

Improving the Response of the Justice System to Sexual Offences:

Guide to Our Issues Papers



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

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

Our focus

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

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

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

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

Our terms of reference

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

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

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

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

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

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

How to tell us your views

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

Giving feedback online

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

Making a submission

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

Important details about making a submission

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

Formal consultations

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

A guide to our issues papers

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

Table 1: List of issues paper topics

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

Our approach

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

Terms used

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

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

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

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

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

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

What we will do with your responses

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

Our process from here

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

Endnotes

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