

## **Child Sexual Abuse and Criminal Justice**

### **Response to Royal Commission into Institutional Responses to Child Sexual Abuse Consultation Paper on Criminal Justice**

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## Introduction

Victoria Legal Aid (VLA) plays an important institutional role within the criminal justice system, representing both offenders and victims at various stages of the criminal process.

As the largest defence practice in Victoria, we represent a significant number of people charged with sexual offences, many of whom themselves have been victims of sexual and other offending. VLA regards the proper representation of criminal accused in trial and appeal processes as an important safeguard for victims as well as for offenders. For example, an accused is not permitted to cross-examine a victim of sexual abuse in the absence of legal representation.<sup>1</sup> Proper representation may also reduce inappropriate or misconceived appeal applications, and assist in increasing the effectiveness of court orders. VLA is also the lead legal service provider for people subject to applications and reviews under the *Serious Sex Offender (Supervision and Detention Order) Act 2009* (Vic).

In 2015-16, VLA provided 962 grants of legal assistance for people charged with committing sexual abuse offences, 43 per cent of which were represented by our in-house practice. One third of total grants were for alleged offending against a child. Given our role as the funding provider for approximately 80% of people who face criminal trial in Victoria, and our in-house legal expertise, we have an important role in exploring options for changes to the trial process to ensure high quality services and the efficient management of criminal cases. In January 2014 VLA undertook a review of criminal trials in Victoria. Our [Delivering High Quality Criminal Trials](#) review examined options for improving the quality of legally aided criminal trials in Victoria.

VLA also provides information, advice and representation to victims of crime seeking to access financial assistance from the Victims of Crime Assistance Tribunal, and assists victims to obtain compensation by pursuing claims under the *Sentencing Act 1991* (Vic).

Sometimes the most important and challenging role a defence lawyer can play is to assist their client to build insight so that they reach a point where they can more clearly consider taking responsibility for their actions and their willingness to take up options that may be available for their rehabilitation. That process can be very complicated with clients that experience multiple issues such as mental illness, cognitive impairment or drug and alcohol addiction.

Our experience of cases involving child sexual offending is that clients facing these types of allegations consistently present with highly complex psychological needs. There is a high risk of mental health issues becoming more acute when the client begins to accept the consequences of their offending, is contemplating or has entered a plea of guilty and in turn is facing what will likely be a lengthy term of imprisonment. Alternatively, when a client exercises their right to contest the allegations, the stress and stigma of a criminal trial can profoundly impact the mental and physical wellbeing of the accused, particularly in the context of increasing public awareness and media focus on sexual offending and the prolific nature of social media. In 2014 the Coroners Court of Victoria investigated a cluster of reported deaths where the deceased was facing pending child sexual offence charges and intentionally took their own life. It was identified that the most common time when these deaths occur is either immediately following the suspect being charged or proximate to court proceedings. The purpose of this investigation was to look at what, if any, supports were available to the alleged offender to prevent these deaths occurring.

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<sup>1</sup> Section 357 *Criminal Procedure Act 2009* (Vic)

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We note also that there are unique vicarious trauma risks for defence lawyers working exclusively in this area and for this reason, while sexual offence cases are often complex, technical and specialist in nature, VLA recently merged its general indictable and specialist sex offence teams to ensure that our practitioners undertake a mixture of casework.

VLA supports reforms that are likely to improve criminal justice responses to child sexual abuse and protect the community from sexual offending to ensure that victims receive justice and are not further traumatised by their experience within the criminal justice system. However, this must be appropriately balanced against the need for an accused person to receive a fair hearing without undue prejudice in accordance with section 24 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). It is vital in a community that believes in fairness and the rule of law that all people have access to a just process where significant sanctions are at stake.

The Royal Commission recognises that Victoria already has in place a number of special measures and procedures for both protecting victims and survivors of sexual abuse during the court process and ensuring that a person accused of committing a sexual offence receives a fair hearing. Therefore, our submission is limited to addressing those issues, proposals and recommendations in the Consultation Paper that raise the possibility of a new policy or process or amendments to existing legislation that would be likely to have the most impact on VLA's clients.

We note that the Royal Commission is not specifically examining the issue of child sexual abuse and related matters outside institutional contexts but that any recommendations it makes may impact on the response to all forms of child sexual abuse in all contexts. This would have implications for adults and young people who are accused of having committed child sexual abuse offences outside an institutional setting and who form the majority of VLA's clients who are charged with sexual offences.

## Blind reporting

The Royal Commission's Consultation Paper considers whether or not blind reporting should be permitted or encouraged and how the competing objectives of respecting survivors' wishes and maximising effective reporting of child sexual abuse should be balanced.

Reporting child sexual abuse is important both for securing a criminal justice response for the victim and preventing further abuse and should be encouraged. However, we note the complex and personal reasons why a victim or survivor may choose not to report child sexual abuse to police, such as wanting to avoid reliving a traumatic experience or concerns by imprisoned survivors about being labelled an informant in the prison setting, and that blind reporting may relieve some of the anxiety about reporting and related processes.

Respect for the victim's wishes and privacy must be balanced against the need to protect both them and other children from further offending by the perpetrator. We therefore support the position of victim advocacy and support agencies, such as Berry Street and Broken Rites, who will respect a victim's decision not to report but will actively encourage it by addressing some of the perceived barriers to reporting and supporting victims to make the report. We also support Berry Street's policy of blind reporting where any information it holds leads it to form a reasonable belief that children or young people may presently be at risk.

However, it is important for the Royal Commission to note that prosecutions that proceed on the basis of a blind report can impede the ability for an accused person to defend the allegations where, for example, the accused is unable to directly challenge the complainant if information about that

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person is concealed. Therefore, VLA recommends the introduction of minimum standards for police responses to blind reports to ensure that police conduct diligent investigations and that any subsequent prosecution meets the standards required by the criminal justice system for ensuring that the accused person receives a fair trial.

VLA supports the Royal Commission's proposal for the development of a readily-available guide that third parties can give to victims and survivors and considers that this should be available in plain language with access to interpreter services for people from culturally and linguistically diverse backgrounds and with an outline of the options for reporting to police and contact information for victim advocacy and support groups provided.

**Recommendation 1 – Minimum standards for police responses to blind reporting**

Introduce minimum standards for police responses to blind reports to ensure that investigations are conducted diligently and that any subsequent prosecution meets the standards required by the criminal justice system for ensuring that the accused person receives a fair trial.

**Recommendation 2 – Guide for third parties in plain language and contact details**

Develop a readily-available guide for third parties to give to victims and survivors in plain language with access to interpreter services for people from culturally and linguistically diverse backgrounds, including an outline of the options for reporting to police and contact information for victim advocacy and support groups.

## Child sexual abuse offences

### The Victorian course of conduct charge

VLA acknowledges the difficulty faced by many complainants who are unable to provide sufficient detail of their historical sexual assault allegations. Historical sexual offences are universally challenging for complainants, prosecution and accused as the passage of time inevitably leads to diminished recollection and limits the availability of witnesses and forensic evidence.

This difficulty is reflected in the course of conduct charge at clause 4A of the *Criminal Procedure Act 2009* (Vic) (CPA)<sup>2</sup> which does not require proof of 'any particular number of incidents of the offence or the dates, times, places, circumstances or occasions of the incidents' or 'the general circumstances of any particular incident' and 'need not include particulars of any specific incident of the offence, including its date, time, place, circumstances or occasion'.

The Royal Commission's Consultation Paper questions whether the requirement for particulars can be further restricted without causing unfairness to the accused. VLA considers that further restricting the requirement for the complainant to provide some particulars creates a very real risk that people will be wrongly convicted of serious offences on evidence that is impossible to meaningfully test or challenge. In an environment in which both the complainant and the accused are disadvantaged by the passing of time, it is important that appropriate balance is achieved so as not to undermine an accused's presumption of innocence, especially given the serious consequences that follow a conviction.

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<sup>2</sup> Schedule 1

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Whilst an overwhelming majority of sexual offence complaints are genuine, there are a small number of cases where allegations will be made that are incorrect, false or exaggerated.<sup>3</sup> Requiring reasonable particulars that are able to be tested in the courts is one way to guard against the possibility of improper convictions, as it allows an accused to produce exculpatory evidence (for example, alibi evidence). VLA therefore does not support a further restriction on the requirement for particulars in the course of conduct provision.

## Third-party offences

Section 327(2) of the *Crimes Act 1958* (Vic) makes it an offence to fail to make a disclosure where a person forms a reasonable belief that a sexual offence has been committed against a child under the age of 16 years. This reflects existing community attitudes about the need for an additional level of protection for a particularly vulnerable cohort of victims. VLA considers that the subjective and objective test of ‘reasonable belief’ and the reasonable excuse provisions in section 327(2) are appropriate as they strike the right balance between protecting this vulnerable cohort from further abuse and not penalising a third party who fails to disclose in specific circumstances.

The Royal Commission asks for feedback about whether a criminal offence for failure to report should apply to all serious criminal offences. VLA does not support the extension of this offence to all serious criminal offences as the need to protect victims from other serious offending does not justify the imposition of a positive duty on members of the community of which the failure to perform may invoke a punitive response. An expanded failure to disclose offence would place an inordinate burden on members of the community to disclose conduct that may or may not actually constitute serious offending simply to avoid offending against the new provision, and penalise people who inadvertently fail to recognise the conduct of a serious criminal offence. VLA also questions the utility of a provision that would presume an understanding on behalf of members of the community that a positive duty to take particular steps applies.

Such an obligation would also place family and friends in the invidious position of having to nominate loved ones for offending. Complex family dynamics can make a decision to report complicated and difficult, for example where a family member relies on the alleged offender for financial and/or emotional support, experiences threats and fears for their safety in the event of a reprisal, has been a victim themselves, or where another family member who is also the victim has requested that a report not be made. Newly arrived migrants from culturally and linguistically diverse backgrounds may fear social isolation and the withdrawal of financial support from the alleged perpetrator or the victim if a report is made. Fears of reprisals and invasion of privacy present additional challenges for people in small tight-knit communities. Further, the requirement to report may abrogate section 18 of the *Evidence Act 2008* (Vic) in relation to the compellability of family members as witnesses.

## Delays in prosecutions

In our experience, significant delay between an incident and the court hearing to determine its resolution makes it difficult for a person accused of an offence to remember the incident, provide

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<sup>3</sup> The case of *Greensill v The Queen* [2012] VSCA 306 is an example of the importance of this balancing exercise. Ms Greensill’s conviction for sexual offending against two young boys was overturned by the Victorian Supreme Court of Appeal primarily on the basis that the evidence disclosed a real likelihood that the two complainants collaborated, and a real possibility of concoction.



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their lawyer with meaningful instructions, give evidence and, in many cases, actually link the incident in question to the court proceedings. A significant number of stakeholders VLA consulted during our Delivering High Quality Criminal Trials review also expressed frustration about late disclosure by police and prosecution at various stages of the trial process, as late disclosure leads to a multitude of problems including delay and unfairness. During our review, we examined the role of committals in narrowing the issues for trial and testing the strength of the evidence, and the benefits associated with early guilty pleas by the accused for both them and the victim.

In September 2014 VLA conducted a separate [review](#) into our funding of criminal appeals against sentence to the Victorian Supreme Court of Appeal. We found that the victims we consulted during our review experienced the justice system in different ways. However, system delay (often perceived as defence generated delay), as an additional and often unrecognised trauma to victims and their families, was an important common theme identified during the consultation. Whilst delay can be taken into account in reducing sentence for offenders, victims did not feel that delay was taken into account in terms of the impact it has on them and their families. Our review highlighted the need for criminal justice stakeholders to work together more effectively to ensure victims are appropriately informed and included in appeal processes, in recognition of their rights under the *Victims Charter Act 2006* (Vic) and the *Sentencing Act 1991* (Vic).

## **Case management and committals**

VLA considers that where a case can be resolved it should happen as early as is reasonably possible. The strengths and weaknesses of a case should be identified early and a case strategy developed as a result. This was a major focus of the implementation of our Delivering High Quality Criminal Trials review. VLA supports the Royal Commission's focus on achieving early appropriate resolution as this benefits both the accused, the victim and the broader community.

As noted by the Royal Commission, specific measures for maximising the efficient management of sexual offence trials are available in Victoria, including section 270 of the CPA which is intended to encourage early guilty pleas, the management of sex offences in a separate list in the County Court, and the requirement for both parties to answer questions relating to pre-trial issues at the initial directions hearing.

In Victoria, carefully run committals allow for timely testing of the strength of a case, narrowing of the issues for trial, discussions regarding resolution or discontinuance, and the early and full disclosure of evidence. They can also prompt the prosecution to make decisions about how a case is to be put at an early stage well before trial. The pre-committal phase is also important as it is an opportunity to identify whether the case can be resolved early or whether it needs to proceed, with the benefit of a plea of guilty prior to committal a driving factor. However, VLA's practice experience and consultation with stakeholders from across the profession and judiciary in relation to our Delivering High Quality Criminal Trials review revealed that there are issues across the board with late disclosure of evidence by police and the prosecution. There are still too many instances where late disclosure creates delay and unnecessarily prolongs cases when they could have been resolved or determined earlier. It is difficult for the defence to respond and comply with case management requirements where, for example, they have not received notices of tendency and coincidence evidence, additional statements or material that should have been disclosed at the committal mention stage.

Section 123 of the CPA prohibits the Magistrates' Court in sexual offence cases from granting leave to cross-examine victims who were under the age of 18 years at the time of the proceedings or have

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a cognitive impairment. Special hearings take place outside of the trial process just prior to empanelment to obtain evidence from these vulnerable classes of victims. Evidence from these victims is also able to be given remotely. Recent amendments have enabled flexibility and judicial discretion around how special hearings are used, recognising that some victims want to give their evidence in court. However, VLA's experience is that the current special hearing approach to children and cognitively impaired victims of sexual offences can sometimes lead to late resolution and discontinuances, given that they do not occur until just prior to empanelment of a jury. Late decisions as to resolution and discontinuance of matters can have an adverse impact on both victims and the accused.<sup>4</sup>

An additional challenge with more streamlined committals is that lawyers lose the ability to properly test the strength of the evidence, especially in cases where evidence is contested or where full and proper disclosure of the evidence has not occurred. Some of the more difficult cases can benefit from an early assessment or identification of the strength of the evidence which can also impact on the ability to resolve early. The benefit of early cross-examination of the victim does not just flow to the accused person. Prosecutors can also be aided to make earlier decisions around the prospects of conviction and whether to proceed with a prosecution. The ability to assess issues early enables the prosecution to identify problems and run the case accordingly. In our experience, there are still too many cases that are discontinued late in the process, often on the eve of trial. This can be devastating for victims, expensive for the community and unfair to accused people.

This highlights the need for flexibility of approach in criminal cases and the importance of tailoring case management and procedures to suit the needs of the case. Committals are not the only way in which early disclosure, preparation and resolution can be achieved. VLA therefore supports a formal case management approach in the higher courts which would facilitate early resolution and ensure early and full disclosure by police and prosecutors. VLA also supports strengthened disclosure obligations for the prosecution and police through additional legislation and more transparent model litigant policies and procedures, including around decisions to discontinue prosecutions.<sup>5</sup>

The way in which victims and key witnesses are proofed by the prosecution is also critical. Management of victims' expectations is extremely important and prosecutors and support services they rely upon are critical to properly preparing victims for the process and possible outcomes.

### **Recommendation 3 – Strengthened disclosure obligations**

Strengthen the disclosure obligations for the prosecution and police through additional legislation and more transparent model litigant policies and procedures, including around decisions to discontinue prosecutions.

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<sup>4</sup> Royal Commission into Family Violence, Witness Statement of Helen Fatouros, Executive Director, Criminal Law Services, Victoria Legal Aid, WIT.0111.001.0001, 6 August 2015

<sup>5</sup> As recently as the filing of this contribution with the Commission, the Victorian Supreme Court of Appeal has determined on interlocutory appeal that a permanent stay was the appropriate outcome in a matter involving historical charges of sexual abuse. The case involved an 84 year old with Alzheimer's disease who was found to be unfit to stand trial, with the Court of Appeal finding a hearing of the matter to be irreparably unfair. The decision is not currently available, however it can be provided to the Commission upon its release.

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## Guilty pleas

VLA considers that the criminal justice system's response to child sexual offending would be improved if there were tangible advantages for early guilty pleas, disincentives for late ones and processes to facilitate informed decision making by defence lawyers and people accused of committing an offence. This would require legislative reform to permit sentence indications to be given as to duration (or likely range) of sentence as well as to sentence type. Similarly, legislative certainty as to the level of reduction in sentence for a guilty plea and the diminishing value of that reduction the later a plea is entered could make a major difference.<sup>6</sup> However, it is important to note that any statutory incentives to plead guilty would need to be appropriately applied by the court to ensure that the accused is not improperly pressured to plead. For instance, in *Guariglia v The Queen* [2010] VSCA 343, Nettle and Hansen JJA found that the applicant's plea of guilty 'was procured by improper pressure, which had a material effect on his decision to change his plea to guilty, and for that reason his plea of guilty was not an exercise of free choice' [at 42]. As such, the appeal was allowed and a new trial was ordered.

### **Recommendation 4 – Indications of sentence duration**

Amend the CPA to permit sentence indications to be given as to duration (or likely range) of sentence as well as to sentence type.

## Evidence of victims and survivors

### **Improving special measures – pre-recording all of a witness's evidence**

The Royal Commission raises the recording of the full evidence of complainants – evidence in chief, cross-examination and re-examination – pre-trial in the absence of a jury as an option for potential reform to help vulnerable witnesses to give their best evidence. Specifically, it is suggested that 'some adult survivors are likely to gain real benefit from being able to use a prerecorded police investigative interview as their evidence in chief'.<sup>7</sup>

VLA provides in-principle support for the use of pre-recorded interviews as evidence for adult complainants, noting that in part this already happens in Victoria for certain cohorts of vulnerable sexual offence victims. However, a key concern is that the skill of police officers in leading evidence or eliciting relevant information varies and is in fact not the role of police in the criminal trial process. Editing is often required of the existing audio-taped evidence that can be relied upon in Victoria and generally prosecuting counsel are best placed to examine in chief given determinations of relevance and admissibility. We therefore agree that improving police investigative interviewing, including through improved skills and training, would need to be a priority if pre-recorded interviews were able to be used as evidence.

VLA considers that measures would need to be put in place to allow adult witnesses who have given evidence via a recording to be further examined in chief and of course cross-examined about issues that arise during the course of a trial as is currently provided for in section 368(1) of the CPA for children and adults with a cognitive impairment. This is an important safeguard for ensuring fairness

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<sup>6</sup> VLA (January 2014), *Delivering High Quality Criminal Trials Consultation Paper*, pp. 34-5.

<sup>7</sup> Royal Commission into Institutional Responses to Child Sexual Abuse (September 2016), *Criminal Justice*, Consultation Paper, p. 383

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to all involved in the trial, particularly the accused person's right to a fair trial and in putting their defence fully.

**Recommendation 5 – Ability to cross-examine if pre-recorded police interviews admitted into evidence**

Ensure that any legislative changes that allow adult complainants to use pre-recorded police interviews as evidence include provision for the conduct of further cross-examination in respect of any issues that may arise during the course of a trial.

## **Intermediaries**

VLA supports the introduction of a formal scheme for providing witness intermediaries for child complainants or complainants with an intellectual disability or acquired brain injury (ABI) in child sexual offence cases to support them to provide accurate and reliable evidence and meaningfully participate during the hearing of these matters. We agree that improving the quality of evidence provided is consistent with ensuring that the criminal justice system is accessible and has increased capacity to produce safe convictions for institutional child sexual abuse. However, we are of the view that any intermediary scheme should be professionally based, intermediaries should receive formal training before becoming registered, and appropriate guidelines, standards or code of conduct would need to be developed to ensure clarity and objectivity around the role boundaries of the intermediary such that an accused's right to a fair trial is not undermined.

Consideration should also be given to introducing the role of an intermediary or support person for vulnerable accused people, such as children and adults with a cognitive impairment, given their likelihood of experiencing significant stress and confusion about the examination, cross examination and re-examination processes. We note that the South Australian 'communication partners' scheme broadly extends to defendants, not just vulnerable witnesses.

Guidelines, standards or code of conduct would be needed to ensure that the scope of the role of the intermediary or support person was both clearly defined and avoided the potential for an overlap with the role of a litigation guardian and/or the role of the defence lawyer and prosecution. Rules regarding the need for impartiality and confidentiality would need to be addressed within both the guidelines and the professional training to protect the integrity of the evidence, for example to ensure that the intermediary does not directly or inadvertently influence the evidence given by the witness. Behavioural techniques and rules around the conduct of intermediaries to ensure minimal interference and disruption of the trial and to limit the risk of the jury becoming distracted by their presence from the evidence being given should also be included.

The role of an interpreter in the courtroom to assist the intermediary to communicate with the witness or accused person who cannot properly understand or speak English would also need to be taken into account, in particular whether an intermediary for this purpose in addition to an interpreter for the conduct of the trial itself would be required. Further, changes to courtroom procedures would be needed to require the judge to explain to the jury that the witness has an option to be supported by an intermediary and what the intermediary's role in the proceedings is, to limit the risk of the jury making impermissible inferences, for example that an intermediary or support person is required because the witness feels threatened by the presence of the accused in the courtroom. VLA considers that the court should have the power to stand aside a witness intermediary if it appeared to the court that the intermediary was not properly performing their function.

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Police questioning and interviews pose particular problems for people with ABI and intellectual disabilities, both as complainants and accused persons. For instance, people with ABI may acquiesce to what is suggested to them by people in authority, such as police, because they are eager to appear compliant and/or do not want to reveal their cognitive impairment. They may agree with suggestions or statements put to them regardless of whether or not they understand the question, the suggestion is true, or they are compelled by law to do so.

VLA therefore favours changes to the evidence laws which would prevent the police from beginning or carrying out questioning or an investigation of, or conducting a forensic procedure (such as fingerprinting or obtaining a DNA sample) on a person with ABI, other cognitive impairment or intellectual disability who may be charged with a child sexual or other offence in the absence of an independent support person or intermediary.

#### **Recommendation 6 – Guidelines for professional intermediary scheme**

Any intermediary scheme should be professionally based with formal training required before registration, and appropriate guidelines, standards or code of conduct developed in consultation with the legal profession to clarify the role of the intermediary or support person and protect the integrity of the evidence.

#### **Recommendation 7 – Change questioning, investigations and forensic procedures**

Change the evidence laws to prevent the police from beginning or carrying out questioning or an investigation of, or conducting a forensic procedure (such as fingerprinting or obtaining a DNA sample) on a person with ABI, other cognitive impairment or intellectual disability who may be charged with a child sexual or other offence in the absence of an independent support person or intermediary.

### **Ground rules hearings**

In the Consultation Paper, the Royal Commission refers to the potential benefits of pre-trial directions hearings to lay the ‘ground rules for how the questioning of witnesses – in particular, vulnerable witnesses – is to be conducted’ in sexual offences cases which were outlined by witnesses in one of their case studies. It is submitted that ‘ground rules provide not only for a more precise and less stressful experience for the witness but may also narrow the issues to be taken by the parties, thus improving the efficiency of the trial’.<sup>8</sup>

VLA supports the use of ‘ground rules hearings’ in sexual offence cases, particularly should intermediaries be introduced. Such hearings would also reinforce and give practical effect to Victoria’s [Charter of Advocacy for prosecuting or defending sexual offence cases](#). The Charter provides a guide for prosecutors and defence lawyers about good conduct in relation to court proceedings for sexual offences to minimise ‘the trauma experienced by victims of sexual assault in the justice system while ensuring that people accused of sexual offences receive a fair trial’.<sup>9</sup>

However, VLA considers that it is important that any ground rules established at the directions hearing should relate to *how* the defence asks questions of the witness not whether specific questions that would otherwise be allowed under section 41 of the *Evidence Act 2008* (Vic) should

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<sup>8</sup> Royal Commission into Institutional Responses to Child Sexual Abuse (September 2016), op. cit., p. 382

<sup>9</sup> Department of Justice (Victoria) (2013), *Charter of Advocacy for prosecuting or defending sexual offence cases*, p. ii.

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be asked. The ground rules should assist to provide a less stressful experience for witnesses and complainants by making it easier for them to better understand the questions put to them by the defence and enable a full and honest answer. This may also inadvertently reduce the number of follow up questions asked by the defence, thereby facilitating a more efficient trial.

Although section 41 gives the court power to disallow an improper question or improper questioning put to a witness in cross-examination, or inform the witness that it need not be answered, ground rules established before a committal or trial may protect the vulnerable witness from experiencing any trauma or confusion in response to questioning that would otherwise have been asked but subsequently disallowed.

It is important to note that court processes can also be confusing and stressful for people who are accused of committing an offence, as demonstrated by the Coroners Court of Victoria's finding in 2014 that the most common time when these deaths occur is either immediately following the suspect being charged or proximate to court proceedings. People who are accused of a sexual offence with specific vulnerabilities, such as children and adults with a cognitive impairment, may not understand what has been asked by the prosecution and who feel intimidated by the cross-examination process. Therefore, VLA recommends that any introduction of 'ground rules' hearings should also include rules for the prosecution questioning of vulnerable accused where the defence seeks to call their client, particularly those with a cognitive impairment.

However, VLA considers that further careful consideration needs to be given to how 'ground rules hearings' would operate in practice, particularly in conjunction with an intermediary scheme, before the Royal Commission recommends in favour of introduction or prior to any decision by the State Government to implement them. This would include, for instance, consideration of how defence can depart from the rules set where the evidence leads to further lines of inquiry relevant to the accused's defence or the facts in issue.

#### **Recommendation 8 – Ground rules to cover questioning of vulnerable accused**

Any introduction of 'ground rules' at pre-trial directions hearings should also include ground rules for the questioning of vulnerable accused, such as children and adults with a cognitive impairment, by the prosecution.

## **Tendency and coincidence evidence**

VLA agrees with the observations of Counsel Assisting the Royal Commission that there is 'inherent overlap' between tendency and coincidence evidence:

*that, in institutional child sexual abuse cases, tendency evidence will often reveal conduct with a variety of common features, while coincidence evidence will reveal a tendency of the accused to act in a particular way; and that 'In a sense, thus, coincidence evidence can be seen substantially as a subset of tendency evidence'.<sup>10</sup>*

However, VLA submits they should remain distinct forms of evidence under the Uniform Evidence Act (UEA). Whilst the admissibility process is similar, they are conceptually two very different forms

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<sup>10</sup> J Kirk and D Barrow, *Opinion of Counsel Assisting the Royal Commission regarding Week 1 of Case Study 38*, [88] in Royal Commission into Institutional Responses to Child Sexual Abuse (September 2016), op. cit., p. 449.

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of evidence – one based purely on probabilities, the other propensity of human nature drawn from the jury’s life experiences.

VLA agrees there is often considerable overlap, particularly in the institutional setting, to the extent that tendency evidence effectively encompasses coincidence. However, it may not always overlap so neatly. For instance, offending where a teacher is moving between schools or at locations outside the institution where identity is in issue or where identity is not an issue but there is a particularly unusual feature to the conduct. The example provided by the Royal Commission of the New Zealand case of *N v R* [2012] NZCA 99 illustrates a situation where this could arise. In that case:

*the defendant faced charges of digitally penetrating a 12-year-old while she was asleep and intoxicated. The defendant had previously pleaded guilty to a charge of sexual intercourse with a 13-year-old girl on the basis it was consensual. The court held that the prior conviction would be admissible to demonstrate a sexual attraction to pubescent girls if the issue was the identity of the offender. However, if the defendant admitted the indecent assault but denied penetration, the prior conviction would be inadmissible.*<sup>11</sup>

Outside of the institutional setting, or in relation to other sexual offending, the differences are more apparent. It would therefore be undesirable to have two different approaches, particularly where there is little need, for instance if the restriction in the Victorian case of *PNJ v DPP* [2010] VSCA 88 was not operating. Without a clear delineation between these two different reasoning processes it is possible for the jury to become naturally and understandably confused and impermissible cross reasoning may occur.

As we do not know how juries reason with these two different concepts, VLA considers that more jury research is required in this area before any changes are made, noting that this appears to have been beyond the scope of the Royal Commission’s Jury Reasoning Research.

If further relaxation of the statutory distinctions was contemplated, careful jury directions would need to be provided to explain the different reasoning processes and when they could and could not be used. This would both enable the use and prevent the misuse of these two different reasoning processes.

## **Admissibility of evidence**

The Royal Commission considers that there is ‘significant merit’ in the approach adopted in England and Wales which allows more relevant evidence to be placed before juries, and that the best approach may be that if the evidence is of relevance to the offences charged then it should be capable of being considered by the jury as the triers of fact.

VLA considers that the current threshold of ‘significant probative value’ in the UEA is appropriate. The Commission’s research shows that tendency and coincidence evidence is a powerful form of evidence which significantly increases conviction rates. Therefore, in most cases it will reach the threshold of significant probative value. This research has also shown the particularly powerful way that tendency and coincidence evidence can affect the jury’s assessment of guilt or innocence.

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<sup>11</sup> Royal Commission into Institutional Responses to Child Sexual Abuse (September 2016), op. cit., p. 431 referring to D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, p. 57.

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Therefore, it is important that appropriate safeguards are in place to ensure that this evidence is used in an appropriately reasoned way given the presumption of innocence. In our view, the current test for admitting this evidence only where the ‘probative value of the evidence substantially outweighs the prejudicial effect it may have on the defendant’ is considered to be an appropriate safeguard.

There has also been significant reform of the UEA around context, relationship and tendency evidence with a lowering of the threshold for the admission of such evidence. Any further reduction of thresholds around the admission of such evidence risks imbalance that could lead to injustice and wrongful convictions. Therefore, VLA does not consider that further reform is warranted.

Any further reduction in the thresholds around admissibility of such evidence would need to be accompanied by appropriate jury directions from the trial judge, with the assistance of counsel, to ensure that the jury only engaged in permissible tendency and coincidence reasoning.

VLA notes that extensive jury direction reforms in Victoria were designed to simplify and assist juries to undertake their deliberations more easily. Significant reforms around complex sexual offence directions have already sought to eliminate outdated or confusing directions that operate unfairly for victims in light of what we now know about the nature of sexual assault (for example around delay and reporting).<sup>12</sup>

## Appeals

### Inconsistent verdicts

In the Consultation Paper the Royal Commission examines some of the difficulties which have been identified in relation to ‘inconsistent verdicts’ as a ground of appeal that is commonly raised in child sexual abuse cases. As noted by the Commission, this ground may arise where the jury returns a guilty verdict on one or more counts and a not guilty verdict on one or more other counts in a trial involving multiple counts.

The Victorian Supreme Court of Appeal consistently follows the principles in relation to the ground of appeal of ‘inconsistent verdicts’ that are set out by the High Court of Australia in *Mackenzie v The Queen* (1996) 190 CLR 348 and reaffirmed in *MFA v The Queen* [2002] HCA 53. In *Amato v The Queen* [2013] VSCA 346, Maxwell P acknowledged at [3] that complaints of inconsistent verdicts are frequently advanced in the Victorian Supreme Court of Appeal but that they rarely succeed. His Honour states (at [3] and [5] respectively):

*This is hardly surprising, in my view, given that success on the inconsistency ground involves persuading the appellate court that no logical or rational basis can be found for reconciling the verdicts in question.*

*As a result, if there is some evidence sufficient to sustain the difference in verdicts, the Court is not inclined to substitute its own view for that of the jury.*

VLA therefore does not consider that there are any remaining difficulties in relation to ‘inconsistent verdicts’ in Victoria which the Commission needs to address.

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<sup>12</sup> Refer to section 1 of the *Jury Directions Act 2015* (Vic).



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## Post-sentencing issues

### Supervision and detention orders

The successful reintegration of prisoners, aimed at reducing the risk of re-offending is in the interests of the whole community. The treatment and rehabilitation of offenders is one of the primary purposes of the detention and supervision scheme for serious sex offenders under Victoria's *Serious Sex Offenders (Detention and Supervision) Act 2009* (SSODSA).<sup>13</sup> This assists in achieving the main purpose of the Act, that of enhancing the protection of the community.

VLA considers that improvements could be made to the way people who are subject to supervision or detention orders are supported and managed. In our experience, the rehabilitation supports provided to people on orders are often limited and inadequate. Engagement with specific services are often not incorporated into the order and services are limited. Regular treatment supports and services do not deal in offence-specific treatment but rather provide support/social engagement for those people with cognitive impairments or other disorders.

There has been a steady increase in the number of people subject to orders under the SSODSA. The majority pose a risk of further serious sexual reoffending and are rightly on orders under the SSODSA. However, in an increasing number of cases we query if orders under this Act are the most appropriate way to treat and manage the risk. The complex personalities and impairments that are present in a majority of the people on these orders warrants consideration of whether alternative disability or mental health orders could be used to manage the risk. This would enable the post-sentence risk regime to operate in the least restrictive way possible, consistent with the requirements of the SSODSA and the *Charter of Human Rights and Responsibilities Act 2006* (Vic). VLA recommends in favour of reforms that create more options and meaningful conditions that enable judges to tailor orders such that the supervision and treatment supports match the level of risk and the needs of the offender. The provision of such supports would better promote the purposes of the SSODSA.

VLA also recommends that graduated and properly supported pathways should be created that enable genuine re-integration back into the community to prevent future reoffending. Key features of planning for reintegration should include release plans and accommodation support. While release plans are currently taken into account in the determination of the Parole Board, prisoners should have the opportunity to be more actively involved in their development, supported by integrated and intensive case management. VLA supports the recommendation of the Complex Adult Victim Sex Offender Management Review Panel (the Harper Review) that sex offenders in prison should be provided with offence-specific clinical assessment and treatment early in their sentence in contrast to the existing process of delivering interventions in the last 30 months before an offender's earliest eligibility date.<sup>14</sup> It is considered that this should apply equally to child victim sex offenders.

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<sup>13</sup> Section 1(1).

<sup>14</sup> Recommendation 23, Complex Adult Victim Sex Offender Management Review Panel (November 2015, released April 2016), *Advice on the legislative and governance models under the Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) (Harper Review).

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VLA also supports the Harper Review’s recommendation for the development of flexible community accommodation options to cater to the complex needs of offenders on post-sentence orders, with placement options focused on community protection rather than punishment.<sup>15</sup>

Targeted investment that goes towards increasing and improving treatment and support services, as well as the skill of staff tasked with the difficult job of managing these complex clients is key to improving the efficacy of any post-sentence regime. We support the Harper Review’s recommendation that the Department of Justice and Regulation ensure that staff members working with sex offenders receive appropriate and timely training.<sup>16</sup>

It is essential that offenders are afforded every opportunity to participate in re-entry and re-integration programs and that the intensity of interventions is proportionate to the risk posed by a child sexual offender. When proper investment also sits alongside a more responsive legislative framework that provides additional options to better manage risks and those offenders who truly require post-sentence supervision, we will be able to deliver a greater level of protection to the community.

**Recommendation 9 – Tailored detention and supervision orders to address risk**

That the Commission consider providing guidance around the reform of post-sentence regimes to create more options and conditions that enable judges to tailor detention and supervision orders such that supervision and treatment supports match the level of risk and the needs of the offender.

**Recommendation 10 – Graduated and supported pathways for reintegration**

Create graduated and properly supported re-entry programs and pathways, with the intensity of interventions proportionate to the risk posed by an offender, to enable offenders to genuinely re-integrate back into the community post prison release.

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<sup>15</sup> Recommendation 30, Harper Review.

<sup>16</sup> Recommendation 28, Harper Review.