 43 Confidential
- 44 Red Cross Support for Trafficked Persons Program
- 45 Sex Work Law Reform Victoria
- 46 Safer Families Research Centre and Monash Social Inclusion Centre
- 47 Refugee Health Network and Refugee Health Program
- 48 Star Health and Project Respect
- 49 Victoria Legal Aid
- 50 End Rape on Campus
- 51 Associate Professor Debbie Ollis and Professor Amanda Keddie, Deakin University
- 52 Victorian Aboriginal Legal Service (VALS)
- 53 Elizabeth Morgan House and a victim survivor of sexual assault
- 54 Lucille Kent, a victim survivor of sexual assault
- 55 Victorian Equal Opportunity and Human Rights Commission (VEOHRC)
- 56 Cecilia, a victim survivor of sexual assault
- 57 Department of Health and Human Services (DHHS)
- 58 Victims of Crime Consultative Committee (VOCCC) representatives
- 59 Ashleigh Rae, Nicole Lee, Penny
- 60 Flat Out
- 61 Children's Court of Victoria
- 62 Mark, a person who has experienced sexual harm
- 63 A victim survivor of sexual assault, name withheld
- 64 Marie (a pseudonym), the mother of a child who was a victim of image-based abuse
- 65 Commission for Children and Young People (CCYP)
- 66 Consultation focused on people who have a lived experience of states of mental and

- emotional distress commonly labelled as 'mental health challenges', and are victims/survivors of sexual assault
- 67 Loddon Mallee Regional Aboriginal Justice Advisory Committee
- 68 Youthlaw
- 69 Deborah, a victim survivor of sexual assault
- 70 Victoria Police (No 1)
- 71 Magistrates' Court of Victoria (No 1)
- 72 Asylum Seeker Resource Centre (ASRC)
- 73 Family Safety Victoria (No 1)
- 74 Magistrate David Fanning, Neighbourhood Justice Centre (NJC)
- 75 Family Safety Victoria (No 2)
- 76 YACVic and YACVic Young People
- 77 Witness J
- 78 Roundtable on reporting (Victoria Police, Sexual Assault Services Victoria and some centres against sexual assault; Office of Public Prosecutions; Victoria Legal Aid; Criminal Bar Association)
- 79 Commissioner for Aboriginal Children and Young People and Manager, Koori Advisory and Engagement
- 80 Victoria Police (No 2)
- 81 Danielle, a victim survivor
- 82 Katherine Dowson, South Eastern Centre Against Sexual Assault
- 83 VEOHRC (No 2)
- 84 Aboriginal Justice Caucus
- 85 Roundtable on the experience of children and young people (centres against sexual assault; Victorian Aboriginal Child Care Agency; Commission for Children and Young People; Family Safety Victoria; Child Witness Service; Youth Support and Advocacy Service; Department of Families, Fairness and Housing; Youthlaw; Victim Services, Support and Reform, Department of Justice and Community Safety; Professor Martine Powell, Griffith University; Fiona Livingstone Clark, Barrister and PhD candidate)
- 86 Magistrates' Court of Victoria (No 2)
- 87 County Court of Victoria (No 2)
- 88 Victims of Crime Commissioner
- 89 Sexual Assault Services Victoria (No 2)
- 90 Criminal Bar Association (No 2)
- 91 Victoria Police (No 3)
- 92 Dr Patrick Tidmarsh
- 93 Victoria Police (No 4)
- 94 Office of Public Prosecutions (No 2)
- 95 Victoria Legal Aid (No 2)
- 96 Children's Court of Victoria (No 2)
- 97 Family Safety Victoria (No 3)
- 98 Care Leavers Australasia Network (CLAN)
- 99 Alison, the mother of a rape survivor

# Appendix C: Acknowledgments

## People

Cecilia Barassi-Rubio, Director, Immigrant Women's Support Service

Greg Byrne PSM, Greg Byrne Law

Elena Campbell, Associate Director of Research, Advocacy & Policy, Centre for Innovative Justice, RMIT University

Professor Kathleen Daly, Griffith University

Professor Andrew Day, The University of Melbourne

Dr Bianca Fileborn, The University of Melbourne

Professor Nicola Henry, RMIT University

Mary Ivec, Convenor, ACT Restorative Community Network

Professor Luke McNamara, University of New South Wales

Dr Antonia Quadara, Manager, Sexual Violence Research, Australian Institute of Family Studies

Associate Professor Julia Quilter, University of Wollongong

Dr Claire Spivakovsky, The University of Melbourne

Dr Patrick Tidmarsh

Dr Steven Tudor, La Trobe University

Carolyn Worth AM

## Organisations

Aboriginal Justice Caucus

ACT Restorative Justice Unit

Australian Women Against Violence Alliance

County Court of Victoria

Crime Statistics Agency

Department of Health and Human Services

Department of Justice and Community Safety

Family Safety Victoria

Gatehouse Centre, The Royal Children's Hospital  
knowmore legal service  
Multicultural Centre for Women's Health  
Office of the Public Advocate  
Office of Public Prosecutions  
Project Restore (New Zealand)  
Sentencing Advisory Council  
Sexual Assault Services Victoria and centres against sexual assault  
Victim Support Agency  
Victoria Legal Aid  
Victoria Police  
Victims of Crime Commissioner  
Victims of Crime Consultative Committee  
Victims Survivors' Advisory Council  
Women with Disabilities Victoria



# Appendix D: Availability of data about sexual offences in the criminal justice system

Note: This table compiles the information extracted for the purposes of this report and may not be comprehensive. In particular, we did not request information from the lower courts (as data was publicly available for our purposes) or the Supreme Court of Victoria (although some information was supplied in its submission and via email).

Stage	Category	Information	Avail-able?	Published?	Notes	Source	Organisation
Police	Numbers	Number and rate of recorded offences	Yes	Yes, quarterly		Recorded Offences	Crime Statistics Agency Victoria
		Number and rate of recorded criminal incidents	Yes	Yes, quarterly		Criminal Incidents	Crime Statistics Agency Victoria
		Number and rate of incidents involving the same alleged offenders	Yes	Yes, quarterly		Alleged offender incidents	Crime Statistics Agency Victoria
		Number of victim reports (the number of people recorded as victims of one or more criminal offences)	Yes	Yes, quarterly		Victim reports	Crime Statistics Agency Victoria
	Who	Age and sex of victims by principal offence	Yes	Yes, quarterly	Male and female only	Victim reports	Crime Statistics Agency Victoria
		Relationship of victim to offender	Yes	Yes, quarterly	Further detail available (eg acquaintance)	Victim reports	Crime Statistics Agency Victoria
		Age and sex of offenders by principal offence	Yes	Yes, quarterly		Alleged offender incidents	Crime Statistics Agency Victoria
	Contexts	Number of sexual offences flagged as family violence incidents	Yes	Yes, quarterly		Victim reports	Crime Statistics Agency Victoria
		Number and rate of offences by local government area	Yes	Yes, quarterly		Recorded Offences	Crime Statistics Agency Victoria
		Number and rate of criminal incidents by local government area	Yes	Yes, quarterly		Recorded Offences	Crime Statistics Agency Victoria
		Number and rate of alleged offender incidents by Aboriginal and Torres Strait Islander status	Yes	Yes, quarterly		Alleged offender incidents by Aboriginal and Torres Strait Islander status	Crime Statistics Agency Victoria

Stage	Category	Information	Available?	Published?	Notes	Source	Organisation
Police Continued	Contexts Continued	Location type of recorded offences	Yes	Yes, quarterly		Recorded Offences	Crime Statistics Agency Victoria
		Location type of recorded criminal incidents	Yes	Yes, quarterly		Criminal Incidents	Crime Statistics Agency Victoria
		Other offence types recorded	Yes	No	Can be extracted for analysis by Crime Statistics Agency	See 'Attrition of sexual offence incidents across the Victorian criminal justice system'	Crime Statistics Agency Victoria
	Outcomes	Investigation status of recorded offences (including complaints withdrawn)	Yes	Yes, quarterly		Recorded Offences	Crime Statistics Agency Victoria
		Charge status for criminal incidents	Yes	Yes, quarterly		Criminal Incidents	Crime Statistics Agency Victoria
		Relationship of victim to offender	Yes	Yes, quarterly	Further detail available (eg acquaintance)	Victim reports	Crime Statistics Agency Victoria
		Reasons for charges not progressing	Not readily extracted		Narrative information must be reviewed		
	Time	Time between incident and report	Yes	No	Can be extracted for analysis by Crime Statistics Agency		
		Time between report and police outcome	Yes	No	Can be extracted for analysis by Crime Statistics Agency	See 'Attrition of sexual offence incidents across the Victorian criminal justice system'	

Stage	Category	Information	Available?	Published?	Notes	Source	Organisation
Prosecution	Numbers	Number of prosecutions (including for sexual offences)	Yes	Yes, annually		Annual report	Office of Public Prosecutions Victoria
		Outcomes of nolle prosequi or permanent stays	Yes	No			Office of Public Prosecutions Victoria
		Reasons for nolle prosequi or permanent stays	Yes	No	Four categories: accused deceased, no reasonable prospect of conviction, or not in public interest, or not recorded		Office of Public Prosecutions Victoria
	Time	Time between incident and filing of hearing	Yes	No			
		Time between filing hearing (first court hearing) and trial	Yes	No			Office of Public Prosecutions Victoria
	Supports	Witnesses referred for support	Yes	Yes, annually	More detailed records held internally	Annual report	Office of Public Prosecutions Victoria
Other		Applications for joint trial	No				
		Applications to introduce sexual history evidence or confidential communications	No				

Stage	Category	Information	Available?	Published?	Notes	Source	Organisation
Courts	Numbers	Number of cases involving principal sexual offences	Yes	Yes, annually		Criminal Courts	Australian Bureau of Statistics
		Number of sexual offences by principal proven offence	Yes	Yes			Higher courts sentencing database, see Sentencing Advisory Council statistics
		Cases finalised in sexual offence cases involving child and/or cognitively impaired witness	Yes	No	Available on request		County Court of Victoria
		Charges per case, including principal offence	Yes	Yes	Can be extracted for analysis by Crime Statistics Agency; public version only where charges proven		SACStat Sentencing Advisory Council
	Outcomes	Cases finalised (sexual offences and other types)	Yes	Yes, annually	Public version broken down into higher courts and Magistrates' Courts; records also held by courts and Office of Public Prosecutions in more detail	Criminal Courts	Australian Bureau of Statistics

Stage	Category	Information	Available?	Published?	Notes	Source	Organisation
Courts Continued	Outcomes Continued	Outcomes (eg guilty plea, conviction, acquittal)	Yes	Yes, annually	Public version broken down into higher courts and Magistrates' Courts; for more detail, see Sentency Advisory Council statistics; records also held by courts and Office of Public Prosecutions in more detail	Criminal Courts	Australian Bureau of Statistics
		Sentencing outcomes	Yes	Yes	Periodic analysis on types of sexual offences		SACStat Sentencing Advisory Council
		Outcomes involving children or person with cognitive impairment	Not readily extracted				County Court of Victoria
	Time	Age of case from initiation to finalisation	Yes	No	Available on request		County Court of Victoria
		Average time from case initiated to finalisation	Yes	No	Available on request		County Court of Victoria
		Average time from case initiated to finalisation with child and/or cognitively impaired witness	Yes	No	Available on request		County Court of Victoria
		Stage at which cases resolved	Yes	No	Available on request		County Court of Victoria
		Age of pending cases	Yes	No	Available on request		County Court of Victoria
	Appeals	Finalised appeals by offence type	Yes	No	Available on request		County Court of Victoria; Supreme Court of Victoria

# Appendix E: Restorative justice for sexual offences in Australia and New Zealand where the person responsible is an adult

Jurisdiction	Description of scheme or program	Risk management
<b>Australian Capital Territory</b>	<p>Established in legislation in 2004. Available for sexual offences since 2018.</p> <p>In less serious cases, if the person responsible participates in restorative justice (RJ), the police may decide not to file charges.<sup>1</sup></p>	<p>Legislation sets out underlying principles/objects and a framework for operation based on a victim-centred approach.<sup>2</sup></p> <p>RJ does not replace the criminal justice system or change 'the normal process of criminal justice'.<sup>3</sup></p> <p>For most sexual offences, RJ is only available after the person responsible has been charged and has pleaded or been found guilty.<sup>4</sup></p> <p>Outcomes may be considered in sentencing, but the court is not required to adjust a sentence to reflect participation in RJ.<sup>5</sup></p>
<b>New South Wales</b>	<p>Since 1999, RJ has been available in a limited way.<sup>6</sup></p> <p>Either the person harmed or the person responsible can request RJ if the person responsible has been found guilty, sentenced, and is serving a sentence, whether in custody or on parole. All legal matters must have been finalised.<sup>7</sup></p>	<p>The Restorative Justice Team says RJ is provided in a way that is 'safe, private and confidential and managed by skilled and experienced facilitators'.<sup>8</sup> It says it places 'victims at the centre of the process'.<sup>9</sup></p>

- 1 ACT policing explain on their website that a potential advantage of RJ for offenders is that successful participation may mean they avoid court and 'the matter will not be taken any further by police': 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>>. The governing legislation provides that a person can be referred for RJ before other options for dealing with the offence are considered, although it adds that 'the referral is to have no effect on any other action or proposed action in relation to the offence or the offender'. As a result, charges may still be filed or a prosecution continued regardless of a RJ process or outcome: *Crimes (Restorative Justice) Act 2004* (ACT) s 7(1), (2).
- 2 The underlying principles/objects of the Act include 'to enhance the rights of victims ... by providing restorative justice as a way of empowering victims to make decisions about how to repair the harm done by offences', and 'to ensure that the interests of victims of offences are given high priority in the administration of restorative justice': *Crimes (Restorative Justice) Act 2004* (ACT) s 6(a), (c).
- 3 Ibid s 6(d).
- 4 Ibid s 16(3). After charges are filed, a court may refer *less serious* sexual offences for RJ, but only if it considers that exceptional circumstances justify the referral: ibid s 27(5).
- 5 *Crimes (Restorative Justice) Act 2004* (ACT) s 25(f)(i). See also ss 6(d), 7(2).
- 6 Jane Bolitho and Karen Freeman, *The Use and Effectiveness of Restorative Justice in Criminal Justice Systems Following Child Sexual Abuse or Comparable Harms* (Report, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016) 8 <<http://www.childabuseroyalcommission.gov.au/getattachment/9f328928-a343-4c65-b98e-94e3185894c7/Restorative-justice-following-child-sexual-abuse-o>>.
- 7 NSW Government, 'Victims Support', *Corrective Services NSW* (Web Page, 2020) <<https://correctiveservices.dcj.nsw.gov.au/csnsw-home/support/victim-support.html#Restorative1>>.
- 8 NSW Government, 'Victims Support', *Corrective Services NSW* (Web Page, 2020) <<https://correctiveservices.dcj.nsw.gov.au/csnsw-home/support/victim-support.html#Restorative1>>.
- 9 Department of Justice (NSW), *Victim Offender Conferencing—Restorative Justice Team* (Information Sheet, 2020) <<https://correctiveservices.dcj.nsw.gov.au/content/dcj/csnsw/csnsw-home/download.html/content/dam/dcj/corrective-services-nsw/documents/victims/Restorative%20Justice%20brochure.pdf>>.

Jurisdiction	Description of scheme or program	Risk management
<b>New South Wales</b>	RJ is provided by a Restorative Justice Team located within Corrective Services NSW Victims Support Unit. <sup>10</sup>	No enabling legislation or published operational framework or guiding principles, aside from the information above, which is available on Corrective Services NSW's website. <sup>11</sup>  The risk of re-privatising sexual offending is averted because matters are only eligible for RJ following a successful criminal prosecution.
<b>Queensland</b>	RJ conferencing has been available since the early 1990s. It was formerly referred to as 'justice mediation' and is still described as mediation in the <i>Dispute Resolution Centres Act 1990</i> (Qld), under which it can be provided. The Act provides that mediation sessions should be conducted with as 'little formality and technicality, and with as much expedition, as possible'. <sup>12</sup>  Referrals may be made by the courts, police, prosecutors or corrective services. Victim survivors, and accused people/offenders through their legal representative, can request RJ. <sup>13</sup>  RJ conferencing can occur at any stage of the criminal justice process. <sup>14</sup> Availability as a pre-sentence option is based on the courts' general powers to adjourn cases. <sup>15</sup>  Where the matter is before a court, the referrer will decide the best way to proceed, including whether the court process should continue or what impact this will have on the sentence imposed. <sup>16</sup>	There is no formal governance framework for RJ in Queensland.  Convenors are accredited mediators appointed under the <i>Dispute Resolution Centres Act</i> . <sup>17</sup> The Act provides that mediators are only eligible for appointment if considered to have relevant knowledge, experience or skills. <sup>18</sup> Their appointment should take into account 'the desirability of the mediators appointed reflecting the social, gender and cultural diversity of the general community'. <sup>19</sup>  The Dispute Resolution Centres Act provides that mediation is voluntary. <sup>20</sup> Anything said and any admissions are not admissible in legal proceedings. <sup>21</sup>  The Queensland Department of Justice and Attorney monitors outcome agreements. <sup>22</sup>

- 10 Department of Justice (NSW), *Victim Offender Conferencing—Restorative Justice Team* (Information Sheet, 2020) <<https://correctiveservices.dcj.nsw.gov.au/content/dcj/csnsw/csnsw-home/download.html/content/dam/dcj/corrective-services-nsw/documents/victims/Restorative%20Justice%20brochure.pdf>>.
- 11 NSW Government, 'Victims Support', *Corrective Services NSW* (Web Page, 2020) <<https://correctiveservices.dcj.nsw.gov.au/csnsw-home/support/victim-support.html#Restorative1>>.
- 12 *Dispute Resolution Centres Act 1990* (Qld) s 29(2).
- 13 'About Adult Restorative Justice Conferencing', *Queensland Government* (Web Page) <<https://www.qld.gov.au/law/legal-mediation-and-justice-of-the-peace/settling-disputes-out-of-court/restorative-justice/about>>.
- 14 Ibid; *Dispute Resolution Centres Act 1990* (Qld) s 30(2).
- 15 Queensland Sentencing Advisory Council, *Penalties for Assaults on Public Officers* (Final Report, August 2020) 292 <[https://www.sentencingcouncil.qld.gov.au/\\_data/assets/pdf\\_file/0003/657732/chapter-11-institutional-responses.pdf](https://www.sentencingcouncil.qld.gov.au/_data/assets/pdf_file/0003/657732/chapter-11-institutional-responses.pdf)>.
- 16 'About Adult Restorative Justice Conferencing', *Queensland Government* (Web Page) <<https://www.qld.gov.au/law/legal-mediation-and-justice-of-the-peace/settling-disputes-out-of-court/restorative-justice/about>>.
- 17 Ibid.
- 18 *Dispute Resolution Centres Act 1990* (Qld) s 27AB(2).
- 19 Ibid s 27AB(3).
- 20 Ibid s 31.
- 21 Ibid s 36(4).
- 22 'About Adult Restorative Justice Conferencing', *Queensland Government* (Web Page) <<https://www.qld.gov.au/law/legal-mediation-and-justice-of-the-peace/settling-disputes-out-of-court/restorative-justice/about>>.



Jurisdiction	Description of scheme or program	Risk management
Victoria	The Family Violence Restorative Justice Service was established in 2017 for people who have experienced family violence. <sup>23</sup> It is run by the Department of Justice and Community Safety.	<p>A published 'Framework' contains guidance on principles and processes for best practice RJ for family violence, as well as on program development.<sup>24</sup></p> <p>The Framework describes the following principles as essential elements of RJ for family violence:</p> <ul style="list-style-type: none"> <li>• victim-centred</li> <li>• do no (further) harm</li> <li>• participation is voluntary</li> <li>• perpetrator acceptance of responsibility</li> <li>• appropriate resources and skills</li> <li>• integrated justice</li> <li>• transparency of process and outcomes.<sup>25</sup></li> </ul> <p>The Framework also says that RJ should be private and confidential.<sup>26</sup></p> <p>The Framework says that RJ for family violence is independent of the 'traditional justice system' and 'should not be seen as a substitute for criminal or civil law processes',<sup>27</sup> nor used as a 'diversionary or perpetrator accountability mechanism'.<sup>28</sup></p>
New Zealand	<p>There is no single enabling legislation for RJ in New Zealand. Four separate Acts govern RJ for adults.<sup>29</sup></p> <p>RJ is available for all criminal offences, including sexual offences. The person harmed has a right to request RJ at any point in criminal proceedings. Court staff, police and—where relevant—probation officers, are obliged to refer cases for RJ in accordance with such requests,<sup>30</sup> although this obligation is not legally enforceable.<sup>31</sup></p>	<p>There are no court referrals for sexual offences until after a conviction.</p> <p>The Ministry of Justice has published a 'Best Practice Framework'<sup>32</sup> for the conduct of RJ, and 'Restorative Justice Standards for sexual offending cases'.<sup>33</sup></p>

23 In response to a recommendation of the Royal Commission into Family Violence: Department of Justice and Regulation (Vic), *Restorative Justice for Victim Survivors of Family Violence* (Framework, Family Violence Restorative Justice Project, 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* (Final Report, March 2016) vol IV, ch 22, Recommendation 122 <<http://rcfv.archive.royalcommission.vic.gov.au/Report-Recommendations.html>>.

24 Department of Justice and Regulation (Vic), *Restorative Justice for Victim Survivors of Family Violence* (Framework, Family Violence Restorative Justice Project, August 2017) 3 <<http://www.justice.vic.gov.au/restorative-justice-for-victim-survivors-of-family-violence-framework>>.

25 Ibid 6–9.

26 Ibid 7.

27 Ibid 8.

28 Ibid 4.

29 *Sentencing Act 2002* (NZ); *Victims' Rights Act 2002* (NZ); *Parole Act 2002* (NZ); *Corrections Act 2004* (NZ). Restorative justice for young people is governed by the *Children, Young Persons and Their Families Act 1989* (NZ).

30 *Victims' Rights Act 2002* (NZ) s 9(2). The referral obligation only applies if the relevant officer is satisfied that the necessary resources are available to allow restorative justice to occur: s 9(2).

31 *Victims' Rights Act 2002* (NZ) s 10.

32 Ministry of Justice (NZ), *Restorative Justice—Best Practice Framework* (Report, 2017) <<https://www.justice.govt.nz/assets/Documents/Publications/restorative-justice-best-practice-framework-2017.pdf>>.

33 Ministry of Justice (NZ), *Restorative Justice Standards for Sexual Offending Cases* (Report, 2013) <<https://www.justice.govt.nz/assets/Documents/Publications/Restorative-justice-standards-for-sexual-offending-cases.pdf>>. See also Ministry of Justice (NZ), *Restorative Justice Practice Standards for Family Violence Cases* (Report, 2 August 2019) <<https://www.justice.govt.nz/assets/Documents/Publications/Restorative-Justice-Family-Violence-Practice-Standards-August-2019.pdf>>.

Jurisdiction	Description of scheme or program	Risk management
<b>New Zealand</b>	<p>Since 2014, all District (mid-tier) Court cases, including those involving sexual offences, must be referred for an RJ suitability assessment after a guilty plea and before sentencing.<sup>34</sup> In addition, all courts have a discretion to refer cases for RJ following a guilty finding (ie a conviction following a not guilty plea) and before sentencing.<sup>35</sup></p> <p>Outcomes of RJ must be considered in sentencing.<sup>36</sup></p> <p>RJ is run by community-based groups, contracted by the Ministry of Justice.<sup>37</sup></p> <p><b>Project Restore–NZ</b> is an Auckland-based RJ provider that specialises in cases involving sexual harm. It takes court-referred cases as well as community-based referrals.</p>	<p>The best practice framework principles are:</p> <ul style="list-style-type: none"> <li>• participation is voluntary</li> <li>• victim and offender are encouraged to participate fully, although victim must determine their own level of involvement</li> <li>• participants are well informed</li> <li>• the offender is held accountable and acknowledges responsibility</li> <li>• the process is flexible and responsive</li> <li>• the emotional and physical safety of participants is an overriding concern.<sup>38</sup></li> </ul> <p>In addition to the 'Best Practice Framework' principles above, RJ for sexual offending must be:</p> <ul style="list-style-type: none"> <li>• victim/survivor-driven</li> <li>• designed both to maximise the opportunity to experience a sense of justice and the chances of healing, and to minimise the chances of harm.<sup>39</sup></li> </ul> <p>The independent 'Resolution Institute' is funded by the Ministry of Justice to provide training and accreditation for RJ providers.<sup>40</sup></p> <p>The practice model used by <b>Project Restore–NZ</b> involves a convenor plus dedicated support personnel for the person harmed (the 'survivor specialist') and the person responsible (the 'harmful behaviour specialist'), all of whom have an understanding of or backgrounds working in sexual violence. In addition, a clinical supervisor provides supervision and training in weekly case review meetings.<sup>41</sup></p>

34 But only if this is consistent with the victim survivor's wishes, a restorative justice provider is available and restorative justice has not already occurred: *Sentencing Act 2002* (NZ) s 24A. See also Sarah Mikva Pfander, 'Evaluating New Zealand's Restorative Promise: The Impact of Legislative Design on the Practice of Restorative Justice' (2020) 15(1) *Kōtuitui: New Zealand Journal of Social Sciences Online* 170.

35 *Sentencing Act 2002* (NZ) s 25(1)(b). District Court referrals following conviction in sexual offence cases are rare, because 'there will usually be an appeal', with the person responsible 'continuing to deny the offending, and this is not conducive to restorative justice': Consultation 37 (New Zealand District Court judges with experience on the sexual violence court pilot).

36 *Sentencing Act 2002* (NZ) ss 8(j), 10.

37 Resolution Institute, 'Facilitator Pathway', *Restorative Justice* (Web Page, 2021) <<https://www.resolution.institute/restorative-justice>>.

38 Ministry of Justice (NZ), *Restorative Justice—Best Practice Framework* (Report, 2017) <<https://www.justice.govt.nz/assets/Documents/Publications/restorative-justice-best-practice-framework-2017.pdf>>.

39 Ministry of Justice (NZ), *Restorative Justice Standards for Sexual Offending Cases* (Report, 2013) 20 <<https://www.justice.govt.nz/assets/Documents/Publications/Restorative-justice-standards-for-sexual-offending-cases.pdf>>.

40 Resolution Institute, 'Facilitator Pathway', *Restorative Justice* (Web Page, 2021) <<https://www.resolution.institute/restorative-justice>>.

41 Consultation 12 (Project Restore).

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## Improving the Justice System Response to Sexual Offences

*Report*

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