Commonwealth Royal Commission

Criminal Justice Consultation Paper

Victorian Government Response

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Contents

1 Introduction

The Victorian Government welcomes the release of the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) consultation paper on criminal justice matters (the Consultation Paper) and the opportunity to respond to the important issues that it raises.

The Victorian Government supports the important work of the Royal Commission and it has participated in a number of policy roundtables to discuss many of the issues raised throughout the Consultation Paper. This response further contributes to those discussions, and where possible, draws upon the material and views already provided to the Royal Commission by the Department of Justice and Regulation and Victoria Police.

2 Issues in police responses

2.1 Principles for police responses

A victim or survivor's initial contact with police has the capacity to influence their experience of the entire criminal justice system's response to their needs, and therefore the initial response by police should encourage reporting and actively support a victim to proceed with their complaint.

Victoria Police strongly supports the Royal Commission's proposed principles for initial police responses and acknowledges that basic training for all police who come into contact with survivors of institutional sexual abuse is of significant importance. In addition, Victoria Police supports a requirement for supervisors, senior officers, and police community liaison offices to undertake the same training.

Victoria Police currently provides guidance to front line police on how to respond to complainants and witnesses when they receive an initial report of a sexual crime in the Victoria Police *Code of Practice for the Investigation of Sexual Crime* (the Code of Practice)[1]. Victoria Police recognises that along with this guidance, specific training for all frontline police on the nature of sexual abuse and the needs of victims promotes good practice and ensures that police officers have necessary skills to support victims. This training can also dispel misconceptions that are commonly held about sexual offences which can negatively impact on the police response.

2.2 Encouraging reporting

Victoria Police acknowledges that some victims may be more willing than others to report sexual crimes, and that some victims may also choose to withdraw from an investigation or prosecution process. Accordingly, Victoria Police advises witnesses that they can withdraw from an investigation at any time.

However, Victoria Police will continue to investigate an offender even when a witness withdraws if there is an ongoing risk to community safety or pursuing charges is in the public interest. To support this approach the Code of Practice includes guidance for allowing a victim as much control as possible when making an initial report[2], and it sets out the procedure for police to follow for when a victim decides to withdraw their report[3].

Victoria Police acknowledges that in some cases a victim's complaint cannot be progressed if there is insufficient evidence but an investigation could be re-opened if further victims of the same offender or other witnesses come forward. To enable this, Victoria Police supports the establishment of formal arrangements for victims to provide their consent to be re-contacted in these circumstances even if they do not make an initial formal statement.

Victoria Police's Sano Taskforce was established to investigate historic and new allegations of child abuse that emanated from the Victorian Parliamentary Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations, and the Task Force also coordinates investigations emerging from the Royal Commission. The Sano Task Force provides information to victims and witnesses to encourage reporting and it has a dedicated telephone number and email address. Victoria Police has also produced an information booklet which provides advice about the process for reporting sexual crimes. It advises that witnesses can:

[1] Victoria Police Code of Practice for the Investigation of Sexual Crime, Victoria Police, Section 7.1, 2016 http://www.police.vic.gov.au/content.asp?a=internetBridgingPage&Media_ID=117044
[2] Ibid, section 7.3.8
[3] Ibid, section 7.5

- Make a formal report and initiate a police investigation.
- Tell their story and defer any decision to proceed.
- Make a statement with a clear decision not to proceed formally.[4]

Victoria Police supports the Royal Commission's suggested approaches to encourage reporting, and ensuring that information is available through a variety of channels – such as online or specialist telephone numbers. Appropriate channels for reporting should also be available to CALD communities and other vulnerable victims. Victoria Police also acknowledges that strengthening police relationships with Aboriginal and Torres Strait Islander communities (ATSI), will allow police to encourage ATSI victims to report sexual crimes.

2.3 Police investigations

As noted in the Consultation Paper, Victoria Police has established Sexual Offence and Child Abuse Investigation Teams (SOCITs) which are staffed by specially trained investigators who focus on the investigation of sexual offending. The SOCITs have been established to deliver victim-centric policing to victims of sexual crimes, and the teams also facilitate continuity in staffing.

Despite implementation of the SOCIT service delivery model, police rostering, transfers and the pressures that arise from the need to address other crime inevitably impact on SOCIT units. As a result Victoria Police agrees that there should be an ongoing focus on the need to ensure continuity of staffing for the investigation of sexual offences.

Victoria Police also agrees that ongoing communication and support for victims and their families is a key component of police investigations. The Code of Practice supports this approach and articulates the role of police in providing victims with regular updates, referrals for counselling and support, advice on investigation and court processes, and notification of key dates (for example, court hearings)[5]. The Code of Practice also explains that police must inform a victim about decisions to not charge a suspect or to discontinue an investigation, the reasons for this decision, and that the decision will be reviewed if further information becomes available[6].

As noted above, the Victoria Police model for responding to sexual crime incorporates specialist training of police investigators.[7] A key component of the training is an investigative framework that focusses on the credibility of the complaint rather than the credibility of the complainant. Investigators are trained to fully explore an offender's sexual and non-sexual grooming behaviours and so called counter-intuitive victim behaviour in order to gather evidence that objectively demonstrates the perpetrator's criminal offending.

2.4 Police charging decisions

Victoria Police strongly endorses the Royal Commission's proposed principles to inform police charging decisions, and specifically acknowledges the benefit of investigators receiving early advice on charging decisions from prosecutors. Victoria Police also endorses the Royal Commission's proposed principle regarding corroboration not being a determining factor in charging decisions for sexual crimes. However, if this principle is recommended by the Royal Commission, consideration could be given as to whether it should also guide the decision-making of prosecutors.

2.4.1 Victoria Police Victims of Crime Policy Statement

Victoria Police acknowledges the importance of providing an effective and responsive service to individuals and communities impacted by crime. Guided by the obligations in the *Victims Charter Act 2006* and the *Charter of Human Rights and Responsibilities* Act *2006*, Victoria Police has formalised its response to victims through the implementation of a Victims of Crime Policy Statement[8]. At the centre of this policy is the recognition of the important role that victims play in the criminal justice system. The statement includes the following principles:

1) Victims of crime will be provided with information about support services and entitlements available to them.

[4] Sano Taskforce Brochure, Victoria Police, 2013
[5] Victoria Police Code of Practice for the Investigation of Sexual Crime, Victoria Police, 2016 http://www.police.vic.gov.au/content.asp?a=internetBridgingPage&Media_ID=117044, section 7.4.6
[6] Ibid, section 7.5
[7] Details of this training have been previously provided to the Royal Commission.
[8] Victims of Crime Policy Statement, Victoria Police, 2007

2) Victims will be made aware that they can be notified of the investigation process.
3) We will update victims, where they request, at reasonable intervals of the investigation process, unless such information jeopardises the investigation. In which case, victims will be informed of that fact.
4) Where a victim has expressed concerns for their safety and welfare, this information will be considered in any applications for bail.
5) We will inform victims, where they request, of any applications for bail and relevant conditions imposed, as soon as reasonably practicable.
6) We will inform victims of the progress of the prosecution and their entitlement to attend court. We will provide victims with details about how to find out about the date, time and place of the hearing.
7) We will provide victims with information about the court process and the role of the witness.
8) Where victims express concerns for their safety, measures will be taken to protect them from contact with the accused in court.
9) Where a victim requests, the outcome of the court process will be explained to them.
10) We will inform victims of their right to complete a Victim Impact Statement and refer them to support services for further assistance.
11) We will handle and store the victim's property in a respectful and secure manner and return it to them as soon as it is practicable.
12) We will inform victims, where requested, if an appeal is initiated, the details of the appeal, and the end result.[9]

The statement complements the Sexual Crime Code of Practice[10] and the Code of Practice for the Investigation of Family Violence[11].

2.5 Investigative interviews

Victoria Police strongly endorses the Royal Commission's proposed principles to guide police investigative interviewing, and the ongoing professional development of sexual offence investigators that allows for all investigators to update their knowledge and skills in line with current research and international best practice.

Victoria Police SOCIT and other sexual crime investigators participate in specialist training delivered through the SOCIT VARE (Visual and Audio Recorded Evidence) Course. A project is also underway to align this course to the Victoria Police Education and Training Quality Standards which will provide a framework for continuous improvement of the course in accordance with current research and international best practice for the investigation of sexual crime and investigative interviews.

In Victoria, only investigators who have completed the SOCIT VARE course are qualified to take a VARE statement from a witness. The course curriculum specifically addresses the developmental and communication needs of vulnerable witnesses, how memory works, and appropriate questioning techniques. The course covers academic theory and practical exercises that include sessions where investigators interview children and people who have disabilities.

The ability of Victoria Police investigative interview training experts to view VARE statements would allow them to monitor quality and would inform both feedback to individual investigators and training more broadly. However, in contemplating any changes that will allow access to VARE, consideration must also be given to the privacy and consent of victims.

2.6 Cost orders

Section 401 of the *Criminal Procedure Act 2009* provides an unfettered discretion to the Magistrates' Court to award costs in summary and committal proceedings before that Court. This section is based on a consolidation of sections 30(3) and 131 of the *Magistrates' Court Act 1989*, and clause 25 of Schedule 5 to that Act.

[9] Ibid.
[10] Victoria Police Code of Practice for the Investigation of Sexual Crime, Victoria Police, 2016 http://www.police.vic.gov.au/content.asp?a=internetBridgingPage&Media_ID=117044
[11] Victoria Police Code of Practice for the Investigation of Family Violence, Victoria Police, 2016 http://www.police.vic.gov.au/content.asp?a=internetBridgingPage&Media_ID=464

The High Court has held that in ordinary circumstances, an order of costs should be made in favour of an accused who has secured the dismissal of a criminal charge brought against him or her, even if the police had reasonable grounds for commencing the proceedings.[12]

The imposition of costs in Magistrates' Court proceedings places a financial burden upon Victoria Police. Section 401 balances this burden against a number of other policy considerations, which include:

- In criminal prosecutions the resources of the Crown are generally greater than those available to the accused. Costs awards to successful accused persons redress the imbalance in criminal proceedings in those instances where the prosecution is wholly unsuccessful.
- Costs awards are intended to compensate the accused for the costs incurred as a result of the prosecution, not to punish the prosecution. Where a prosecution has failed, it is ordinarily just and reasonable that a costs order be made to mitigate the financial consequences of an unsuccessful prosecution upon the accused, even if the prosecution was brought in good faith and on reasonable grounds.
- Liability for costs encourages prosecutors to make a careful assessment of the prospects of obtaining a finding of guilt and produces a more efficient prosecution process.
- If restrictions were imposed upon the power to award costs, Victoria Legal Aid, whose costs are commonly reimbursed through such awards, would suffer a commensurate loss of funds.

Victoria Police suggests that there is merit in the Royal Commission considering whether the Magistrates Court should have the ability to award costs against the Chief Commissioner of Police. Specific consideration could also be given to whether the Magistrates' Court should only be able to award costs against police in certain circumstances, for example, where it can be demonstrated that a brief authorising decision was not made in good faith - that is, where it was not based on a reasonable prospect of conviction and in the public interest.

However, in contemplating any changes made to the power to award costs, consideration should be given to the scope of such changes. In particular, consideration should be given to whether such reforms would be limited to matters involving sexual offences against children or matters prosecuted by police or public prosecution bodies.

It is also noted that the impact of any changes to the power to award costs upon the exercise of the discretion to charge and prosecute is unclear, particularly given that the exercise of the discretion already has regard to whether police know or reasonably suspect that a person has committed an offence, and whether there are reasonable prospects of a conviction being obtained. There is a lack of empirical data about the impact of existing processes on decision-making and on the likely impact of any such changes, such as through cross-jurisdictional comparisons.

Section 401 applies to Magistrates' Court proceedings, and does not affect the general practice that costs cannot be awarded against the Crown in trials on indictment.[13] The Criminal Procedure Act gives the Supreme Court and County Court jurisdiction to order costs in trials on indictment in very limited circumstances, such as whether a party has caused delay or failed to comply with pre-hearing disclosure requirements.[14]

3 Police responses and institutions

3.1 Communication and advice

Victoria Police recognises the broad benefits derived from actively managing communications and providing advice as a criminal investigation into a current allegation of institutional child sexual abuse progresses. This approach ensures the needs of children and their families, institutions, and the broader community are addressed. Victoria Police agrees with the Royal Commission that procedures and protocols that provide guidance to police agencies, institutions and the community is of great assistance.

[12] *Latoudis V Casey* (1990) 170 CLR 534.
[13] See, generally, Judicial College of Victoria, *Victorian Criminal Proceedings Manual*, [19.4.2] <http://www.judicialcollege.vic.edu.au/eManuals/VCPM/index.htm#27824.htm>.
[14] *Criminal Procedure Act 2009* (Vic), s 404.

Guidance on external communications for Victoria Police investigators is currently provided through the Victoria Police Manual, which includes policies for notifying an alleged offender's employer or relevant regulatory authority, and for the release of information to the public and media.

The Code of Practice also provides direction to investigators for keeping victims informed about an investigation. However, Victoria Police acknowledges that these policies do not specifically inform police responses to the needs of institutions, parents and families, and the broader community[15]. As a result, Victoria Police has commenced work to develop specific communications and guidelines to address these needs. This work will build on existing Victoria Police policies, other Victorian Government initiatives that prevent institutional child abuse, and relevant work undertaken by the Royal Commission. Victoria Police will also consider the NSW SOPs and JIRT Local Contact Point Protocol for any learnings that are applicable to Victoria.[16]

3.2 Blind reporting

Victoria Police acknowledges that blind reporting may have the advantage of providing a mechanism for victims to report crime and alert police to an alleged offender even when they do not feel able to personally engage with police for a criminal investigation.

Blind reporting does occur in Victoria – reports can be made through an anonymous Crime Stoppers report, whilst the Centre Against Sexual Assault operates the Sexual Assault Reported Anonymously (SARA) online reporting option which refers information on to police. Whilst police receive and assess these reports and make further enquiries where they can, investigators are often unable to pursue criminal investigations without further details from a victim or the person who made the report. As a result, police prefer to be able to communicate with a victim or reporter directly, so they can provide comprehensive advice about their options for reporting and how any investigation will be managed.

Victoria Police supports the Royal Commission's suggestion that institutions and advocacy and support groups adopt guidelines to deal with blind reporting for matters that fall outside of any mandatory reporting requirements.

4 Child sexual abuse offences

4.1 Persistent child sexual abuse offences

In a 2004 report on *'Defences to Homicide'* the Victorian Law Reform Commission (VLRC) stated that 'social problems rather than legal categories best inform our thinking about the law reform we need or want'.[17] This means it is essential to recognise the context in which persistent child sexual abuse typically occurs and then develop laws to address that problem. In its report on Sexual Offences, the VLRC identified unique characteristics of sexual offences, many of which are relevant in the context of persistent child sexual abuse. The VLRC indicated that:

- Sexual offences usually involve the exercise of power by one person over another.
- Most sexual offences reported to the police involve persons known to the complainant.
- Sexual offences usually occur in private and it is unlikely that there will be any eyewitnesses.
- Historically sexual offence laws were based on the myth that the evidence of children who report sexual offences was inherently unreliable (the law has been changed in a number of ways to remove this assumption).[18]

For reasons identified by the Royal Commission in its Consultation Paper, it is often difficult for victims or survivors to give adequate or accurate details of the offending against them.

Both inside and outside of the institutional context, perpetrators of sexual offences against children may commit:

1) A single offence or several offences on a single occasion.
2) A number of offences on different occasions.
3) Many offences on different occasions over a significant period of time.

[15] Victoria Police Code of Practice for the Investigation of Sexual Crime, 2016, http://www.police.vic.gov.au/content.asp?a=internetBridgingPage&Media_ID=117044
[16] Victoria Police will also consider the requirements within the *Victims Charter Act 2006* and the *Charter of Human Rights and Responsibilities Act 2006*
[17] Victorian Law Reform Commission, *Defences to Homicide: Final Report*, (2004) [1.39].
[18] Victorian Law Reform Commission, *Sexual Offences: Final Report*, (2004) [1.12].

Laws in relation to criminal offences have primarily developed in relation to a single offence, or a single occasion of offending, where a discrete offence could be tailored to a discrete set of facts, and offences were committed in public places where there were usually a number of witnesses. The kind of offences referred to in 2 and 3 above create significant challenges for the criminal justice system.

This can make it difficult to prosecute persistent sexual abuse within the traditional paradigm of a single offence applying to a single clearly identified allegation. The requirement for sufficient particulars to be given of each alleged offence, and enabling each allegation to be distinguished from another, and thereby avoiding duplicity in the charges, is applied much more strictly in Australia than in New Zealand or England and Wales.[19]

The problems that often arise with connecting evidence of persistent sexual abuse with individual offences were discussed by Gaudron and McHugh JJ in *S v The Queen* where they said:

> [A] court must know what charge it is entertaining in order to ensure that evidence is properly admitted, and in order to instruct the jury properly as to the law to be applied; in the event of conviction, a court must know the offence for which the defendant is to be punished; and the record must show of what offence a person has been acquitted or convicted in order for that person to avail himself or herself, if the need should arise, of a plea of autrefois acquit or autrefois convict. … The rule against duplicitous counts has also long rested upon a basic consideration of fairness, namely, that an accused should know what case he or she has to meet. …Of course, the degree of unfairness or prejudice involved will vary from case to case, and it may be, as suggested by Professor Glanville Williams in 'The Count System and the Duplicity Rule', [1966] Criminal Law Review 255, at 264, that on occasions the uncertainty is not 'such as to disable the defendant from meeting the charge'.[20]

This has led Australian courts to adopt a strict approach to the need for particulars concerning child sexual abuse offences. The problems arising from *S v The Queen* were recognised early on in a decision from the full court of the Western Australian Supreme Court in *Podirsky v The Queen*:

> It also carries with it a potential for injustice to the complainant and generally because one effect of the decision in *S v The Queen* is that notwithstanding clear and cogent evidence of a course of conduct involving repeated acts of sexual intercourse in the relevant period, any one of which could have caused conception, the Crown have found it impossible to identify any particular act with sufficient precision to enable any one offence to be charged. This means that unless the law is changed there is a possibility that the more acts of intercourse or other acts of sexual abuse and the greater the length of time over which they occur, the more difficult it may be to establish that any one of a series of multiple offences has been committed. Some reform would seem desirable to cover cases where there is evidence of such a course of conduct.[21]

As discussed in the Consultation Paper, problems have continued to arise with the legislative responses formulated in the wake of *S v The Queen.* The response in Victoria can be found in section 47A of the *Crimes Act 1958*, being the offence of persistent sexual abuse of a child under 16. The problems with this offence were discussed by the Department of Justice and Regulation in its review of Sexual Offences in 2013.[22]

To address these problems, Victoria introduced legislation to enable a course of conduct to be charged in relation to certain sexual offences and theft/fraud offences in the *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (the 2014 Act). Rather than create a new offence, the 2014 Act changed the particulars required to prove an offence, and made a number of other procedural changes to facilitate the prosecution of repeated and systematic offending involving a sexual offence or a theft/fraud offence.

As the course of conduct charging procedure only commenced on 1 July 2015, there have been few cases which have tested the provisions in Victoria. However, the provisions are based upon rule 14.2 of the Criminal Procedure Rules 2010 (UK), which were based on existing practices.

The different kinds of conduct that may be charged using the course of conduct provisions is evident from two early cases:

[19] This issue is discussed in detail in Department of Justice, *Review of Sexual Offences: Consultation Paper* (2013), chapter 12.
[20] *S v The Queen* (1989) 168 CLR 266, 284−5.
[21] *Podirsky v The Queen* (1990) 3 WAR 128, 136.
[22] Department of Justice, *Review of Sexual Offences: Consultation Paper* (2013), chapters 11 and 12.

- between 2003 and 2010, the course of conduct charge involved 541 separate and distinct acts of dishonesty,[23] and
- over almost a two year period, the accused was alleged to have committed an indecent act (fondling a child's penis when washing him) 'every time', 'like every weekend' he stayed with the accused and 'just any time he would shower me'.[24]

The Royal Commission's Consultation Paper refers to the decision in *R v Johnson* [2015] SASC 170. In that case, Justices Sulan and Stanley identified the problem at the heart of offences which require proof of specific instances (like Victoria's persistent sexual abuse offence), stating that 'the operation of [this offence] can produce the perverse paradox that the more extensive the sexual exploitation of the child, the more difficult it can be proving the offence'. Justices Sulan and Stanley suggested that adopting the Queensland relationship offence provisions would address the problem identified in that case. However, it is not clear that it would. This is because the evidence in that case did not identify specific acts, rather, the complainant indicated that her brother assaulted her every week (or so) over almost period of two years, and there was nothing to differentiate one act of rape from another.[25]

The evidence of the complainant in this case essentially was that her brother had engaged in a course of conduct involving repeated and systematic sexual abuse over a two year period. A course of conduct charge would appear to be much better suited to this kind of evidence than a relationship charge under the Queensland offence provisions which requires the identification of two distinct acts (at a minimum). The complainant's evidence in this case is best described as 'many offences on different occasions over a significant period of time' (as referred to above in point 3) above.

This case highlights that the Queensland relationship offence and the Victorian course of conduct charge focus on different aspects of the problem of persistent sexual abuse. The Queensland relationship offence most effectively addresses the problem where there are at least two identifiable (or distinguishable) acts, even if there are many other indistinguishable acts. What is necessary is that the prosecution be able to prove a sufficient number of identifiable acts from which a jury may conclude that there was a relationship of the relevant kind.

The Victorian course of conduct charge does not require there to be a number of identifiable acts. Indeed, the lack of distinguishing features between different acts may be evidence of the repeated and systematic abuse that is alleged. The different focus of the Queensland relationship offence and the Victorian course of conduct charge means that they may each be better at dealing with 'a number of offences on different occasions' and 'a number of offences on different occasions over a significant period of time' respectively. An effective response may require the ability to deal with both of these evidentiary scenarios. Accordingly, the Royal Commission may wish to consider whether the most effective response would involve having both the Queensland relationship offence and the Victorian course of conduct charge.

Victoria prohibits the use of the Victorian course of conduct charge and a persistent sexual abuse charge in the one indictment.[26] While problems would arise from using both mechanisms in the one trial that does not mean that both mechanisms cannot be available to be used. If both mechanisms were available, the prosecution would then need to choose the most appropriate approach in each case. This would be consistent with the aim of identifying the problem and the context in which it occurs and then developing legislative solutions to address that problem. The prosecution could choose which mechanism to use on a case-by-case basis having regard to the nature of the evidence in the case. If this approach were adopted, consideration would need to be given to whether any other potential unfairness arises from the availability or use of both options.

4.1.1 Retrospective operation of the provisions

The Victorian course of conduct charge may apply retrospectively. For example, the definition of a relevant offence includes a sexual offence and a sexual offence is defined to include offences specified under subdivisions of the Crimes Act, 'or under any corresponding previous enactment'. The 2014 Act also included a transitional provision which provided that:

> A person may be charged with a course of conduct charge (within the meaning of clause 4A of schedule 1) irrespective of when the incidents of the commission of the offence are alleged to have taken place.[27]

[23] *Poursanidis v The Queen* [2016] VSCA 164.
[24] From the Summary of Prosecution Opening (from an unpublished ruling in a case which has not yet been completed).
[25] *R v Johnson* [2015] SASFC 170, [102].
[26] *Criminal Procedure Act 2009* (Vic), clause 5(5) of Schedule 1.
[27] See *Criminal Procedure Act 2009* (Vic), s 445.

The course of conduct does not create retrospective criminal liability – it does not criminalise anything that was not already an offence against the law. However, it operates retroactively in that if the alleged offence was an offence known to the law at the time that it is alleged to have been committed, a course of conduct charge may instead be used. That is, if a single offence may be charged, the 2014 Act enables a course of conduct charge to be used for the same offence.

4.2 Victoria's grooming offence

On 9 April 2014, the Victorian Government introduced a grooming offence in response to a recommendation from Betrayal of Trust. The offence applies where an adult communicates, by words or conduct, with a child under the age of 16 years, or with a person who has care, supervision or authority for the child with the intention of facilitating the child's involvement in sexual conduct, either with the groomer or another adult.

Since commencement, 100 counts of the offence have been recorded by Victoria Police and 41 counts have resulted in an arrest. A further 18 counts have resulted in the application of a summons, and 6 counts have resulted in an intent to issue a summons. Overall, 65% of the recorded counts have resulted in a positive police outcome.

4.2.1 Amendments to Victoria's grooming offence

On 6 September 2016, the *Crimes Amendment (Sexual Offences) Act 2016* (the 2016 Act) received Royal Assent, which modernises and simplifies many of Victoria's sexual offences, including sexual offences against children.

The offence of grooming for sexual conduct with a child under the age of 16 years in existing section 49B of the *Crimes Act 1958* will be replaced by new section 49M. The new offence largely replicates existing section 49B, with improvements in structure. Under the new structure, the offence provides that a person (A) commits an offence if –

a. A is 18 years of age or more; and
b. A communicates, by words or conduct (whether or not a response is made to the communication), with –
    i. Another person (B) who is a child under the age of 16 years; or
    ii. another person (C) under whose care, supervision or authority B is; and
c. A intends that the communication facilitate B engaging or being involved in the commission of a sexual offence by A or by another person who is 18 years of age or more.

4.2.2 Encouraging sexual activity

The 2016 Act will also expand Victoria's coverage of grooming conduct with new offences of encouraging sexual activity. The existing offences of procuring sexual penetration of a child in sections 58(1), 58(2) and 58(3) of the *Crimes Act 1958* will be replaced with the broader offences of 'encouraging a child to engage in, or be involved in, sexual activity' in new sections 49K (child under 16) and 49L (child aged 16 or 17 and under care, supervision or authority).

The offence in new section 49K provides that a person (A) commits an offence if –

a. A is 18 years of age or more; and
b. A encourages another person (B) to engage in, or be involved in, an activity; and
c. The activity is sexual; and
d. B is a child under the age of 16 years; and
e. A seeks or gets sexual arousal or sexual gratification from –
    i. The encouragement; or
    ii. The sexual activity that is encouraged.

The new offences replace the phrase 'solicits or procures' with the term 'encourage'. This broad term more clearly describes the type of conduct covered by the offence, where solicits or procures is more closely connected with achieving the resulting sexual conduct. Consistent with existing section 58(1), encouragement with no resulting sexual conduct will be an offence, and the offence also applies regardless of whether the accused intends for the sexual activity to occur.

The new offences are also broader than the existing grooming offence as they relate to encouragement of 'sexual activity' which is defined broadly. An interpretative provision in new section 35D provides that an activity may be sexual due to –

a. the area of the body that is involved in the activity, including (but not limited to) the genital or anal region, the buttocks, or, in the case of a female or a person who identifies as a female, the breasts; or

b. the fact that the person engaging in the activity seeks or gets sexual arousal or sexual gratification from the activity; or

c. any other aspect of the activity, including the circumstances in which it is engaged in.

The encouraging offences target sexualised grooming behaviour but the behaviour does not need to be associated with, or followed by, sexual activity, touching or penetration offences with the offender. For some, this behaviour may represent the totality of their offending, for others it is a preliminary process to sexualise the child and leads to more serious sexual offending against children.

The encouraging offences only apply to the conduct of adults. This recognises that the broad coverage of the offence may otherwise criminalise the acceptable sexual exploration of teenagers.

The fault element that the accused 'seeks or gets sexual arousal or sexual gratification' from the encouragement or the sexual activity encouraged narrows the breadth of the offence, and ensures it does not unduly criminalise the discussion of sexual activity with children – for example, a parent asking a child to wash their genital area.

4.2.3 Aged based offence classifications

The 2016 Act will also replace the sometimes complex individual offences with aggravating features, with two principal, aged based, offence classifications:

- sexual offences against a child aged under 16
- sexual offences against a child aged 16 or 17 and under care supervision or authority.

The sexual penetration offences also include an additional age based offence of sexual penetration of a child under the age of 12 – a number of the exceptions and defences that apply to under 16 offences do not apply to this offence. This offence has the highest penalty of the sexual offences against children (25 years) to recognise the significant harm and high culpability of this form of offending when committed against children under the age of 12.

4.3 Historical limitation periods on commencing prosecution of certain sexual offences

The Consultation Paper identifies that in 1992, the New South Wales Government introduced legislation to remove the limitation period which applied to some child sexual offences. The Consultation Paper also refers to the amendments introduced in Victoria in the 2014 Act which removed any immunity from prosecution arising from the time limits on commencing prosecutions of certain sexual offences committed prior to 1991. The Consultation Paper indicates that such limitation periods should be removed with retrospective effect, however such a removal "should not revive any sexual offences that are no longer in keeping with community standards."[28]

Although not discussed in the Consultation Paper, the 2014 Act addressed this issue. The explanatory memorandum to the 2014 Act provides useful information about this reform:

> Clause 10 [of the Bill] provides for a new section 7A in the Criminal Procedure Act 2009. Subsection (1) of this new section removes any immunity from prosecution arising because of the time limits on the prosecution of certain sexual offences against children committed prior to 1991. Those historical time limits on prosecution currently continue to operate even though the legislative provisions creating the relevant offences (dating back to 1928) have been repealed. The effect of this provision is that the immunity from prosecution gained from the existence of the time limit on the commencement of proceedings is removed. This means that these historical sexual offences against children can now be prosecuted. This provision is modelled on that enacted in South Australia in the Criminal Law Consolidation (Abolition of Time Limit for Prosecution of Certain Sexual Offences) Amendment Act 2003. The High Court held in *PGA v The Queen* [2012] HCA 21 that the repealing provision did not create retrospective criminal liability, but did effectively remove the immunity that had applied after a specified period of time from the date of the alleged offence if a complaint had not been made within that period of time.
>
> New section 7A(2) provides that subsection (1) does not apply if the relevant conduct would not constitute an offence under Victorian law applicable immediately before the commencement of clause 10 of the Bill. This means the historical time limits on prosecuting certain sexual offences

[28] Royal Commission, *Criminal Justice Consultation Paper*, (2016), page 212

> against children will not be abolished where the conduct alleged would not constitute a sexual offence under current laws, as at the commencement of clause 10.
>
> New section 7A(3) provides that where a prosecution of a person is enabled by the removal of the times limits by subsection (1), then that person may rely on certain defences that are currently available in relation to equivalent contemporary offences. For example, where a person is charged with a historic sexual offence against a child under 16 years, consent may be a defence where the person believed on reasonable grounds that the other person was 16 years or older. This defence applies to the contemporary offence of sexual penetration of a child under 16 years but did not apply to some of the historic sexual offences against children under 16.

The removal of historical time limits in Victoria does not revive sexual offences which no longer constitute an offence under current laws and extends existing defences to historical offences. This provides an effective mechanism for addressing injustice without inappropriately criminalising certain conduct.

5 Third party offences

5.1 Failure to disclose

On 27 October 2014, the Victorian Government introduced a new offence under section 327 of the Crimes Act, of failing to disclose a sexual offence committed against a child under the age of 16 years. The offence requires all Victorian adults to disclose to police, as soon as practicable, information that leads them to form a reasonable belief that another adult has committed a sexual offence against a child under 16 years, unless they have a reasonable excuse not to do so. Since the commencement of the offence, Victoria Police has recorded 4 counts of the offence, and ≤3 are proceeding to court.[29]

As highlighted in the Consultation Paper, developing an offence of this nature invariably raises complex policy issues with competing considerations, and various options in relation to the scope of the offence were considered, including how the 'reasonable excuse' defence would operate in relation to vulnerable people, such as victims of family violence. The defences and exceptions to the offence assist to confine the operation of the offence. Whether the current defences and exceptions are appropriate in their scope may become more apparent in due course, as police investigate possible further cases. Whilst four matters have been recorded by Victoria Police, no prosecutions for this offence have commenced.

In relation to the age at which a victim should be entitled to decide whether the offence is reported, the age threshold in the Victorian offence (16 years of age) accords with the age that children are generally considered capable of consenting to sexual activity.

In the Republic of Ireland provision discussed in the Consultation Paper, a child aged 14 or above may make this decision. A child aged under 14 years is presumed, unless the contrary is shown, not to have the capacity to make a decision as to disclosure (see section 4 of the *Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012*). While some children aged 14 or 15 will be mature enough to make that decision, arguably others will not be. The Irish provision also requires a judgment to be made about the capacity of a child aged under 14, and this flexibility may need to be weighed against the advantage of having a clear cut age threshold.

The reporting threshold is another important policy consideration. A threshold of 'reasonable suspicion' may require more people to disclose information to police, on more tenuous grounds, and it is unclear how valuable such information would be to police (and what the consequent impact on police resources would be). In addition, given the sensitivities surrounding such offences, a low threshold is likely to be met with opposition from some stakeholders.

As noted in the Consultation Paper, the Victorian Royal Commission into Family Violence recommended that:

> The Victorian Government amend section 327 of the *Crimes Act 1958* (Vic) to require the Director of Public Prosecutions to approve a prosecution for the offence in cases where the alleged offender is a victim of family violence and consider legislative amendments to reconcile section 327 of the Crimes Act and section 493 of the *Children, Youth and Families Act 2005* (Vic) [within 12 months].

The Victorian Government has previously indicated that it will implement all recommendations of the Royal Commission.

[29] To maintain confidentiality sensitive offence counts with a value of 3 or less are reported as ≤3.

Section 493 of the *Children, Youth and Families Act 2005* creates an offence for failing to protect a child from harm. The offence is punishable by a penalty of not more than 50 penalty units or up to 12 months imprisonment. Unlike section 327 of the Crimes Act, the offence in section 493 applies to a person who has a duty of care in respect of a child and covers a broader range of harm to the child (including significant physical, emotional or psychological harm). Section 493 also requires the person to 'take action' (rather than reporting the matter to police). Proceedings for the offence may only be brought after consultation with the Secretary of the Department of Human Services.

The first aspect of the Victorian Royal Commission recommendation (i.e. requiring the consent of the Director of Public Prosecutions before commencing a prosecution) would be relatively straightforward to implement.

The second aspect (reconciling sections 327 and 493) is more complex. The Royal Commission into Family Violence does not discuss which aspects of each offence it prefers, or how the two offences should be reconciled. Rather, it notes the difficult policy considerations that apply in this area, that section 327 appears to have been 'drafted with these competing considerations in mind' and that some of the criticisms of section 327 also apply to section 493.

5.1.1 Whistleblower protection

Victoria's failure to report offence is not confined to the disclosure of institutional child sexual abuse, however there are protections for a person making a disclosure under sections 328 – 330 of the Crimes Act.

Section 328 provides that a disclosure made in good faith:

a. does not for any purpose constitute unprofessional conduct or a breach of professional ethics on the part of the person by whom it is made

b. does not make the person by whom it is made subject to any liability in respect of it

c. without limiting paragraphs (a) and (b), does not constitute a contravention of section 141 of the *Health Services Act 1988*[30] or section 346 of the *Mental Health Act 2014*.[31]

Section 329 gives people who disclose information under section 327 protection from identification in court. This section:

- restricts the admissibility of certain evidence about a disclosure made under section 327(2) that identifies the person who made the disclosure or is likely to lead to such identification
- provides that witnesses must not be asked (or may refuse to answer) questions which might identify the person who made the disclosure, or would or might lead to such identification.

Unless the court or tribunal grants leave or the person who made the disclosure consents. The court or tribunal may only grant leave if satisfied that the interests of justice require that the evidence be given.

Section 330 makes it an offence for a person (other than the person who made the disclosure or a person acting with the consent of that person) to disclose the name of that person or any information that is likely to lead to the identification of that person. However, the provision excludes disclosures to a police officer, the Secretary of the Department of Health and Human Services or any other person as reasonably required for law enforcement purposes.

5.2 Failure to protect

On 1 July 2015, the Victorian Government introduced a new offence of failure to protect under section 49C of the Crimes Act which applies where there is a substantial risk that a child aged under 16 years that is under the care supervision or authority of an organisations will become the victim of a sexual offence committed by an adult associated with that organisation. A person will be guilty of the offence if they knew of the risk, had the authority or responsibility to reduce or remove the risk, and negligently failed to do so.

As at 30 June 2016, no incidents of this offence have been recorded by Victoria Police.

[30] Section 131 of the Health Services Act 1988 imposes confidentiality requirements on certain people connected to relevant health services (including board members, proprietors and employees).

[31] Section 346 of the Mental Health Act 2014 provides that certain people connected to mental health services (including mental health service providers, staff, former staff and volunteers) must not disclose specified health information about a consumer).

5.2.1 Amendments to Victoria's failure to protect offence

The 2016 Act will reform the failure to protect offence in current section 49C of the *Crimes Act 1958* by introducing an improved structure and the following amendments:

- It provides that the offence applies if the accused occupies a position within or in relation to a relevant organisation. The addition of 'in relation to' will ensure that this element is appropriately broad (e.g. to include a person on a board of management).
- The definition of 'person associated with a relevant organisation' no longer includes 'office holder', as that term is adequately covered by the other positions listed in the (non-exhaustive) definition.
- The definition of 'sexual offence' no longer includes historical offences, as this offence is not intended to have retrospective effect, or an offence against the section itself.

As the Royal Commission has noted, section 49C is targeted quite narrowly. Confining the offence to those with the requisite 'power or responsibility', the requirement that the person 'know' of the 'substantial risk' and the criminal negligence standard all assist to limit the scope of the offence.

6 Judicial directions and informing juries

6.1 The Jury Directions Act 2015

The Victorian Government has introduced significant reforms in respect of jury directions through the *Jury Directions Act 2013* and the *Jury Directions Act 2015*. The jury direction reform process is ongoing, and so far the enacted reforms have been well received by stakeholders.[32]

As noted by the Royal Commission, Victoria has abolished corroboration directions in most cases and has specific provisions on directions on delay and credibility, and delay and significant forensic disadvantage. The *Jury Directions Act 2015* also has provisions on unreliable evidence that are based on the previous *Evidence Act 2008* provisions, with minor refinements.

The Victorian Government has received feedback from stakeholders which suggests that these specific reforms (together with the other reforms in the Jury Directions Act, such as the jury direction request process in Part 3 and the summing up provisions in Part 8) are working effectively to encourage judges to give shorter, more relevant and helpful directions, and to enhance fairness in sexual offence trials in Victoria. This reform process is ongoing, and future reform topics may include directions that commonly arise in sexual offence cases, such as directions on the evidence of child witnesses and victims, and general misconceptions in sexual offence cases.

6.1.1 Codifying judicial directions

Part 3 of the Jury Directions Act promotes a new culture in Victorian criminal trials, involving discussions between the trial judge and counsel. For example, this Part requires counsel to request which directions (both common law directions and directions covered by the Act) they want given in a trial. A trial judge must give a requested direction unless there are good reasons for not doing so, and must not give a direction that has not been requested unless there are substantial and compelling reasons to do so.

However, the Jury Directions Act only reforms specific jury directions that are creating problems in Victorian courts (such as the Kilby/Crofts and Longman directions). It does not codify common law directions that are working effectively. Accordingly, while additional provisions on specific directions are likely to be added in future, the Jury Directions Act will not fully codify jury directions in Victoria. Complete codification of jury directions would be a substantial undertaking and it is not clear that there would be any significant benefit from such an expansive approach.

6.2 Judicial education

The Judicial College of Victoria is responsible for judicial education generally and the Jury Directions Act also educates the judiciary about sexual abuse by addressing common misconceptions in sexual offence trials. These provisions are based on research and academic commentary.

[32] The Jury Directions Act 2013 Act was explained in the department's report Jury Directions: A New Approach (January 2013). Reforms based on the Weinberg Report recommendations formed part of the second tranche of reforms in the Jury Directions Act 2015.

In particular, the directions on consent address common misconceptions about sexual offence victims, including child victims. For example, section 46 (which was recently amended by the 2016 Act) provides that experience shows that:

- People who do not consent to a sexual act may not be physically injured or subjected to violence, or threatened with physical injury or violence.
- People may react differently to a sexual act to which they did not consent and there is no typical, proper or normal response.
- People who do not consent to a sexual act may not protest or physically resist the act.

Section 47, on reasonable belief in consent, addresses unwarranted assumptions that may be held by accused persons towards victims. This section includes a direction that 'a belief in consent based solely on a general assumption about the circumstances in which people consent to a sexual act (whether or not that assumption is informed by any particular culture, religion or other influence) is not a reasonable belief'.

The Jury Directions Act also contains directions on family violence under Part 6. These provisions address common misconceptions about what may constitute family violence and the response of victims. For example, section 60 specifically provides that sexual abuse is a form of family violence and provides that it is not uncommon for a victim of family violence not to report family violence to the police or seek assistance to stop the violence.

As noted above, future amendments to the Jury Directions Act 2015 may address other misconceptions relevant to sexual offence cases.

6.3 Juries' understanding and reasoning

The Victorian Government considers that a range of methods may be effective for improving jurors' understanding of child sexual abuse, and that combining methods may be most effective.

Whilst the use of expert evidence may be useful in particular cases to help juries understand the nature of sexual offending, it can be costly and difficult to obtain, particularly in regional areas. On the other hand, jury directions reform has a broader application and can be as effective as evidence from an expert witness. As discussed above, the Jury Directions Act reforms specific jury directions with a view to improving understanding of child sexual abuse (and sexual abuse more generally) so that jurors approach the victim or complainant's evidence with an open mind. Future reforms may include directions specific to child witnesses or victims.

In relation to timing, research indicates that it is helpful for directions on particular evidence to be given at the time that the evidence is given, and then repeated later in the trial. While Part 3 of the Jury Directions Act focuses on directions at the end of the trial, section 10(2) allows for 'directions in running', by clarifying that Part 3 does not preclude the giving of directions, consistent with the Act, at any time before the close of evidence.

Victoria is also trialling the use of a general Jury Guide. The Jury Guide is a short booklet given to jurors at the start of a trial that contains information relevant to criminal trials. It is designed to provide juries with practical guidance and support, and aims to:

- Reinforce important information on criminal trials (e.g. by reminding jurors not to conduct their own investigations).
- Complement the oral directions given by trial judges at the start of trials.
- Provide practical guidance to jurors on how to conduct their deliberations.

The guide was developed by an expert Advisory Group that advises on jury directions reforms. The Advisory Group is chaired by the Department of Justice and Regulation and includes judges from the Court of Appeal, Supreme Court and County Court, and representatives from Victoria Legal Aid, the Office of Public Prosecutions, the Criminal Bar Association and academics. The Advisory Group developed the Guide in recognition of research which demonstrates that many jurors feel that they would be assisted by written information about the trial process.

The guide will be evaluated after a 12 month trial. If the guide does prove useful, future consideration could be given to educational materials on specific issues such as sexual abuse.

7 Prosecution responses

7.1 Principles

The Royal Commission has proposed principles to inform prosecution responses, charging and plea decisions and these are supported by Victoria Police. In Victoria, steps have already been taken to improve communication between prosecutors and police in regard to charging decisions, with the implementation of a Prosecution Frontline Support Unit. This unit supports the management and compilation of summary jurisdiction briefs of evidence by offering legal advice, and operational planning support to ensure that briefs are timely and of high quality.

The Victorian Government recognises the value that witness assistance services can provide to both child and adult witnesses as a means of supporting them to provide their best evidence to the court.

7.1.1 Specialist courts and prosecution units

The advantages of a specialist approach to the handling of sexual offence cases requires balance with the need to ensure staff wellbeing and the efficient processing of non-sexual offence cases. Whilst the Specialist Sexual Offence Unit of the Office of Public Prosecutions was positively evaluated in 2011, its scope has more recently narrowed to focus on the most serious and complex cases, with the remainder of sex offence cases distributed to general prosecution staff. The Victoria Legal Aid specialist sexual offences team was dissolved in 2014.

The Children's, Magistrates' and County Courts each manage sexual offence cases in Victoria through specialist sexual offences lists, serviced by specialist sexual offence prosecutors who operate from the Melbourne Prosecutions Unit– however, this is not available outside of Melbourne. The impact on delay of this specialist approach is difficult to quantify given the other factors involved – for example, the short statutory timeframes for the listing of sexual offence cases. Nonetheless, time to trial for criminal offences generally (not just sexual offences) has been reducing over recent years in the County Court.

7.1.2 Early allocation of prosecutors

The Consultation Paper suggests that early allocation of prosecutors will contribute to a reduction of delay. Whilst it is important to focus on the early allocation of lawyers for the prosecution, it may be equally important to ensure that lawyers for accused persons, the vast majority of whom are publicly funded, are also engaged at an early stage, have analysed the evidence and are able to narrow the issues in dispute and provide authoritative advice about settlement. Mechanisms that further 'front load' funding arrangements and strengthen expectations that, early in proceedings, defence practitioners analyse briefs and conduct negotiations could also be considered.

7.1.3 Early guilty pleas

A range of statutory and court case management requirements are in place in Victoria to encourage early guilty pleas. Existing measures include a sentence indication scheme in the higher courts that is limited to an indication of whether a court would or would not (as the case may be) be likely to impose on the accused a sentence of imprisonment that commences immediately.[33] Given most sentences for sexual offences that are finalised by the higher courts result in immediate imprisonment on conviction, the limited scheme may not have a strong impact on early resolution of sexual offence cases in particular. A broader sentencing indication scheme operates for less serious offences dealt with in the Magistrates' Court whereby the court can indicate that, if the accused pleads guilty, the court would be likely to impose a sentence of imprisonment that commences immediately or a sentence of a specific type.

Other statutory mechanisms that encourage early guilty pleas include statutory recognition of an early plea as a factor that will mitigate sentence[34] and the requirement for courts to announce the sentence that would have been imposed but for a plea of guilty having been entered.[35]

[33] *Criminal Procedure Act 2009* (Vic), s 207
[34] *Sentencing Act 1991* (Vic), s 5
[35] *Sentencing Act 1991* (Vic), s 6AAA

7.1.4 Committal hearings

Committal proceedings may assist in the early resolution of some matters and help narrow issues in dispute, although, as noted by the Royal Commission, committal hearings build in some additional delay. Much of the preliminary case management work in a committal proceeding (for example, concerning preparation of the prosecution brief) will occur no matter which court the case is initiated in. Shifting this part of the committal process to trial courts may merely shift the burden (and delay) to a different court.

Removing the committal hearing process may add some delay to the trial process. However, in cases where this examination is short and can be conducted by trial counsel, the delays should be less significant in each case when considered separately. However, the net effect of such a change if it occurred in many cases, would need to be considered in terms of delay.

In Victoria, cross-examination of a complainant who is a child or person with a cognitive impairment is currently not permitted at committal hearings.[36] In such cases, strict limits apply to the cross-examination of other witnesses[37] and a there is a requirement that the committal proceeding is determined within two months after the final committal mention hearing.[38]

7.1.5 Case management and early identification of the issues

The Criminal Procedure Act imposes a range of requirements on parties to disclose evidence, consider and narrow issues and be prepared to engage in structured discussions in both summary and indictable stream cases. The Criminal Procedure Act includes provisions regarding:

- Initial and ongoing disclosure of the prosecution case, including mechanisms for an accused person to seek, and the court to order, further disclosure.[39]
- Disclosure of the case of the accused, including a written response to the prosecution opening in indictable stream cases that identifies the acts, facts, matters and circumstances with which issue is taken and the basis on which issue is taken.[40]
- Required out of court discussions.[41]
- Express case management powers.[42]

Various practice directions compliment these statutory requirements. For example, the County Court Criminal Division Practice Note[43] governs a range of additional pre-trial matters including setting out the questions for parties to be prepared to answer during preliminary hearings, filing and timing requirements for applications, arrangements for the use of CCTV or recorded evidence, and rules for subpoenas relating to confidential communications.

Case management procedures adopted by each of the Courts in Victoria can be an effective means to encourage early guilty pleas. Whilst there may always be some accused people who 'delay the inevitable' by withholding a guilty plea until the last moment, early engagement by a judicial officer who is able to comment, with the authority of the court, on the strength of the prosecution case may help bring such guilty pleas forward. Similarly, early and informed judicial intervention can assist with reconsideration of charging decisions by the prosecution.

7.1.6 Trial listing practices

A major ongoing project for the County Court is a 'ground up review' of listings practice to further reduce delay between charge and finalisation.[44] This review will consider the practice of 'over listing' which, as identified in the Consultation Report, ensures that there is always a trial ready to proceed, but can impact on the efficient use of prosecution and defence resources who either wait in a 'reserve list' or have their cases not reached.

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[36] *Criminal Procedure Act 2009* (Vic), s 123
[37] Leave to cross examine a witness at committal is only permitted if the accused has identified an issue to which the proposed questioning relates and has provided a reason why the evidence of the witness is relevant to that issue, and the Court is satisfied that cross-examination of the witness on that issue is justified. If leave is granted, the court must identify each issue on which the witness may be cross-examined. Section 124, *Criminal Procedure Act 2009.*
[38] *Criminal Procedure Act 2009* (Vic), s 99
[39] Division 2 of Part 3.2 and Part 4.4, *Criminal Procedure Act 2009.*
[40] Division 3 of Part 3.3, and sections 55(3)(c) and 183, *Criminal Procedure Act 2009,*
[41] Section 54 and 118, *Criminal Procedure Act 2009.*
[42] For example, sections 55 and Part 5.5, *Criminal Procedure Act 2009.*
[43] PNCR 1-2015.
[44] County Court of Victoria, Annual Report, 2014 – 2015, page 18.

7.1.7 General principles

What is essential with any case management process is that there is an alignment of resources and effort between the courts, prosecution and defence. This means that the courts, prosecution and defence need to engage with each other cooperatively so that each entity is able to maximise the results of their effort and operate more efficiently.

One of the challenges in making recommendations to address delay is that there can often be difference administrative or cultural barriers that have shaped procedures in each jurisdiction. This provides the context in which legislative schemes operate but may not be apparent from the legislative scheme. As a result, some mechanisms that work in some jurisdictions may not work in other jurisdictions.

Statements of general principle from the Royal Commission about delay reduction may assist different jurisdictions to adapt existing mechanisms and structures. In devising principles it may be important to expressly include each component of the criminal justice system, including, for example, defence practitioners, legal aid agencies, investigators, in addition to prosecutors and the courts.

Existing structures and resource allocation may currently conspire with human nature to relegate meaningful discussion about a case to the 'door of the court'. It may be helpful for any general principles to encourage each component of the criminal justice system to focus on outcomes or results (for example, earlier resolution), rather than mere compliance with court processes.

Principles may assist regarding the allocation of resources to early stages of proceedings as discussed above. Principles may also guide the implementation of enforceable requirements and incentives for early engagement between the parties well in advance of a court hearing. Early engagement may include proper disclosure and analysis of the brief of evidence by both prosecution and defence that will enable the most to be made of each court appearance.

Achieving earlier identification of issues in dispute may help to reduce court time in the committal hearing or trial system (including case management), preparation and appearance costs of the parties, and negative impacts on victims, witnesses, investigators and the accused.

8 Evidence of victims and survivors

8.1 Protections for witnesses in Victorian criminal proceedings

It is important in our adversarial criminal justice system for the court to have available the highest quality evidence, and for each party to be able to properly test the other party's evidence. The use of in person viva voce evidence, without the use of any alternative arrangements, is generally considered the preferable course to elicit such evidence.

In some cases, however, there is a clear policy justification to depart from this course. In particular, the giving of evidence can be a particularly distressing experience for some witnesses because of the nature of the criminal proceedings, such as where they relate to sexual or violent offending. This may result in unnecessary trauma to the witness, discourage the witness from giving evidence, and can affect the quality of the evidence.

Alternative arrangements may also be necessary to assist particular witnesses, such as children or witnesses with a cognitive impairment, to give accurate evidence and participate in the court process. Where alternative arrangements are made available, it is important that this is done on a principled basis having regard to policy justification and the overarching goal of ensuring that the highest quality evidence available is before the court. Regard must also be given to rights of the accused to a fair trial, which includes having the opportunity to properly test the Crown's case.

Victoria has a number of protections which apply in criminal proceedings to the evidence of certain classes of witness. These are contained in Part 8.2 of the Criminal Procedure Act, and include:

- Restrictions on the questioning of complainants and the admissibility of certain evidence in sexual offence cases.[45] For example, the court must not allow questions as to the general reputation of the complainant with respect to chastity.[46]
- Prohibiting an accused personally cross-examining certain witnesses in sexual offence or family violence matters.[47]

[45] *Criminal Procedure Act 2009* (Vic), Division 2 of Part 8.2.
[46] *Criminal Procedure Act 2009* (Vic), s 341.

- Allowing the court to use alternative arrangements for giving evidence by witnesses in sexual offence or family violence matters.[48]
- Allowing the evidence-in-chief of children and cognitively impaired witnesses to be pre-recorded in sexual offence and assault matters.[49]
- Taking the evidence of a child or a person with a cognitive impairment in sexual offence matters during a recorded 'special hearing'.[50]
- Allowing previously recorded evidence of a complainant in sexual offence trials to be re-used in specified related proceedings, including re-trials and appeals.[51]

8.1.1 Eligibility for, and use of, special measures and how special measures can be improved

The process for giving evidence (particularly cross-examination) can be traumatic for witnesses and may not always be the most effective means of eliciting the best quality evidence. Division 4 of Part 8.2 of the Criminal Procedure Act includes various alternative arrangements that may be made available to witnesses in criminal proceedings to assist them when providing their evidence.

The alternative arrangements are available to all witnesses in proceedings relating to sexual offending or family violence – they are not limited to complainants, child witnesses, or witnesses with a cognitive impairment. These alternative arrangements include: [52]

- Permitting evidence to be given by closed-circuit television (CCTV).
- The use of screens to remove the accused from the direct line of vision of the witness.
- Permitting the witness to be accompanied by an emotional support person while giving evidence.
- Permitting only specified persons to be present while the witness is giving evidence.

Where proceedings relate to sexual offences, complainants must give their evidence via CCTV, unless the complainant chooses to give his or her evidence in the courtroom.[53] Where the complainant does elect to give evidence in the courtroom, the Criminal Procedure Act requires that the court direct that he or she be screened from the accused, unless the complainant elects otherwise.[54] The court must also direct that an emotional support person be permitted to be beside the complainant in a sexual offence matter while he or she gives evidence, unless the complainant elects otherwise.[55]

The use of CCTV facilities has proven to be beneficial as it can reduce the trauma experienced by a witness when giving evidence, and also ensures that the complainant will be separated from the accused throughout the trial. However, the use of CCTV means that a jury will not be able to as closely observe the physical demeanour of the witness, including the various non-verbal cues that may be exhibited through body language. This may limit a jury's full understanding of the testimony, particularly where CCTV facilities and infrastructure are inadequate.

It is critical to the success of the trial process that the jury receive the best possible evidence, and that alternative arrangements which facilitate the witness giving evidence in front of the jury, such as limiting who may be in the courtroom, are considered where appropriate.

8.1.2 Problems with special measures

Victoria Police acknowledges the need for police to ensure VARE interviews are of the high quality for use as evidence in court proceedings, by avoiding peripheral details and focusing on the key evidence to prove charges. However, the interview must serve the dual purpose of informing the investigation (and indeed providing the mandate to investigate) as well as forming the evidence-in-chief, should the matter proceed to court. At the outset, the investigator may not be in a position to determine what is remembered by the child as central to their experience as a victim, and therefore the key components of the case are not obvious. Therefore, by necessity, investigators need to be allowed some scope in

[47] *Criminal Procedure Act 2009* (Vic), Division 3 of Part 8.2.
[48] *Criminal Procedure Act 2009* (Vic), Division 4 of Part 8.2.
[49] *Criminal Procedure Act 2009* (Vic), Division 5 of Part 8.2.
[50] *Criminal Procedure Act 2009* (Vic), Division 6 of Part 8.2.
[51] *Criminal Procedure Act 2009* (Vic), Division 7 of Part 8.2.
[52] *Criminal Procedure Act 2009* (Vic), s 360.
[53] *Criminal Procedure Act 2009* (Vic), s 363.
[54] *Criminal Procedure Act 2009* (Vic), s 364.
[55] *Criminal Procedure Act 2009* (Vic), s 365.

terms of the type of information elicited, in order to fully investigate allegations and eventually produce the best evidence on behalf of the victim to the court.

Whilst this should not result in disadvantage to the victim, the Royal Commission's Complainant's Evidence Research clearly demonstrates that this is in fact often the result (for example, by cross-examination on details that are not central to the case to draw out unreliable, conflicting evidence from the witness, to cross-examine victims on inconsistencies and undermine their overall credibility as a witness).[56]

Victoria Police can pursue improvements in their interview practice, but this may have limited impact on victims being able to provide their best evidence to the court if there are no corresponding reforms in how the VARE investigative interview is used in the court context. For example, in a simulation study research focusing on the effect of cross-examination on children's accuracy found that even though 9 and 10 year old children were more likely to change incorrect responses than correct ones, they nonetheless changed over 40% of their correct responses, and cross-examination still exerted a significant negative effect on their overall accuracy levels.[57]

8.1.3 The possibility of recording all of an eligible witness' evidence

Allowing evidence to be recorded outside of the normal trial process, such as in an interview with police or during a special hearing, allows evidence to be given in a less intimidating environment and can improve the experience of witnesses. Where recorded evidence can be used in later proceedings, additional delay and unnecessary trauma from repeating evidence can also be reduced or avoided. In addition, the recording of all of a witness's evidence may further facilitate the prosecution of the accused which may otherwise be discontinued if a witness is unable to, or does not wish to, give evidence at trial or repeat his or her evidence on appeal.

Part 8.2 of the Criminal Procedure Act allows for the whole of a witness's evidence (that is, including cross-examination and re-examination) to be recorded, and Division 6 of Part 8.2 provides for 'special hearings' for the whole of the complainant's evidence to be recorded either before or during the trial.[58] These hearings may utilise evidence-in-chief which is recorded separately, such as during a police interview.[59] The Division applies for criminal proceedings relating to sexual offending where the complainant is under 18 years of age or has a cognitive impairment.[60] Where the Division applies, the complainant must give their evidence at the special hearing, unless the complainant wishes to give direct testimony.[61] The recording from the special hearing may be used in appeals, retrials, and other specified related proceedings.[62]

Although the recording of a witness's evidence at a separate hearing can reduce the adverse effect of giving evidence upon the complainant and increase the quality of the complainant's evidence, it is important that doing so does not interfere with the accused's right to a fair trial and the accused's ability to fairly test the evidence.

In the case of special hearings, the accused and his or her legal practitioner are to be present in the court room (although the accused is not to be in the same room as the complainant when the evidence is being taken), and the accused is entitled to see and hear the complainant while the complainant is giving evidence and to have at all times the means of communicating with his or her legal practitioner.[63]

The Criminal Procedure Act also provides that where a witness's evidence is given by CCTV during the course of the proceedings, outside of a 'special hearing', the whole of the evidence is to be recorded.[64] The Criminal Procedure Act provides that this, or other recordings of a complainants' evidence, is admissible in an appeal, a retrial, or specified related proceedings.[65]

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[56] M Powell, N Westera, J Goodman-Delahunty and A Pichler, *An evaluation of how evidence is elicited from complainants of child sexual abuse*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016
[57] R Zajac and H Hayne, *The Negative Effect of Cross-examination Style Questioning on Children's Accuracy: Older Children are Not Immune*, (2006) 20 Applied Cognitive Psychology 3, 3.
[58] See the discussion below regarding some resourcing issues in relation to special hearings.
[59] *Criminal Procedure Act 2009* (Vic), ss 367.
[60] *Criminal Procedure Act 2009* (Vic), ss 369-70.
[61] *Criminal Procedure Act 2009* (Vic), s 359(2).
[62] *Criminal Procedure Act 2009* (Vic), ss 368, 374.
[63] *Criminal Procedure Act 2009* (Vic), s 372.
[64] *Criminal Procedure Act 2009* (Vic), s 362(3).
[65] *Criminal Procedure Act 2009* (Vic), s 379.

In order to protect the rights of the accused, the court in a later proceeding may only admit the recording if it is in the interests of justice to do so, including having regard to the impact on the accused,[66] and the accused is entitled to seek leave to cross-examine the complainant.[67]

8.1.4 Any resourcing issues in improving and extending special measures

Some victims of child sexual offences are more likely to be vulnerable as a result of their experience and this can influence their ability to provide the level of detail that police require regarding painful and often highly personal details. As identified in the Complainant's Evidence Research, video recording of the investigative interview and using this as evidence-in-chief for a subsequent court hearing improves the quality and quantity of the evidence presented.

The experience of Victoria Police suggests that conducting a video-recorded interview allows the interviewer to respond to the victim in a sensitive and supportive way. As a consequence, in comparison to taking a dictated statement, video-recording ensures a vastly superior interview experience for the victim. As identified by the Royal Commission, taking a statement can result in recording errors, and police have also identified the potential for these errors to occur through word exchange and the loss of detail as the victim seeks to minimise the effort expended. For these reasons, Victoria Police considers that there are benefits in adult victims of child sexual abuse being eligible for pre-recorded evidence in the form of a video recorded investigative interview, under similar provisions that apply to children and persons with a cognitive impairment in Victoria.

However, extending the use of pre-recorded evidence may have significant resource implications. Alternative arrangements and the use of recorded evidence necessarily places a demand upon the court's, police's, and parties' resources. For example:

- Expanding the use of recorded or CCTV evidence may require the use of additional recording equipment, remote witness facilities, and support staff.
- Expanding the use of pre-recorded examination-in-chief may require additional people to be trained and authorised to take recorded evidence-in-chief.
- A greater use of special hearings may introduce additional layers of complexity into the case management of proceedings and cause delay if special hearings are required within a particular timeframe and in advance of the final hearing of a matter (which may, in turn, cause additional delays for other types of cases).

In Victoria, special hearings were initially introduced as a pre-trial process. The 2011 Sexual Assault Reform Strategy evaluation[68] found that the conduct of special hearings as a separate pre-trial process contributed to increased delays in the prosecution of other sexual offence cases and placed an onerous burden on court resources. Special hearings also contributed to court delay by effectively doubling the time that would be required if the complainant were to give evidence during the trial. This is because the special hearing must be recorded, which will often take one to two days, and then the recording is played to the jury once the trial has commenced.

The *Criminal Procedure Amendment Act 2012* introduced amendments to allow for special hearings to be conducted during the course of the trial.[69] The Court must consider a number of factors in determining when the special hearing should be held, which enables the court to consider the needs of the complainant.[70]

Expanding the use of recorded evidence may place an additional burden upon the prosecution to edit recordings, the defence to review edited recordings, and court time may be required to adjudicate disputes about editing. On the other hand, alternative arrangements and the use of recorded evidence may also result in efficiency gains, if, for example, witnesses are not required to attend court and repeat evidence, or disruptions and inadmissible questioning can be edited out.

To effectively manage the implementation of new technology to support improvements to special measures, the Royal Commission could consider whether to introduce national standards for the technical aspects recording evidence to ensure that evidence of this nature is maintained at an acceptable level.

[66] *Criminal Procedure Act 2009* (Vic), s 381(1)
[67] *Criminal Procedure Act 2009* (Vic), s 385.
[68] Success Works (2011), *Sexual Assault Reform Strategy: Final Evaluation Report* (report prepared for the Department of Justice, Victoria), [4.6.1.2].
[69] *Criminal Procedure Act 2009* (Vic), s 1A.
[70] *Criminal Procedure Act 2009* (Vic), s 1B.

8.1.5 Whether competency testing should be reformed

Under the Evidence Act, a court may inform itself 'as it thinks fit' as to the competency of a witness, including children and persons with a cognitive impairment.[71]

The level of comprehension of child witnesses and witnesses with cognitive impairments varies widely. Accordingly, it may be difficult to prescribe a method by which a court is to determine the witness' competency — what may be an appropriate method with respect to one witness may not be appropriate in respect of another, despite both witnesses seemingly having similar characteristics. There are advantages in allowing a court to adopt a flexible approach to inform itself as to a witness' competency in a way which is the most appropriate in the circumstances.

At the same time, it is important that courts' assessments of witnesses have regard to specialist knowledge and expertise, and judicial officers be given guidance as to the most effective and accurate means of determining a witness' competency.

In Victoria, the court may obtain information about a witness' competency from a person who has relevant specialised knowledge based on the person's training, study, or experience.[72] The Judicial College of Victoria has also published a practical guide to testing competency of child witnesses, developed jointly with the specialist Child Witness Service. The guide identifies a number of overarching principles to guide the questioning of children, and suggests a preferred processes and content for such questioning. It is published online and is available to all judicial officers and practitioners.[73]

It is also acknowledges that the findings from the Complaint Evidence Research suggest that competency testing for children could be simplified.[74]

9 Appeals

9.1 The prosecutor's right to bring interlocutory appeals

Victoria is one of four jurisdictions in Australia that provides for a general right of appeal by the prosecution against interlocutory decisions made during the course of a trial. This is a recent change brought about by a general review of Victorian criminal law, and has worked well in the Victorian jurisdiction.

The principal purpose of reviewing pre-verdict appeals procedures is to ensure that trials are conducted 'correctly' the first time, and reduce the number of successful appeals and re-trials. A secondary purpose is to provide an opportunity to correct errors in the trial court that, if left uncorrected, would destroy or substantially damage the prosecution case.

The difference between an interlocutory appeal and a prosecution appeal against an acquittal is that an interlocutory appeal may enable a decision to be corrected before or in the course of the trial. It does not allow the prosecution to appeal against an acquittal verdict that comes at the end of a trial. An interlocutory appeal essentially brings forward an issue that may otherwise become part of a post-conviction appeal. Typically, it deals with only one issue, unlike an appeal against conviction that may involve many issues.

An interlocutory appeal effectively brings forward the appeal court's consideration of an issue. It does not provide two appeals on the same issue. Therefore, if the appeal court determines a matter on an interlocutory appeal, that issue in practice will not be re-litigated in the appeal court at the conclusion of the trial proceedings. However, an interlocutory appeal does not prevent an appeal on any other matter at the conclusion of trial proceedings.

Any interlocutory appeals procedure should interfere as little as is reasonably possible with pre-trial and trial processes and should not itself become a significant cause of delay.

Advantages of interlocutory appeals include:

[71] *Evidence Act 2008* (Vic), s 13(8).
[72] *Evidence Act 2008* (Vic), s 13(8).
[73] Judicial College of Victoria, 'Uniform Evidence Manual', Appendix A. Available at <http://www.judicialcollege.vic.edu.au/eManuals/UEM/index.htm#29832.htm>.
[74] M Powell, N Westera, J Goodman-Delahunty and A Pichler, *An evaluation of how evidence is elicited from complainants of child sexual abuse*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016

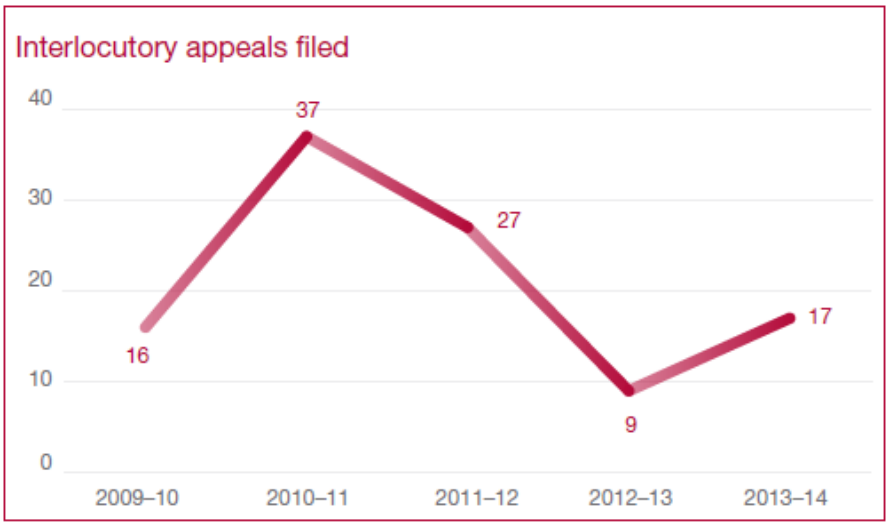
- Reducing the number of retrials, thereby sparing the participants in trial proceedings of a retrial (including survivors - which as the Consultation Paper points out, can be particularly affected by lengthy criminal justice processes).
- Avoiding trials because due to the resolution of a key issue (e.g. concerning the admissibility of certain evidence) may result in a plea or a withdrawal of charges.
- Preventing the acquittal of an accused because of an error in the trial (particularly when the accused would likely have been convicted in a properly conducted trial).
- Preventing the conviction of an accused because of an error in the trial (particularly when the accused would likely have been acquitted in a properly conducted trial)[75]
- Promoting community confidence in trial processes by addressing problems in a trial before a verdict is given
- Increasing the efficiency of the criminal justice system.

Potential disadvantages of broadening interlocutory appeal rights may include:

- Increasing delay in completing trials, particularly if the appeal court is not able to hear a matter quickly where an appeal is commenced after a jury has been empanelled
- The risk of proceedings being fragmented once a jury has been empanelled – it may be difficult for a jury to continue hearing a trial if there is a significant break in trial while the appeal is heard
- Proceedings may be delayed or frustrated if it becomes too easy to commence appeal proceedings
- A possible increase in an appeal court's workload.

In Victoria, the number of interlocutory appeals filed since the introduction of these laws in January 2010 is set out below. The graph below demonstrates that the number of interlocutory appeals filed annually since 2009–10 has decreased in its last three years of operation.[76] The commencement of interlocutory appeals coincided with the introduction of the Evidence Act, which was the source of a number of interlocutory appeals in 2009–10 and 2010–11.

Table 1: Interlocutory appeals filed



9.2 The Victorian model for interlocutory appeals

In Victoria, the interlocutory appeals regime applies to both pre-trial and trial decisions of a trial judge. There is an important difference between interlocutory appeals commenced pre-trial and during trial. Appeals concerning decisions made during a trial will always be urgent (as a jury will be waiting). Such appeals should be reserved for exceptional situations and be more limited.

[75] Although this situation will currently be remedied in a post-conviction appeal, there are benefits in avoiding a wrong conviction at the earliest available stage, especially for the reasons outlined in the consultation paper.
[76] Interlocutory appeals commenced on 1 January 2010. Therefore the 2009–10 period covers only 6 months of operation (on an annual basis that would equate to 32 appeals).

Restricting access to appeals during trial should not encourage earlier resolution of important issues. There may be a forensic advantage to the accused in testing a ruling pre-trial. If the accused is successful on the point on an interlocutory appeal then that will work to their advantage in trial. However, success on the same point on a post-conviction appeal may not result in a retrial given that the error may not amount to a substantial miscarriage of justice.

Such early resolution is to be encouraged as better case preparation assists the courts in managing court lists and is consistent with the new approach to pre-trial issues. To achieve this in Victoria, extra hurdles have been added to certification and leave when they are sought after the trial has commenced.

Interlocutory appeals only apply to trial proceedings for indictable offences in Victoria, and can be taken against any "interlocutory decision", which is defined broadly. Interlocutory appeals concerning admissibility of evidence are limited to evidence which, if excluded, would eliminate or substantially weaken the prosecution case. Further, it is more difficult to appeal during trial, than pre-trial; however, both types of appeal require certification by the trial judge and leave from the appeal court.

The regime in Victoria was developed following consideration of the NSW scheme, which has been in place since 1987. There are similarities between the two regimes but also some important differences. The NSW scheme was introduced as a way of managing increasing numbers of applications for stays of proceedings based on an abuse of process, and those applications created significant delays. Interlocutory appeals appear to have been effective in reducing the rate of retrials.

A key feature of the NSW system is that it applies to 'an interlocutory judgment or order'. The definition of that phrase has been the subject of a great deal of judicial scrutiny and has resulted in some uncertainty concerning the issues that are properly the subject of interlocutory appeals. Three important features of the NSW system that have not been followed in Victoria are:

- the restriction of appeals to judgments or orders
- the different treatment of the accused and the prosecution on whether leave to appeal is required, and as to the ability to appeal against key evidential points
- the approach to judge certification.

The approach in Victoria also provides stronger restrictions on the ability to appeal during trial (including a list of mandatory factors for granting leave).

In order to avoid the sorts of technical arguments that have arisen in NSW as to whether an issue can be appealed, the Victorian system adopts a very broad approach to the question of what can be appealed (i.e. the definition of an 'interlocutory decision'). This allows a leave decision to focus on whether it is genuinely in the interests of justice to allow the issue to be appealed, rather than on technical arguments as to whether a particular decision is a 'judgment' or 'order'.

The NSW provisions require the accused to seek leave to appeal, but not the prosecution. Similarly, the prosecution is granted a right of appeal against significant evidential rulings concerning the prosecution's case but the accused is not. Contrary to that approach, in Victoria, the parties have equal statutory access to appeals. In particular, leave is required in all cases to allow the Court of Appeal to control the use of interlocutory appeals on a consistent basis.

In NSW, the judge may certify that a judgment or order is suitable for an interlocutory appeal. Such certification is neither necessary nor sufficient and therefore adds an extra layer of proceedings for no discernible purpose. Instead, in Victoria, certification is a necessary precondition to the grant of leave to appeal, but is limited to specific threshold issues which the certifying judge is best placed to decide.[77]

9.3 Inconsistent verdicts

The Consultation Paper has given consideration to the case law regarding 'inconsistent verdicts' and has canvassed the various difficulties in this area in relation to appeals. However, it may also be worth considering jury directions as it relates to these difficulties. It is arguable that there may be situations in which juries arrive at supposedly inconsistent verdicts because they are ill informed or have misunderstood instructions, and this may be addressed through adequate jury directions. For example, research has demonstrated that people make and recall memories differently, and that genuine accounts often contain differences.

[77] For further information about the Victorian interlocutory appeals regime, see Criminal Law – Justice Statement, Department of Justice, *Criminal Procedure Act 2009 Legislative Guide* (February 2010) and Philip Priest QC and Bruce Gardner, 'An Appealing Procedure' (December 2009) (83) 12 *Law Institute Journal* 32.

Further, the normal variability of memory can be further exacerbated by the impact of trauma, such as that experienced by victims of sexual assault. However, these issues are not commonly understood, and instead, juries may be under the misconception that a true victim will always give a complete and consistent account of a sexual offence. Consequently, defence counsel will often focus on differences in account. Where there are differences in account or inconsistent versions of events from the same witness, a jury should be directed to consider the evidence on an informed basis, which may include directions explaining that, for example, people may not remember all the details of a sexual offence or may not describe a sexual offence in the same way each time. This may avoid the issues of inconsistent verdicts at an earlier stage.

10 Tendency and coincidence evidence and joint trials

10.1 Position prior to adopting Uniform Evidence Law

In 1997, prior to introducing the Evidence Act, Victoria introduced sections 372 and 398A into the Crimes Act to address the problem of sexual offence trials involving multiple complainants being regularly severed due to the inadmissibility of propensity evidence.

Section 372 provided a presumption of joinder in cases involving two or more charges for a sexual offence. Section 398A provided that propensity evidence that was relevant to a fact in issue was admissible where, in all the circumstances, it was just to admit the evidence despite any prejudicial effect it may have on the person charged with the offence. The provision also modified the common law by providing that the possibility of a reasonable explanation consistent with the innocence of the accused was not relevant to the question of admissibility.

On 1 January 2010, the Criminal Procedure Act and the Evidence Act commenced in Victoria. This resulted in:

- the re-enactment of section 327 in sections 193 and 194 of the Criminal Procedure Act
- section 398A being replaced by the uniform evidence laws on tendency and coincidence in sections 97 and 98 of the Evidence Act.

At that stage, the cases on the admissibility of tendency and coincidence evidence in NSW (in applying the uniform evidence law) indicated that the way that the courts interpreted and applied the law produced similar results to the laws in Victoria. Because of this, a re-enactment of section 398A was not considered necessary.

10.2 Uniform Evidence Law

The Uniform jurisdictions of Victoria, New South Wales, Northern Territory, Tasmania and the Australian Capital Territory, while exhibiting some differences in precise enactments, and in case law on common provisions, are able to be analysed within a consistent logic, structure and discourse. This is one of the benefits of uniform legislation.

The experience of common law jurisdictions (Queensland), or jurisdictions containing statutory evidence law (South Australia, Western Australia) is not easily comparable.

The approach of international jurisdictions (Canada, UK, NZ) while relevant and providing interesting comparisons, are not consistent with the approach of the Uniform Evidence Law. As such, adopting any particular reform, such as that of the UK, is likely to result in a similar raft of issues concerning its interpretation.

This submission predominantly discusses evidence law within the framework provided by the Uniform Evidence Law.

10.3 Proof beyond reasonable doubt of tendency and coincidence evidence

In Victoria, the Jury Directions Act provides that only the elements of an offence must be proven beyond reasonable doubt. This applies to circumstantial evidence, including tendency evidence. This is a point of difference with other jurisdictions, such as NSW, where this evidence may be required to be proven beyond reasonable doubt before juries act upon it.

The department's report Jury Directions: A Jury-Centric Approach discusses the prior law in Victoria, and arguments regarding requirements for proof of evidence beyond reasonable doubt.[78]

In Victoria, the previous requirement to direct the jury that they must be satisfied beyond reasonable doubt about an indispensable intermediate fact was not the only situation in which a trial judge had to direct the jury that certain facts or evidence must be proved beyond reasonable doubt. For example, in R v Sadler [2008] VSCA 198, the Court of Appeal indicated that the trial judge must direct the jury that it must be satisfied beyond reasonable doubt of uncharged acts that the jury would use as a step in their process of reasoning towards guilt. To ensure that the extent of the abolition of any requirement to direct the jury that a matter must be proved beyond reasonable doubt (other than an element of the offence) was clear, the Jury Directions Act 2015 includes a note specifically referring to R v Sadler.

Requiring the jury to be satisfied beyond reasonable doubt of indispensable intermediate facts or uncharged acts unnecessarily complicates jury directions and the jury's task and risks misleading the jury into focusing on factors other than whether the offence has been proved.

10.4 Concoction, collusion or contamination

As discussed above, prior to the introduction of the Evidence Act in Victoria, section 398A(3) of the Crimes Act provided that 'the possibility of a reasonable explanation consistent with the innocence of the person charged with an offence is not relevant to the admissibility of…[propensity evidence]'.

On its face, the amendment did not indicate whether this only precluded the trial judge from considering the issue of concoction (by overruling the decision in *Hoch*) or whether it extended to removing from the court's consideration, the issues of the truth and accuracy of the evidence when determining admissibility.

The leading authority on the section was the case of *R v Best* (1998) 102 A Crim R 56, Callaway JA (with whom Phillips CJ and Buchanan JA agreed) said, at [64]:

> s 398A adopts the English test of admissibility for all propensity evidence and questions of collusion and unconscious influence are left to the jury. It is entirely consonant with the common law as understood in Australia to leave the reliability of the evidence to a jury. They are able, and in some cases better qualified, than a judge to assess the weight of an argument that evidence has been concocted or is the product of unconscious influence ... That is also a good deal fairer to the witnesses, whether the issue is determined on the basis of the depositions or after a voir dire.

The introduction of the Evidence Act was not intended to change the operation of these laws. However, in practice it had that effect in Victoria (see *Velkoski v The Queen* [2014] VSCA 121).

In *IMM v The Queen* [2016] HCA 14 at [59] the plurality said that:

> Before turning to the application of ss 97(1) and 137 to the facts in this case, there should be reference to the appellant's submission concerning the risk of joint concoction to the determination of admissibility of coincidence evidence. The premise for the appellant's submission – that it is "well-established" that under the identical test in s 98(1)(b) the possibility of joint concoction may deprive evidence of probative value consistently with the approach to similar fact evidence stated in *Hoch v The Queen* – should not be accepted. Section 101(2) places a further restriction on the admission of tendency and coincidence evidence. That restriction does not import the "rational view ... inconsistent with the guilt of the accused" test found in *Hoch v The Queen*. The significance of the risk of joint concoction to the application of the s 101(2) test should be left to an occasion when it is raised in a concrete factual setting. (footnotes omitted).

As noted by the Royal Commission, it may be desirable to clarify the position of pre-trial consideration of issues of concoction, collusion or contamination.

10.5 Evidence of previous conviction

The Consultation Paper raises questions about whether evidence of convictions should be admissible in later cases. While this may be an important feature of the approach in England and Wales, the threshold question is whether there are sufficiently strong reasons for departing from the general approach used in the Evidence Act. If the Royal Commission recommends working within the tendency and coincidence framework of the Evidence Act, it is not clear what changes are proposed to be made to that framework and how they would interact with tendency and coincidence – as they may overlap in some instances.

[78] Department of Justice and Regulation, *Jury Directions: A Jury Centric Approach,* 20015 http://www.justice.vic.gov.au/home/justice+system/laws+and+regulation/criminal+law/jury+directions+a+jury-centric+approach

The Consultation Paper does not consider in depth the category of 'bad character evidence', which is generally how evidence of convictions is characterised. Greater consideration should be given to this law and related principles before proposing any reform to the existing law on the admission of this evidence. It is not clear whether what is proposed is the admission of the bare fact of a conviction, or the admission of a statement of facts in relation to an offence and the information that a person has been convicted. This also raises the question of the type of evidential reasoning that is relevant to this form of evidence – whether it be tendency evidence, coincidence evidence or context evidence.

Consideration should also be given to the risk of unfair prejudice when a jury is presented with evidence that equates with the finding beyond reasonable doubt of another jury in a separate trial. Given the nature of allegations in sexual offence cases involving a number of victims, there is also the possibility that the one trial might have evidence of tendency based on conduct for which the accused has not been convicted as well as conduct for which the accused has been convicted. In addition to issues concerning the risk of unfair prejudice, there may be considerable challenges for trial judges being able to give clear directions and the jury being able to comprehend any nuances involved.

10.6 Jury research

The Royal Commission's jury reasoning research provides a detailed consideration of juror reasoning in sexual offence cases where relationship or tendency evidence of other victims is admitted, either in separate trials, or in a joint trial. In relation to directions in the form of question trails, the report notes that:

> First, deliberations in separate trials were less protracted. Second, juries spent a greater proportion of time discussing the specific counts and the judges' directions. Third, mock jurors who used a question trail reported requiring significantly less cognitive effort to reach a unanimous verdict. Together, these findings suggest that question trails facilitate jury consensus and efficiency.[79]

The report considers the ability of juries to comply with directions and reason permissibly where evidence was admitted and forms of tendency or context reasoning were available. However, in cases where the jury is instructed not to reason in certain ways the research shows that limiting directions risk having the opposite of the intended outcome.

As noted in the report, there are limitations to the extrapolations that can be made from mock juror trials, due to the impossibility of recreating the exact scenario of a random juror pool, and the often lengthy trial process where the jury will need to determine many more issues. Despite these limitations, the report provides a valuable contribution to the understanding of juror reasoning on issues of tendency evidence of victims in sexual offence trials.

10.7 Joinder

In Victoria, Schedule 1 of the Criminal Procedure Act governs the proper joining of charges. Clause 5 allows for the joining of related offences in the one indictment. 'Related offences' are defined as including those offences that are founded on the same facts or form, or are part of, a series of offences of the same or similar character'.

Section 194 of the Criminal Procedure Act contains a presumption of joinder for sexual offence cases. It provides that if two or more charges for sexual offences are joined together in the same indictment, it is presumed that those charges are to be tried together. The presumption created by section 194 is not rebutted merely because evidence on one charge is inadmissible on another charge.

Joinder has been found to be appropriate where the jury may be directed that:

- they may take the evidence given by one complainant into account as tendency evidence in determining whether the prosecution has established the offences alleged to have been committed against another complainant
- they are to put the evidence of one complainant completely out of mind as they consider whether the prosecution has established guilt in relation to the offences alleged to have been committed against the other complainant.

Despite this, in practice charges are often severed, or the issue of severance is conceded by the prosecution where evidence is not cross-admissible between complainants. This is because of a perceived risk of unfair prejudice, in that jurors may consider the other complainant's evidence, or the

[79] J Goodman-Delahunty, A Cossins and N Martshuk, *Jury reasoning in joint and separate trials of institutional child abuse: An empirical study*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p250

fact of another complainant, when assessing an individual case in which that evidence or fact are not admissible. However, the Royal Commission's jury research provides evidence concerning the level of such risk, suggesting that consideration should be given to changing this area of law.

10.8 Limiting recommendations to sexual offences

Chapter 10 of the Consultation Paper is specifically focused on the form of tendency and coincidence evidence relevant to sexual offence cases – complaint evidence of another victim of the same accused. Further, the Royal Commission's terms of reference concern sexual abuse in institutional settings. The Consultation Paper does not discuss whether the issues raised by the Royal Commission should be limited to sexual offence cases or should involve changes to tendency and coincidence evidence generally.

Given the complexity of this area of law, it would be undesirable for such laws to apply differently depending upon the type of offence charged. It is arguable that there are significant differences in practice in the application of tendency and coincidence laws – this appears to stem from concerns about the risk of unfair prejudice to the accused arising from the admission of this kind of evidence. The Royal Commission's research, discussed at Chapter 10.5 of the Consultation Paper, is therefore particularly important to these issues.

Whatever changes is proposed, the Victorian Government will need to consider how such laws will work in non-sexual offence cases. Consideration could also be given to a joint reference to the Australian Law Reform Commission on the Uniform Evidence Law, as occurred in 2004.

11 Sentencing

11.1 Good character as a mitigating factor

The *Sentencing Act 1991* sets out the legislative framework for sentencing in Victoria and it requires that Victorian courts take into account evidence of 'the offender's previous character' in sentencing. However, there is no legislative guidance as to the weight prior good character should be given when balanced against other sentencing factors.

Unlike New South Wales and South Australia, there is no legislative requirement in Victoria to exclude good character as a mitigating factor in sentencing for child sexual abuse offences. Similarly, there is no legislative requirement for prior good character to be considered an aggravating factor where it facilitated the offending, as required by sentencing guidelines in England and Wales.

Good character in the context of institutional child sexual abuse was discussed by the High Court of Australia in *Ryan v R* (2001) 206 CLR 267, which remains authority under Victorian law. *Ryan* requires that Victorian courts taken into account prior good character, although the circumstances of the offending can limit its mitigating weight.

The *Victorian Sentencing Manual*, published by the Judicial College of Victoria, provides practical guidance to the Victorian judiciary on sentencing. Section 10.3.5.5 (offences where good character afforded minimal weight) states that:

> Good character will attract minimal weight where the offence is viewed as grave or serious. This is because other sentencing considerations such as the need for general deterrence and protection of the community will be emphasised.
>
> Good character will also be of reduced significance for offences that are commonly committed by offenders of otherwise good character, or who exploit their respectability to further their offending.

On 10 June 2016, the Victorian Sentencing Advisory Council (SAC) published a report titled *Sentencing of Offenders: Sexual Penetration with a Child under 12*, which analysed sentencing data and sentencing remarks for Victorian cases of sexual penetration with a child under 12, sentenced between 1 July 2009 and 30 June 2014. The SAC noted that prior good character evidence is of less significance in child sexual assault cases and can actually be an aggravating factor, if the offender's ostensible good character facilitated the offending.[80]

In relation to the New South Wales legislation, which prevents a court from taking into account an offender's prior good character or lack of previous conviction(s) if it assisted the offender to commit the offence, the SAC noted that:

[80] Sentencing Advisory Council, *Sentencing Offenders, Sexual Penetration with a Child under 12*, 2016, page 52

> Though Victoria lacks a similar provision, the point is salient in this state under general sentencing principles. Good character will be of reduced significance for offences that are commonly committed by offenders of otherwise good character, or who exploit their respectability to further their offending.[81]

11.2 Sentencing standards

Unlike other Australian jurisdictions, which generally sentence by applying historical sentencing standards, section 5(2)(b) of the Sentencing Act requires Victorian courts to have regard to 'current sentencing practices'. Accordingly, when Victorian courts sentence for historical sexual abuse offences they are required to have regard to the (historical) maximum penalty for the offence but with reference to current sentencing practices. This is a partial application of historical sentencing standards.

Section 8.3 (current sentencing practices) of the *Victorian Sentencing Manual* states that:

- Sentencers may take into account formal sentencing statistics and comparable cases when determining current sentencing practices.
- Current sentencing practices can never do more than indicate the range of available sentences. Every case is different and there is no single correct sentence that must be imposed in any case.
- Sentencers must exercise caution both in assessing and in utilising indicators of current sentencing practices, such as sentencing statistics and comparable cases.

In response to a recent report from the SAC[82] the Victorian Government has announced that it will introduce a standard sentence scheme that will increase sentences for 12 serious crimes, including rape, murder and sexual offences involving children.

Under the scheme, a 'standard sentence' will be created to represent the mid-point of seriousness for specific offences and calculated at 40 per cent of the maximum penalty. For example, the maximum sentence for sexual penetration of a child under 12 is 25 years imprisonment, which makes the 'standard' sentence for that offence to be 10 years imprisonment.

The courts will be required to consider the legislated standard sentence length, alongside other relevant factors, in arriving at the appropriate sentence in a given case. The courts will also be required to provide reasons for departures from standard sentence lengths.

The table below summarises the current maximum penalties and proposed standard sentences for the sexual offences that will be subject to the standard sentence scheme:

Table 2: Standard Sentences

Sexual Offences	Maximum Penalty	Standard Sentence
Rape	25 years	10 years
Incest with child/step child	25 years	10 years
Incest with child/step child of de factor (under 18)	25 years	10 years
Sexual penetration with a child under 12	25 years	10 years
Sexual penetration with a child 12-16 under care, supervision or authority	15 years	6 years
Sexual penetration with a child 12-16	10 years	4 years
Indecent act with a child under 16	10 years	4 years
Persistent sexual abuse of a child under 16	25 years	10 years

It is anticipated that the impact of the standard sentence scheme is to increase sentence lengths for sexual offences (particularly sexual offences against children) over time, so that the median or average sentences for these offences will increase and be reflected by current sentencing practice.

The sentencing guidelines in England and Wales that require sentencing for historical sexual offences in accordance with standards that apply at the time of sentencing are intending to ensure that the

[81] Ibid
[82] Sentencing Advisory Council, *Sentencing Guidance in Victoria*, 2016

courts apply a modern approach to sentencing, that prioritises the culpability of the offender and the harm caused or intended by the offence.

The report found that legislative attempts to increase sentences appear to have had minimal influence on sentencing practices for the offence of sexual penetration with a child under 12. As noted above, the Victorian government has included this offence in its proposed standard sentence scheme which will impose a standard sentence of 10 years for this offence.

In addition to the above proposed amendments to increase sentence lengths for particular sexual offences, the Victorian Government has also announced new restrictions on the availability of Community Corrections Orders (CCO's) for serious offences. The amendments will prevent the use of CCOs and other non-custodial orders for ten serious offences, including the following sexual offences:

- rape
- persistent sexual abuse of a child under the age of 16
- sexual penetration of a child under the age of 12
- incest (where the victim is under 18)
- rape by compelling sexual penetration.

The Royal Commission may wish to give consideration to the SAC report *'Sentencing of Offenders: Sexual Penetration with a Child under 12'*. The report uses different methodologies to assess the sentences for this offence and provides valuable insight into sentencing practices. The report analyses the possible reasons for sentences for sexual penetration with a child under 12 remaining relatively low, and sentences are compared with the offence of rape to identify factors that might explain the differences in sentences for these offences.[83]

12 Post-sentencing arrangements

On 24 April 2016, the Harper Review[84] into the management of serious sex offenders was released, and the Victorian Government has accepted in-principles all 35 recommendations. As part of the response, the Victorian Government plans to build a new secure facility to manage the most serious offenders, and the sex offender supervision scheme will be expanded to include the state's most serious violent offenders, and additional powers to control high risk offenders will also be introduced.

The Victorian Government will also introduce:

- A new model for assessing and managing prisoners so that intervention happens earlier and those who remain a risk to the community are identified.
- An expanded supervision model for those on orders and additional resources for mental health treatment for violent offenders.
- A new facility for offenders on supervision orders who have disabilities.
- The development of a new governance model for overseeing the operation of the scheme so that decisions are always made in the interests of community safety.

[83] Sentencing Advisory Council, *Sentencing Offenders, Sexual Penetration with a Child under 12*, 2016, page 52
[84] Harper D, *Advice on the legislative governance models under the Serious Sex Offenders (Detention and Supervision) Act 2009*, Complex Adult Victim Sex Offender Management Review Panel, November 2015