

Submission to Scoping the development of specialised and trauma-informed legal services for victims and survivors of sexual assault – Discussion Paper

Background

About the Victorian Victims of Crime Commissioner

The Victims of Crime Commissioner (VOCC) is an independent statutory officer with powers to advocate for the respect, recognition, and inclusion of victims of crime in the justice system.

The VOCC is independent of ministers and government departments.

Under the *Victims of Crime Commissioner Act 2015* (Vic) (VOCC Act), the VOCC is empowered to advocate for the respect, recognition and inclusion of victims of crime in the justice system by:

- investigating complaints made by victims about their treatment by justice agencies and victims' services¹
- monitoring the compliance of justice agencies and victims' services with the *Victims' Charter Act 2006* (Vic) (Victims' Charter)²
- conducting inquiries into systemic issues that affect victims of crime³
- representing the concerns of victims to government and providing advice to the Attorney-General, the Minister for Victim Support and government departments and agencies about improvements to the justice system to meet the needs of victims of crime.⁴

Unlike victims of crime commissioner roles in other Australian jurisdictions, the VOCC does not deliver services to victims. The VOCC is an independent regulator that monitors the compliance of justice agencies and victims' services with the Victims' Charter, providing an essential independent complaints and oversight function.

The VOCC is committed to ensuring that victims of crime are heard and respected by justice agencies and victims' services, and that these agencies and services provide safe, inclusive and trauma-informed responses to all victims of crime.

¹ *Victims of Crime Commissioner Act 2015* (Vic) s25A.

² *Victims of Crime Commissioner Act 2015* (Vic) s28(1A).

³ *Victims of Crime Commissioner Act 2015* (Vic) s13(1)(b-c), 23(1).

⁴ *Victims of Crime Commissioner Act 2015* (Vic) s13(1)(a),(d).

Introduction

The VOCC welcomes the Australian Government's commitment to working with victims and survivors, states and territories and support services to strengthen criminal justice responses to sexual assault.

The VOCC also endorses the National Plan to End Violence Against Women and Children 2022-2032 (National Plan's) aim to enhance access to fair justice outcomes for all victims and removing barriers to engaging with the criminal justice process.

The VOCC has been advocating for enhanced legal advice and assistance for victims of crime, particularly victims of sexual assault, consistently over a number of years.⁵ Lack of access to legal advice and assistance has consistently been raised by victims of crime as one of the single most significant barriers to them participating meaningfully in the justice system.⁶

For many victims consulted by the VOCC, enhanced participation in the justice system is directly linked to their need for independent legal advice and assistance, particularly legal advice that is independent of police, prosecution and courts.

For victims participating in the criminal trial process, many mistakenly assume prosecutors are 'their lawyers' and can prioritise their rights and needs.⁷ Victims of sexual assault can be shocked to then learn that although a state's case would not proceed without their evidence, they are not afforded the same right to independent legal advice and assistance as an accused.

Many victims of crime find it difficult to reconcile that the accused automatically receives legal representation and advice, but victims are not afforded this same right. In sexual assault cases where victims are subject to some of the most invasive and traumatic aspects of our adversarial trial process, such as cross-examination and subpoenas for personal records, this lack of independent legal support leaves many victims feeling alone, unsupported and without voice, resulting in secondary trauma as a result of feeling legally exposed at such vulnerable times. While the prosecution may provide information to victims, and in some circumstances, consult with them, the prosecution's interests do not necessarily align with victims' interests.

Accordingly, victims have told the VOCC about the need to be able to access legal information from an independent, trusted source (separate to the prosecution), with that independent advice available from the initial reporting stage.

The VOCC therefore commends the Australian Government's commitment to piloting a legal services model in three locations across Australia, noting such a pilot will likely

⁵ See, for example, Victims of Crime Commissioner, Submission No 99 to Victorian Parliament's Legal and Social Issues Committee, *Inquiry into Victoria's Criminal Justice System* (1 September 2021) 36-38; 41-44; Victims of Crime Commissioner, Submission No 45 to Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (May 2022) 34-41.

⁶ See, for example, Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victim Services Review* (RMIT University, November 2020) 148.

⁷ Mary Iliadis, *Adversarial Justice and Victims' Rights: Reconceptualising the Role of Sexual Assault Victims* (Taylor & Francis Group, 2020) 35.

serve to reinforce the dire need for victims of sexual harm⁸ to have permanent access to comprehensive state-funded legal assistance.

Victims' and survivors' specific legal needs

Scoping the development of specialised and trauma-informed legal services for victims and survivors of sexual assault (the Discussion Paper) seeks stakeholder views on victims' and survivors' specific legal needs when they contact, or are considering coming into contact with, the justice system.

It has been well established in Victoria through various reviews and inquiries that victims of crime have a broad range of unmet legal needs.⁹ Importantly, research has found that victims will often have a constellation of related legal issues that flow directly from victimisation, such as legal needs relating to:

- accessing state-funded financial assistance,¹⁰ restitution,¹¹ compensation¹² or redress¹³
- civil law issues such as defamation or intervention orders¹⁴
- child protection,¹⁵ family law or migration issues¹⁶

⁸ The Victims of Crime Commissioner advocates more broadly for all victims of crime to have access to state-funded legal advice and assistance however, as the Discussion Paper focuses only on victims of sexual assault, this submission only focuses on victims of sexual assault.

⁹ See, for example, RMIT Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victim Services Review* (Final Report, November 2020) 148.

¹⁰ In Victoria, this is currently via the Victims of Crime Assistance Tribunal, but will be replaced by the new Financial Assistance Scheme in late 2023: Victorian State Government, *Victims of Crime Financial Assistance Scheme* (Web Page) <https://www.vic.gov.au/victims-crime-financial-assistance-scheme>

¹¹ Under the *Sentencing Act 1991* (Vic), a restitution order can be made in addition to, but separate from, the criminal sentence imposed on an offender. A restitution order requires the offender to return stolen property (or the money from its sale), or make a payment of a sum of money up to the value of the stolen property. Sentencing Advisory Council, 'Restitution and Compensation Orders Reference: Consultation Materials' 1 ('Fact Sheet 1: Overview'). See also *Sentencing Act 1991* (Vic) Part 4, Divisions 1 and 2.

¹² Compensation orders for victims are found in the *Sentencing Act 1991* (Vic) s 85B; s 85G; 85I; 85J and also in the *Victims of Crime Assistance Act 1996* (Vic) s 1; 5; 8; 8A; 10; 11; 12; 13; 24; 53; 54; 59.

¹³ The National Redress Scheme is available for people who have experienced institutional child sexual abuse. See, National Redress Scheme, *National Redress Scheme* <www.nationalredress.gov.au>

¹⁴ Intervention orders include Family Violence Intervention Orders (FVIO) and Personal Safety Intervention Orders (PSIOs). Both orders are civil orders administered by the Magistrates' Court of Victoria. PSIOs apply in all non-family violence relating circumstances.

¹⁵ Child protection matters are heard in the Children's Court of Victoria in the Children's Courts 'Family Division'. In some cases, criminal matters may intersect with decisions about a child's need for protection under *the Children, Youth and Families Act 2005* (Vic).

¹⁶ It is well established that domestic and family violence perpetrators may use various forms of systems abuse, including in relation to family law, to reassert power and control over victims. See, for example, The Australasian Institute of Judicial Administration, *Systems abuse - National Domestic and Family Violence Bench Book* (June 2021) The Australasian Institute of Judicial Administration <<https://dfvbenchbook.aija.org.au/understanding-domestic-and-family-violence/systems-abuse/>>

- criminal law issues that may intersect with/relate to crime victimisation.¹⁷

Many of these legal issues or processes require interaction with a range of legal entities including different courts and tribunals, sometimes at both the state and federal level, as well as different government agencies.

Victims also have a range of information and participatory entitlements related to the investigation and prosecution of a crime. In Victoria, some (but not all) of these entitlements are contained in the *Victims Charter Act 2006* (Vic).

Victims' rights and entitlements often span many pieces of legislation and may also be contained in organisational policies¹⁸ which only further supports the contention that victims require independent legal advice and assistance to be fully aware of these entitlements.

Without access to legal advice or assistance, many victims may be unaware of, or misinterpret, their information and participatory rights and entitlements. These include entitlements relating to:

- making a Victim Impact Statement and / or reading it aloud in court during a sentencing hearing¹⁹
- providing views before the Director of Public Prosecution makes certain prosecutorial decisions, like modifying charges, discontinuing the prosecution or accepting a plea of guilty to a lesser charge²⁰
- applying to the court for compensation or restitution²¹
- seeking leave to appear and make submissions in response to applications to access confidential medical or counselling records²²

¹⁷ See, for example, Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996* (Report, 2018) 204.

¹⁸ Including *Sentencing Act 1991* (Vic), the *Victims of Crime Assistance Act 1996* and relevant protections afforded victims under the *Criminal Procedure Act 2009* (Vic), *Evidence (Miscellaneous Provisions) Act 1958* (Vic), *Evidence Act 2008* (Vic), *Public Prosecutions Act 1994* (Vic), *Judicial Proceedings Reports Act 1958* (Vic), and *Open Courts Act 2013* (Vic). Entitlements can also be included in policy documents. For example, Director of Public Prosecutions Victoria - Kerri Judd QC, 'Discontinuance Review Framework' <<https://www.opp.vic.gov.au/getattachment/95b67060-1da7-4380-87e3-fcb65dafdba9/Discontinuance-Review-Framework.aspx>>.

¹⁹ *Sentencing Act 1991* (Vic) Division 1C – Victim Impact Statements.

²⁰ *Victims' Charter Act 2006* (Vic) s9B.

²¹ *Sentencing Act 1991* (Vic) Division 1 – Restitution; Division 2-Compensation.

²² Under section 32C(5) of the *Evidence (Miscellaneous Provisions) Act 1958* the victim (called the 'protected confider') may with the leave of the court, appear in the proceeding and make submissions. This is one of the few times during a criminal trial process where a victim has standing to appear and make submissions to the court.

- being heard in relation to certain treatment,²³ post-sentence²⁴ or parole decisions
- access to protections or special arrangements while giving evidence.²⁵

Victims consulted by VOCC have noted the logical disconnect between victims having legislative entitlements under Victorian legislation, while lacking access to independent legal advice to advise victims of their entitlements and enforce them when they are breached. In practice, this means that although victims may have rights or entitlements ‘on paper’, they may not be meaningfully realised for many victims without access to legal advice and assistance.²⁶

Through engagement with victims and other stakeholders, the VOCC continues to hear that without access to legal advice from an independent, trusted source (separate to the prosecution):

- the complexity of the justice system continues to be a barrier to meaningful victim participation
- victims are not always aware of their entitlements, such as entitlements under the Victims’ Charter or protections in court
- the justice system continues to cause secondary victimisation, with victims unable to adequately protect themselves.

Engagement with victims has indicated clear support for access to state-funded legal assistance across all stages of the investigation, prosecution and criminal trial process, as well as processes adjacent/parallel to it like intervention orders, family law proceedings, compensation and coronial proceedings.

Gaps in the legal services currently available for victims and survivors

The Discussion Paper seeks stakeholder views on gaps in legal services currently available for victims and survivors that should be addressed as a priority.

In Victoria, the Victorian Government has introduced a Victims Legal Service.²⁷ The Victims Legal Service provides free legal advice and support to people who have suffered injury or loss because of a crime and need help to:

²³ Where a person is found not guilty or unfit to stand trial due to mental impairment: *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).

²⁴ In Victoria, serious sex offenders and serious violent offenders that present an unacceptable risk to the community can be made subject to ongoing supervision or detention after they have served their prison sentence. See Post Sentence Authority, Post sentence scheme (31 January 2022) <<https://www.postsentenceauthority.vic.gov.au/post-sentence-scheme>>.

²⁵ There are a range of special protections / arrangements for a complainant regarding a sexual offence charge who is giving evidence under the *Criminal Procedure Act 2009* (Vic).

²⁶ Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process: Report* (2016) 122 (*‘The Role of Victims of Crime in the Criminal Trial Process’*).

²⁷ Victorian State Government, *Victims Legal Service* (Web Page) <<https://www.victimsofcrime.vic.gov.au/victims-legal-service#:~:text=If%20you%20or%20someone%20you,legal%20advice>>

- seek financial assistance through the Victims of Crime Assistance Tribunal (VOCAT)
- get compensation from the person who committed the crime.

However, the Victims Legal Service is not able to assist with other victim-related legal matters.

While the creation of the Victims Legal Service is an important and worthwhile first step, this limited service provision results in a significant gap in legal services for victims of sexual assault that need to be addressed as a priority. Outlined below are the key areas of priority.

How victims' and survivors' legal rights, preferences and wellbeing can be better protected in the courtroom process

The Discussion Paper seeks stakeholder views on how victims' and survivors' legal rights, preferences and wellbeing can be better protected in the courtroom process.

In addition to addressing the gaps in legal advice and assistance outlined above—through a comprehensive, state-funded specialist legal service—the VOCC also advocates for a model of independent legal representation in sexual assault cases. This is outlined further below.

Piloting a model of independent legal representation

Addressing the gaps in legal advice and assistance outlined above should address many of the legal challenges faced by victims of sexual assault. However, the VOCC contends that a legal advice and assistance model alone will not resolve all issues for victims of sexual assault in the adversarial criminal trial process.

Victims in sexual assault trials face unique challenges during the criminal trial process, including rigorous cross-examination often in relation to very personal and distressing content as well as applications for access to private medical and counselling records. Academic Fiona E Raitt has described victims' disadvantage during sexual assault trials as follows:

Complainants have only a limited voice: they can give evidence but as they cannot canvass their rights, they depend upon another to do so. As neither prosecutors nor judges are equipped to represent these interests, complainants must look elsewhere.²⁸

For this reason, some academics and legal experts have suggested that effective participation in the criminal justice system for sexual assault complainants may never be achieved without some degree of independent legal representation.²⁹

Victims' legal rights, preferences and wellbeing can be better protected in the courtroom through a model that not only provides broad-based legal advice and

²⁸ Fiona Raitt, 'Independent Legal Representation in Rape Cases: Meeting the Justice Deficit in Adversarial Proceedings' (2013) 9 *Criminal Law Review*, 729-749, 739.

²⁹ Fiona Raitt, 'Independent Legal Representation in Rape Cases: Meeting the Justice Deficit in Adversarial Proceedings' (2013) 9 *Criminal Law Review*, 729-749, 749; Sir John Gillen, *Report into the law and procedures in serious sexual offences in Northern Ireland* (Report April 2019) 173.

assistance 'around' the justice process, but also enables independent legal representation for complainants during some trial / hearing processes.

Accordingly, the VOCC advocates that the Australian Government pilot innovative approaches that could make a real difference for victim-survivors. Areas where independent legal representation could be trialled to make a significant difference for victims of sexual assault include:

- having independent legal representation (separate to the prosecution) to represent victims' interests during ground rules hearings (pre-trial)³⁰ and during trial to ensure access to special protections / arrangements while giving evidence
- when victims are required to make submissions in response to applications to access confidential medical or counselling records or other private communications³¹
- having independent legal representation (separate to the prosecution) when there are applications to question victims about prior sexual history evidence
- at committal the committal stage, under the special provisions for pre-trial cross examination of children or vulnerable witnesses, and in relation to any applications that concern the victim's privacy interests
- having independent legal representation (separate to the prosecution) post-trial (at the sentencing phase) in relation to victim impact statements, including having independent counsel in court to address issues with defence questioning a victim on the contents of their victim impact statement or requesting parts of a VIS be 'struck out.'

This may require modifications to some criminal trial and pre-trial processes to accommodate a third legal representative (in addition to the prosecution and defence) to be present (and able to intervene) during aspects of some criminal processes.

However, the VOCC contends that a limited form of victim legal representation is consistent with fair trial principles and can provide an effective way of informing the court about the rights and interests of victims in ways that the prosecution cannot. Victims would not become a party to proceedings, but victims would have standing to appear (via their legal representative) at specific stages of the process.

³⁰ In Victoria, a ground rules hearing is a pre-hearing process used to discuss and establish how vulnerable witnesses will be enabled to give their best evidence by the court setting ground rules for the questioning of the witness. Victims are not represented by independent counsel in relation to ground rules hearings, but intermediaries can be used. Intermediaries are officers of the court (and therefore serve the court, not individual victims). Intermediaries assess the communication needs of a vulnerable witness and provide strategies on how to best communicate with the witness. See, generally, Natalia Antolak-Saper and Hannah MacPherson, 'Vulnerable Witnesses and Victoria's Intermediary Pilot Program' (2019) 43(5) *Criminal Law Journal* 325.

³¹ Under section 32C(5) of the *Evidence (Miscellaneous Provisions) Act 1958* the victim (called the 'protected confider') may with the leave of the court, appear in the proceeding and make submissions. This is one of the few times during a criminal trial process where a victim has standing to appear and make submissions to the court. However, there is no dedicated, specialist legal representation for this to occur and evidence suggests that in Victoria, 'people's entitlements to protection of confidential communications and their sexual history are still not being fulfilled': Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences: Report* (Final Report, 2021) 264.

Protections during cross-examination

The VOCC also advocates for a model where an independent legal representative for the victim can provide advice to the court in relation to compliance with evidentiary protections during cross-examination aimed at protecting witnesses from improper questions or questioning.

In Victoria, witnesses are to be protected from questioning that:³²

- is misleading or confusing
- is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive
- is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate
- has no basis other than a stereotype (for example, a stereotype based on the witness's sex, race, culture, ethnicity, age or mental, intellectual or physical disability).

However, as victims of sexual assault do not have their own legal representation, they are reliant on prosecutors or judicial officers enforcing legislative protections against unlawful or inappropriate questioning by defence counsel. Evidence suggests not all prosecutors and judicial officers adopt interventionist approaches during the cross-examination of a complainant.³³

Finding an acceptable role for independent victim legal representation may involve granting victims' counsel a specific role in the criminal process to protect the victim's capacity to testify with integrity, without detracting from the accused's right to ask relevant questions and test the prosecution case.

Service delivery approaches or models

The Discussion Paper seeks stakeholder views on legal service delivery approaches or models the pilot should explore as a priority.

Care must be taken that legal service delivery approaches or models do not add further complexity to victims' service system navigation. As noted in a recent review of Victoria's existing service system, 'Coordination and collaboration between the various service types that comprise the sexual assault system remain fraught and inconsistent.'³⁴

³² *Evidence Act 2008 (Vic) s41(3)*.

³³ The Victorian Law Reform Commission found in 2021 that despite reforms, victims continue to experience 'brutal' cross-examination: Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences: Report* (Final Report, 2021) 455.

³⁴ Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences: Report* (Final Report, 2021) 90. See also, Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victim Services Review* (RMIT University, November 2020) 62.

For this reason, the VOCC advocates for any pilot approaches to integrate with existing models / approaches and employ a tailored and place-based approach, with a sound advisory and governance model comprised of victim-survivors and other stakeholders.

Recommendations for particular locations for this pilot

As noted above, the Victorian State Government has already implemented a limited Victims Legal Service that leaves many gaps in legal assistance for victims of sexual assault, as outlined in detail on page six of this submission.

Accordingly, the VOCC advocates for one of the Australian Government's legal services pilots to be located in Victoria, having regard to the following key factors:

- ability to integrate with/expand upon the existing (limited) Victims Legal Service which is already provided via a range of community-based providers, including specialist services³⁵
- existing health / justice partnerships that could be bolstered or enhanced, leveraging the experience of existing organisations that may have historically had insufficient funds to fully implement a holistic legal service for victim-survivors³⁶
- the location of existing multidisciplinary centres (MDCs) in Victoria which are 'one stop shops' providing safe and discreet access to:
 - specially trained police investigators
 - counselling and advocacy support
 - private counselling rooms and group therapy spaces
 - video audio recorded evidence (VARE) rooms where child victim survivors and adults with cognitive impairments can provide their statement to police
 - clinic rooms where victims can have their general health and wellbeing needs assessed by qualified community health nurses
 - forensic medical suites
 - remote witness facilities
- innovative court locations that would provide victims with state of the art physical and community service infrastructure to support the provision of enhanced legal advice and assistance (e.g. Bendigo law courts³⁷).

³⁵ Including the Victorian Aboriginal Legal Service, Djirra, Women's Legal Service Victoria.

³⁶ For example, the Integrated Services for Survivor Advocacy (ISSA) partnership supports victims/survivors to recover from sexual assault and/or family violence by supporting them to navigate the legal system. It is a health justice partnership between Springvale Monash Legal Service (SMLS) and the South Eastern Centre Against Sexual Assault and Family Violence (SECASA): South-East Monash Legal Service Inc, *Integrated Services for Survivor Advocacy* (Web Page) <https://www.smls.com.au/integrated-services-for-survivor-advocacy/>

³⁷ The new Bendigo Law Court enables separation between parties attending court, including safe waiting areas and separate circulation pathways for persons in custody and operational staff. It includes remote witness facilities, safe waiting facilities and meeting rooms for support agencies and client services: Court Services Victoria, *Bendigo Law Courts Development* (Web Page) <https://courts.vic.gov.au/projects/bendigo-law-courts-development>