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# ***Beyond Belief, Beyond Justice:***

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The difficulties for  
victim/survivors with disabilities  
when reporting sexual assault  
and seeking justice.

Final report of Stage One  
of the  
Sexual Offences Project

Jonathon Goodfellow  
Margaret Camilleri  
and the staff and volunteers of the

**Disability Discrimination Legal Service**  
**November 2003**

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The difficulties for victim/survivor with disabilities when reporting sexual assault and seeking justice.

### **Final Report of the Sexual Offences Project Stage 1**

The title of this report comes from a number of the constant themes the project heard in the comments participants contributed to the project during interviews and focus groups.

One of these themes was the fact that many victim/survivors with disabilities when reporting incidents of sexual assault felt that they were considered, often because of their disabilities, beyond belief.

A related theme was the fact that many people who work with victim/survivors with disabilities found the fact that any victim/survivor would not be believed, itself beyond belief.

Another theme contributing to the title comes from reports of the incapacity of the justice system to meet the needs of victim/survivors with cognitive impairment in ways that mean they can gain real access to justice and meaningfully participate in the legal process, appearing to place these victim/survivors beyond justice

Many participants also expressed frustration that this situation results in many accused offenders residing comfortably in the knowledge they would be unlikely to be successfully tried through a legal system that places victim/survivors with disabilities beyond justice.

Together, these themes illustrate the feelings of exasperated participants that such disbelief could be so embedded in the values, attitudes and laws that overwhelm victim/survivors of sexual assault with disabilities.

After all if you are considered to be *beyond belief* then you are most certainly *beyond justice*.

## **Acknowledgments**

The Disability Discrimination Legal Service gratefully acknowledges the many people who contributed to the Sexual Offences Project Stage One. Our thanks go to the many people across Victoria who work with victim/survivors with disabilities who gave their time, experiences and insight in contributing to the Project. A special thanks to the Victorian Law Reform Commission.

Grateful thanks to the Lance Reichstein Foundation for their initial and ongoing support and commitment to the Project.

This report was written by Jonathon Goodfellow and Margaret Camilleri with the support of the staff and volunteers of the Sexual Offences Project of the Disability Discrimination Legal Service.

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**ISBN:** *(pending)*

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November 2003**

Funded by the Lance Reichstein Foundation  
with the support of  
the Mercy Foundation  
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the City of Melbourne Lord Mayor's Charitable Trust

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# Introduction

This report presents the findings of a Project that examined the experiences of victim/survivors of sexual assault who have disabilities that affect their cognitive capacity<sup>1</sup>. The Sexual Offences Project for Women with Disabilities (the Project) was conducted by the Disability Discrimination Legal Service Victoria Incorporated (DDLs) and guided by a reference group with members representing the Disability Working Group of the Federation of Community Legal Centres, the Mental Health Legal Centre, Villamanta Legal Service, Headway Victoria, the Office of the Public Advocate (OPA) and the Centres Against Sexual Assault (CASA) Forum. The Project received broader support from the Equal Opportunity Commission (EOC), the Victorian Law Reform Commission (VLRC), Elizabeth Hoffman House, the Islamic Women's Welfare Council of Victoria, the Victorian Women's Trust, the Office of Women's Policy (OWP) and the Department of Human Services (DHS).

The Project methodology included a literature review, consultations with people who work with victim/survivors with disabilities and stakeholders through community forums and interviews, and an analysis of collected data and key service provider policy and procedural documents (see Chapter 1). The Project visited 5 regions across Victoria and consulted with a wide range of individuals and organisations including: the Victorian Police Sexual Assault and Child Abuse Coordination Office (SOCACO); staff of CASA's; the Victorian Women with Disabilities Network; Women's Legal Service Victoria; Judicial Officers and Court personnel; volunteers of the OPA Independent Third Person (ITP) Program; and many individuals representing disability advocacy, Women's, Indigenous, psychiatric and other service organisations. The Project was funded primarily by grants of \$22,000 from the Lance Reichstein Foundation and supported by the Mercy Foundation who granted \$6,862, and the City of Melbourne Lord Mayors Charitable Trust who donated \$1,350. The important contributions of all individuals and organisations are gratefully acknowledged.

Despite much progress in ensuring sexual assault is an issue of major concern in Australian society, it still holds a relatively low profile, the subject of widespread indifference and often

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<sup>1</sup> The Project explored issues for women with 'impaired mental functioning' (as defined by the *Crimes Act 1958(Vic)*, s 50). This was considered appropriate given that this group of women are arguably the most vulnerable to sexual assault (see Chapter 2) and the Project's funding submission and final agreement reflect this. The Victorian Law Reform Commission (VLRC) reference for inquiry regarding sexual offences law and procedure requires the Commission to especially consider the issues for disadvantaged victim/survivors, including women with 'impaired mental functioning'. The DDLs recognises that women with other disabilities also experience sexual assault and can experience difficulties and discrimination when seeking access to the criminal justice system. However, these issues are outside the parameters of this Project. Given the diversity of women who experience 'impaired mental functioning', the almost universal condemnation many of these women express about this legislative definition, and the antiquated use of the word 'mental', the term used to refer to this group by the Project and throughout this report is 'victim/survivors with cognitive impairment'.

active concealment. For victim/survivors with cognitive impairment, sexual assault is simultaneously both a common and a largely hidden experience. Whilst society is increasingly obsessed with sexual expression, our institutions and residential care facilities are full of people with disabilities who have experienced sexual assault that nobody is ever likely to discover – they are silent, out of sight and out of mind. Worse still, these people remain at high risk of further sexual assault and abuse.

The Australian and international research evidence suggests that whilst the numbers of people with a disability in the community are relatively low, the relative number of sexual assaults perpetrated against them is high (see Chapter 2). Informed by historical prejudices about people with disabilities' sexual expression, community reactions – or perhaps over-reactions – continue to be pervaded by prejudicial notions that include: that locking people in their homes protects them from sexual assault; that sex education leads to deviance, disease and death; that a silent person is a consenting person, and, that people with disabilities are either sexual deviants or childlike and asexual. Despite these continuing prejudices, the reality of people with disabilities' experience is that they are more likely to be the victim of sexual assault than not, and their perpetrators are most often their co-residents or carers.

The policies and practices of disability service providers and other professionals working with people with disabilities, still often lead to silence and isolation in the name of protection (see Chapter 3). Whether this arises out of the belief that, for example these victim/survivors could be fabricating events to seek attention or that the sexual act was consenting, it remains the case that most victims continue to be kept silent in the very environment where the assault took place, living with the very person who perpetrated the assault without any real choices about reporting the crime or removing the offender.

Of course victim/survivors with cognitive impairment are no less abused because some, for example, may be non-verbal or have difficulties communicating their thoughts and feelings. Their experiences of sexual assaults are still real and very damaging. This Project found (see chapter 4) that as a result of sexual assault, victim/survivors with cognitive impairment are often:

- not believed when they do report sexual assault;
- not considered reliable witnesses;
- not considered capable of participating in the justice process;
- 'punished' by being removed from their homes and out of reach of the perpetrator;
- placed at even greater risk of further sexual assault as a result; and
- filled with fear leading to withdrawal into social isolation.

Whilst the community still has a long way to go to ensure to the greatest extent possible, that people with disabilities who are victim/survivors of sexual assault can gain access to justice, this project and everyone associated with the DDLS are hopeful that this report and through the VLRC Sexual Offences reference, we can achieve change where others have tried and only

succeeded in part. To do this we need: more research into the needs of victim/survivors with disabilities and the patterns of abuse they are exposed to; better data collection to identify victim/survivors with disabilities; greater emphasis on sensitive service delivery and worker practices; increased worker skills in identifying sexual assault and disability; systemic reforms of the criminal justice and support service systems; adjustments to the environments and processes supposed to facilitate access to justice; greater levels of support and advocacy; and individual skills development and education that empowers people with disabilities to become more aware and assertive.

Whilst this is still a daunting list of needs, we only need remember back to when the notion of de-institutionalisation still filled most people with fear to remind ourselves that with determination and a commitment to the rights of people with disabilities, we can achieve today what may have seemed yesterday like the impossible.

# **1:Background & Overview**

## **The Disability Discrimination Legal Service**

The Disability Discrimination Legal Service (DDLS) is an independent, community legal centre that specialises in disability discrimination legal matters.

The long term goal of the DDLS is:

*To maintain, promote and carry out the aims of the Disability Discrimination Act 1993 (Cth), to ensure:*

- *the elimination of discrimination on the basis of disability;*
- *that people with disabilities have a right to equal treatment before the law; and,*
- *to promote community understanding that people with disabilities have the same fundamental rights as the rest of the community.<sup>2</sup>*

The DDLS provides disability discrimination legal information, education, advice, referrals, casework assistance and policy and law reform services free to people with a disability throughout Victoria.

The DDLS is a member of the Disability Working Group of the Federation of Community Legal Centres. This group supports the Law Reform activities of its members to achieve systemic reform in support of the rights of Victorians subject to economic and social disadvantage. On a national level, the DDLS participates in the Disability Rights Network of the National Association of Community Legal Centres whose membership addresses systemic issues of concern to people with a disability across Australia.

## **The Sexual Offences Project**

The Sexual Offences Project for Women with Disabilities was developed in response to long held concerns about the systemic discrimination victim/survivors of sexual assault with a disability can experience when seeking justice. The Project was initiated by the DDLS and the Lance Reichstein Foundation who provided the majority of funding with additional financial support from the Mercy Foundation and the City of Melbourne Lord Mayor's Charitable Trust.

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<sup>2</sup> DDLS Constitution.

The Project built on a number of research and policy initiatives in recent years, which have also highlighted these concerns. In 2001 the Victorian Law Reform Commission (VLRC) was given a reference to examine Sexual Offences law and procedure, which includes a focus on marginalised women including women with disabilities<sup>3</sup>. In the following 18 months the Victorian Government launched three key strategies; the *Crime and Violence Strategy*<sup>4</sup>, *Women's Safety Strategy 2000 – 2003*<sup>5</sup> and the *State Disability Plan 2002 – 2012*<sup>6</sup>, which all outline strategies to address advocacy and support for women with disabilities who face violence, sexual assault and other threats to their safety.

A number of previous reports raised issues faced by women with disabilities who were victim/survivors of sexual assault in Victoria. These included the 1997 report by Family Planning Victoria (FPV), *Working with Victim Survivors of Sexual Assault with an Intellectual Disability*<sup>7</sup> and *Silent Victims*<sup>8</sup>, a 1988 report completed for the OPA. In addition to the issues raised and strategies suggested in these reports the DDLS, through its increasing networks with Women's advocacy organisations, and its own advocacy activities, was aware of the difficulties and discrimination that victim/survivors with cognitive impairment face when reporting sexual assault and accessing the criminal justice system.

## **Project Aims and Objectives**

The aim of the Project was:

- To examine the issues and problems victim/survivors with cognitive impairment experience when reporting sexual assault and proceeding with prosecution in Victoria.

The Project objectives were:

- To consult victim/survivors with cognitive impairment about their experiences of sexual assault and access to justice.

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<sup>3</sup> For a detailed overview of this reference and the Commission's draft recommendations to date, see: Victorian Law Reform Commission *Sexual Offences: Interim Report (2001)* Melbourne Victoria (hereafter *Interim Report*).

<sup>4</sup> Crime and Violence Prevention Victoria, *Safer Streets Safer Homes: A Crime and Violence Prevention Strategy for Victoria (2002)* Department of Justice, Victorian Government, Melbourne Victoria (hereafter *Crime and Violence Prevention Strategy*).

<sup>5</sup> Office of Women's Policy, *Women's Safety Strategy 2000 – 2003 (2000)* Department of Premier and Cabinet, Victorian Government, Melbourne Victoria.

<sup>6</sup> An 'all of government' strategy, the Plan outlines the Government's vision for Victorians with disabilities over the next decade and is available from the Department of Human Services (DHS) library or website: [www.dhs.vic.gov.au/disability](http://www.dhs.vic.gov.au/disability). Victorian Government, *State Disability Plan 2002-2012 (2002)* Disability Services Branch, Department of Human Services, Melbourne Victoria.

<sup>7</sup> One of the outcomes of a 12-month joint Project between Family Planning Victoria (FPV) Disability Unit and Centres Against Sexual Assault (CASA's), and funded by the DHS, Disability Services Branch, this report is available from the DHS library and website. The practice guidelines and training manual is available from FPV. Frawley, P., *Working with Victim/Survivors of Sexual Assault with an Intellectual Disability: Recommended Practice Guidelines for Centres Against Sexual Assault (1997)* Family Planning Victoria & Department of Human Services, Disability Services Unit Sexual Offences Project, Melbourne Victoria (hereafter *Victim/Survivors with Intellectual Disability: Practice Guidelines*).

- To contribute to the VLRC's Sexual Offences Reference through the provision of Project data, advice and recommendations and through participation in VLRC consultations and research.
- To contribute to the Reichstein Foundation's other funded Sexual Offences Projects through the facilitation of networking and collaboration; the provision of Project data, advice and recommendations; and, through participation in these Projects' consultations and research.

## **Project Methodology**

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The Project intended to identify some of the experiences of victim/survivors with cognitive impairment. Early in the Project's development, it was envisaged that these experiences would be collected directly from victim/survivors. However, due to ethical concerns and resource constraints, as well as the varying abilities of victim/survivors to share their experiences, it was decided that victim/survivors would not be directly interviewed. The Project instead invited those people who work with victim/survivors to give case studies that illustrate important issues and experiences when reporting and/or seeking access to justice.

The Project methodology comprised five stages: consultation and development; literature review and resource development; data collection; data collation and analysis; and, the development of the Project's recommendations and preparation of the final report. These five stages are detailed below.

### **CONSULTATION AND DEVELOPMENT**

The Project sought to gain the views of advocacy, counselling and support service providers regarding the outcomes and methodology. It also sought to identify individuals with particular professional expertise in relation to sexual assault and people with disabilities who could assist the Project.

Prior to seeking funds, a meeting was held with representatives from CASA House, the Mental Health Legal Centre, Villamanta Legal Service, Headway Victoria, the OPA and the Lance Reichstein Foundation. At this meeting the basic structure for the Project was endorsed as outlined here. This group then formed the reference group for the Project and continued to meet monthly or as required throughout the life of the Project.

### **LITERATURE REVIEW AND RESOURCE DEVELOPMENT**

A review of relevant Australian and international literature was undertaken to identify common themes and to locate examples of similar initiatives that might assist in developing

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<sup>8</sup> Johnson, K., Andrew, R., Topp, V., *Silent Victims: A Study of People with Intellectual Disabilities as Victims of Crime* (1988) Office of the Public Advocate, Melbourne Victoria (hereafter *Silent Victims*).

the Project's questionnaires and interview guidelines. Despite considerable efforts and the support of the reference group it became apparent that not only had little research been undertaken regarding victim/survivors with cognitive impairments, but that statistics about this group were either non-existent or incomplete. The results of the review are outlined in Chapter 2.

**DATA COLLECTION**

The Project utilised regional focus groups and face-to-face individual and small group interviews with key stakeholders and people who work directly with victim/survivors with cognitive impairment. The key stakeholders included statutory offices such as the OPA and the Office of Public Prosecutions (OPP), disability support services, disability and legal advocacy services, sexual assault support services and people involved in the criminal justice system including police, Magistrates, Court personnel and support services. Interviews and focus groups were held in the Melbourne metropolitan area as well as four regional centres with the Mildura consultations jointly attended by the Project team and the VLRC Commissioner and staff. The numbers of people and organisations in each area are shown below:

<b>LOCATION</b>	<b>INTERVIEWS</b>	<b>FOCUS GROUPS</b>	<b>ORGANISATION S</b>	<b>TOTAL PARTICIPANTS</b>
<b>Melbourne</b>	11	1	18	<b>61</b>
<b>Mildura</b>	17	3	19	<b>80</b>
<b>Ballarat</b>	5	1	7	<b>17</b>
<b>Geelong</b>	5	1	10	<b>26</b>
<b>Gippsland</b>	9	1	10	<b>16</b>
<b>TOTALS</b>	<b>47</b>	<b>7</b>	<b>64</b>	<b>200</b>

An interview guide and a series of questionnaires were developed specifically for the various target groups (see Appendix 3 for an example of one of the questionnaires). They focussed on the following themes:

- experiences of victim/survivors with cognitive impairment when reporting incidents of sexual assault to the police and/or service providers and when accessing the criminal justice system;
- supports and services available and their accessibility to the target group;
- issues and barriers when reporting and accessing the legal system, and
- suggestions for improvements to the reporting and legal systems and the response of the support services system to the target group.

Participants were assured that their confidentiality would be maintained through the removal of any identifying remarks in all contributions made to the Project and through the destruction of audiotapes once transcripts were complete. The names of agencies consulted have not been included in this report due to concerns that as few people work in this sector in rural and regional areas, there was a risk that comments may be attributable to a particular agency in a particular location and therefore potentially identify the participating individual.

The Project team were mindful of the relatively low numbers of participants contributing to the Project given the overall number of people who work or volunteer in the area of sexual assault, disability and criminal justice. The Project did not intend to produce a representative sample of the people who work with victim/survivors. Rather it intended to source participants from the five regions targeted in all service categories. The data therefore, is more representative of the regional areas targeted rather than the Melbourne metropolitan area. This approach was intended to elicit enough responses to highlight some of the differences between metropolitan and regional areas, as well as from region to region. Whilst some differences between metropolitan and regional practice are evident, they were not highly significant when compared to the overall body of data collected.

It was recognised at the development phase of the Project that face-to-face interviews with victim/survivors with cognitive impairment would be difficult. The issues identified were;

- difficulty gaining access to these victim/survivors;
- the amount of time required to conduct individual interviews;
- methodological and ethical issues inherent when interviewing victim/survivors and people with cognitive impairments;
- the possibility of re-traumatising the participants; and
- the limited capacity of Project resources to provide support to these respondents through debriefing, further counselling and referral.

To address these issues the Project team consulted broadly to develop an appropriate ethics framework for the interviews. It then sought the support of generic sexual assault services to identify potential participants, provide referrals to the Project and assist in providing back up support and counselling.

Despite these safeguards, it was decided by the Project's reference group early in the research phase to discontinue the face-to-face interviews with victim/survivors with cognitive impairment and to collect case studies in consultations with workers and stakeholders. This decision was made primarily for three reasons:

- the risk of re-traumatisation and therefore high level of skills and experience required of the interviewer;

- the risk, in a small regional community context, that the stories or contributions of victim/survivors or the professionals consulted being inadvertently recognised in the final work produced by the Project; and
- the relatively low level of resources available for the Project.

Originally the Project sought to interview individual members of the Police force for participation in the Project. However, due to difficulties associated with the process of approving the structure and content of these contributions, an alternative strategy to gain the perspective of the Police was agreed with the Victoria Police Research Coordinating Committee. This agreed strategy involved a one-off consultation with the Sexual Assault and Child Abuse Coordination Office (SOCACO) regarding:

- procedures for interviewing victim/survivors of sexual assault with impaired cognitive functioning; and,
- Victoria police perspectives regarding the difficulties encountered and supports required by victim/survivors when reporting sexual assault and accessing the criminal justice system.

It is important to note that some of the comments obtained from the police member involved in the consultation process may not necessarily reflect the policies of Victoria Police nor be representative of the views of all Victoria Police members.

The data for the Project therefore primarily consists of qualitative information gathered from personnel who work in the disability support, sexual assault or criminal justice systems and who have had some first hand experience of working with victim/survivors of sexual assault with cognitive impairment, as well as a senior officer of the SOCACO.

### **DATA COLLATION AND ANALYSIS**

Data for inclusion in the Projects findings was drawn from five distinct perspectives:

- Those of the victim/survivors with cognitive impairment as described by the people who work closely with them;
- Those of the sexual assault support services involved with the victim/survivors;
- Those of disability support or advocacy services involved with victim/survivors;
- Those of the police force through a consultation with the Acting Senior Sergeant of the SOCACO; and,
- The remaining stakeholders in the criminal justice system who work with victim/survivors including Court personnel, the OPP, community legal centres, legal representatives for both the prosecution and defence, Court Network Program volunteers, the OPA ITP Program volunteers, and Forensic Medical Officers (FMO's).

The weighting attributed to comments and quotes from participant contributions was applied by independent assessments of the data recorded on transcripts by Project team members. Each applied the same criteria as follows:

- the direct relevance of the comments contributed to the Project's aims and objectives;
- the degree to which the comment contributed was collected in a uniform manner relative to the body of data collected;
- the capacity of the comment contributed to retain integrity whilst ensuring the anonymity of the contributor, their subject/s and the context and geographic location described (if applicable); and,
- whether the comments contributed are supported by other Project data, any research findings identified through the literature review, or anecdotal reports from professionals working closely with victim/survivors who were not able to participate in the Project.

### ***PROJECT RECOMMENDATIONS AND REPORT***

The reference group and Project team prepared the Project's final recommendations and report with the assistance of an independent consultant. The report will be released once final clearance of the Victoria police contributions by the Research Coordinating Committee is provided.

## ***Project Outcomes***

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The proposed outcomes relate to the objectives of the Project as outlined earlier in this chapter and are detailed below:

### ***COMPLETION OF CONSULTATIONS WITH VICTIM/SURVIVORS WITH COGNITIVE IMPAIRMENT RESULTING IN DATA REGARDING THEIR EXPERIENCES OF REPORTING SEXUAL ASSAULT AND IN ACCESSING THE CRIMINAL JUSTICE SYSTEM.***

This outcome was not met due to the issues detailed above in the 'Data Collection' section of this chapter. However, data was obtained through workers with victim/survivors with cognitive impairments who contributed case studies detailing their first hand experience assisting victim/survivors in reporting and accessing the criminal justice system.

### ***CONTRIBUTION OF PROJECT DATA, ADVICE, AND RECOMMENDATIONS THROUGH PARTICIPATION IN VLRC CONSULTATIONS AND RESEARCH.***

This outcome was met with DDLS participation in VLRC's Mildura consultations and forums and most of the forums and stakeholder roundtables in Melbourne. The Project has prepared a submission to the VLRC's Interim Report, which comprises this report and specific responses to the recommendations of the Interim Report. For further details or a copy of the submission please contact the Disability Discrimination Legal Service of the (contact details listed on inside front cover).

***DEVELOPMENT AND FACILITATION OF SEXUAL OFFENCES PROJECTS' NETWORK AND COLLABORATION, PROVISION OF PROJECT DATA, ADVICE AND RECOMMENDATIONS AND PARTICIPATION IN CONSULTATIONS AND RESEARCH.***

This outcome was met with some obvious limitations in sharing Project data and participating in consultations and research. The three organisations, DDLS, Elizabeth Hoffman House and the Islamic Women's Community Council, met regularly and contributed to the electronic discussion group through the National Women's Justice Coalition mediated by the DDLS' Project worker who contributed significant advice and support to these projects.

***COMPLETION OF CONSULTATIONS WITH PROFESSIONALS WHO WORK WITH VICTIM/SURVIVORS WITH COGNITIVE IMPAIRMENT RESULTING IN DATA REGARDING THE PROFESSIONALS' PERSPECTIVE OF VICTIM/SURVIVOR EXPERIENCES OF REPORTING SEXUAL ASSAULT AND ACCESSING THE CRIMINAL JUSTICE SYSTEM.***

This outcome was completed and comprises the majority of Project data utilised for analysis. A total of 47 face to face interviews and 7 forums were undertaken across the four regions and the metropolitan area. In total, 64 organisations were consulted and approximately 200 individuals participated in the Project.

***PRODUCTION OF PROJECT REPORT INCLUDING RECOMMENDATIONS***

This outcome has been achieved. Promotion and distribution will then commence.

There were several outcomes that were not planned but were nevertheless achieved including:

***IDENTIFICATION OF PRIORITIES FOR FURTHER SYSTEMIC INITIATIVES***

Please see chapter 6 for details of Project recommendations.

***FUNDING SECURED FOR FURTHER SYSTEMIC INITIATIVES***

The Project has secured further funding from the Reichstein Foundation and the Victorian Women's Trust for the Project's second stage, a policy and law reform strategy to work with stakeholders and lobby for the adoption and implementation of this Project's recommendations.

***GREATER AWARENESS OF THE ISSUES AFFECTING VICTIM/SURVIVORS WITH COGNITIVE IMPAIRMENTS AMONGST STAKEHOLDERS AND SERVICE PROVIDERS.***

The Project reached 64 organisations in 5 regions totalling approximately 200 individuals, indicating that whilst no formal evaluation of awareness raising was conducted, these agencies gained exposure to the Project and the issues affecting victim/survivors with cognitive impairment.

# 2 Research, Reports & Legislation

## Disability & Sexual Assault: What we know

The incidence of people with 'impaired mental functioning' in Victoria is not reported. This definition is taken from the *Crimes Act 1958 (Vic)*<sup>9</sup> and is not generally used within the disability and health sectors, nor by people to describe their disability. It is therefore difficult to gain a clear picture of the number of people with cognitive impairment in Victoria, although figures do exist for some of the diagnosed disability types covered by this definition. People with intellectual disabilities are estimated to make up 0.99% of the general population in Australia, with 1.7% identified as 'slow at learning or understanding'.<sup>10</sup> In 1997, the ABS reported that 17.7% of adult participants in a survey were identified as experiencing a mental disorder at some time in the previous twelve months – this survey excluded psychotic disorders and included substance abuse disorders.<sup>11</sup> These figures would suggest that a significant number of people do, at some stage of their lives experience cognitive impairment.

Limited research has been undertaken or reported regarding the sexual assault of women with intellectual disabilities, mental illness, acquired brain injury (ABI) and other cognitive impairments, but no literature was found that looks at the incidence for all groups combined. The research that does exist for each group indicates that they are known to experience sexual assault at significantly higher rates than women in the general population<sup>12</sup>. A Canadian report on the incidence of sexual assault of women with an intellectual disability claims that they are one and a half times more likely to experience sexual assault than women who do not have an intellectual disability.<sup>13</sup>

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<sup>9</sup> Section 50 of the *Crimes Act 1958 (Vic)* defines 'impaired mental functioning' with specific reference to mental illness, intellectual disability, dementia and brain injury. Note that this is not an exhaustive list and can cover other cognitive impairments. Note that intellectual disability has the same meaning as for the purposes of the *Intellectually Disabled Persons Services Act 1986 (Vic)*.

<sup>10</sup> Australian Bureau of Statistics, *Disability, Ageing and Carers* (1998 Catalogue 4430.0) Commonwealth of Australia, Canberra, Australian Capital Territory.

<sup>11</sup> Australian Bureau of Statistics, *The National Survey of Mental Health and Wellbeing* (1997 Catalogue 4326.0) Commonwealth of Australia, Canberra, Australian Capital Territory.

<sup>12</sup> See: Sobsey, D., *Violence and Abuse in the lives of People with Disabilities: The End of Silent Acceptance?* (1994) Baltimore, MD; Paul H Brooks (hereafter *Violence, Abuse and People with Disabilities*); Turk, V., and H. Brown. *Sexual abuse of adults with learning disabilities* (1992) Paper presented at the Conference of the International Association for Scientific Study of Mental Deficiency, Brisbane, Australia; *Silent Victims*, above n 8.

<sup>13</sup> *Violence, Abuse and People with Disabilities*, above n 12.

It is likely that the incidence of sexual assault across the range of disabilities covered by the *Crimes Act 1958 (Vic)* definition of impaired mental functioning is significantly higher than the general population, as the figures above would suggest.

The issues and barriers identified through previous research specifically regarding women with intellectual disability and sexual assault, are likely to be similar to those for other women with cognitive impairments, but we should be careful not to generalise across diagnostic categories. As discussed in the next section of this report, what we do know is that a range of barriers to inclusion and equal participation in the community are experienced by women with cognitive impairment in their every day life, and that social factors associated with these disabilities can and do lead to increased vulnerability to sexual assault.

The following section draws together what is known about the incidence and prevalence of the sexual assault of women with disabilities, and summarises key findings about the experiences of these women in relation to increased risk, difficulties reporting sexual assault, barriers to support and accessing the criminal justice system. It also provides an overview of current research on the response of the criminal justice system to women with cognitive impairment who are victim/survivors of sexual assault and outlines relevant provisions within existing legislation.

## ***Incidence & Prevalence***

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The limited information available regarding the incidence and prevalence of sexual assault of women with cognitive impairment can be attributed to a range of issues. Firstly, many women do not report sexual assault; including – and perhaps especially – women with cognitive impairment. Secondly, there exist a range of systemic barriers these women experience when seeking access to justice. Further, in Victoria there is no consistent approach to identifying whether a person who has come into contact with the police or other key stakeholders or contact points within the criminal justice system, indeed has a cognitive impairment. Finally, those victim/survivors who have reported sexual assault may often have had experiences of adverse responses to their disclosure and/or the systemic barriers limiting access to justice such as the policies, procedures and practices of disability support services.

A Project undertaken by Family Planning Victoria and the CASA Forum in 1997, gathered some statistics of CASA workers' assessments of whether women accessing their services identified themselves as being intellectually disabled when asked, or the CASA worker noted a possible intellectual disability based on their service contact. Over a twelve-month period these reports found that 0.5% of people contacting the three CASAs were identified as having an intellectual

disability<sup>14</sup>. A video produced in NSW, *Talk About It*, claims that 8 out of 10 people with intellectual disabilities will experience sexual assault before they turn 18<sup>15</sup>. As noted, it is difficult to locate, access, analyse and sometimes cite statistics relating to the incidence of reported sexual assaults perpetrated against women with cognitive impairment. As a result it is very difficult to estimate the prevalence of these crimes across the community. What data does exist is based on recorded levels of access to sexual assault support services. The lack of any systematic and consistent approach to the collection and distribution of these statistics amongst stakeholders, and the lack of any consistency in the identification of people with cognitive impairment within the criminal justice system, renders any attempt to substantiate the incidence and estimate the prevalence of these crimes with any accuracy redundant.

The data that is available for Victoria and Australia indicates that:<sup>16</sup>

- for the 2000/2001 financial year, a total of 112 police interviews attended by ITP's concerned sexual assault and rape incidents. Of these, 69 incidents reported a victim/survivor with an intellectual disability and in 23 cases the victim/survivor was reported to have a psychiatric disability;
- for the 2000/2001 financial year, 320 clients of CASA House' sexual assault service identified as having a disability. 221 of these clients identified as having a psychiatric disability;
- in April/June 2000, 20% of victim/survivors who used sexual assault services across Australia in the reporting period were identified as having a disability, with mental health cited most frequently (270), followed by intellectual disability (81), with 350 victim/survivors recorded as having a disability unknown to the service.

Overseas studies report that women with disabilities, including cognitive impairments, are more likely to be sexually assaulted than women without disabilities. A study conducted over a six-year period by the Seattle Rape Relief Service found that people with an intellectual disability reported sexual assault at four times the national rate<sup>17</sup>. It is not known how broad the definition of intellectual disability was, but this report which is now quite dated, highlights that sexual assault for people in this category of disability was a significant issue almost two decades ago.

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<sup>14</sup> One regional and two metropolitan CASAs took part in a pilot Project for this research. *Victim/Survivors with Intellectual Disability: Practice Guidelines*, above n 7.

<sup>15</sup> *Ibid.*

<sup>16</sup> Figures reproduced as cited in: *Issues Paper on the Criminal Justice System and Victims of Sexual Offences with 'Impaired Mental Functioning'* (2002) Victorian Law Reform Commission, Melbourne Victoria, p 2. (hereafter VLRC *Issues Paper*).

<sup>17</sup> Ryerson, E., *Sexual Abuse and self protection education for Developmentally Disabled Youth: A Priority Need* (1984) Report to the Sexuality Information and Education Council of the United States, Washington DC, 13 (1), pp 6-7.

## Characteristics of sexual assault

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Much of the research conducted to date identifies that people with cognitive impairment experience sexual assault at higher rates primarily because of increased vulnerability. This increased vulnerability is attributable to:

- A general lack of knowledge and understanding about potential risks and consequences due to limited cognitive and adaptive skills;<sup>18</sup>
- Expressive communication difficulties which make it difficult to articulate and disclose sexual assault;<sup>19</sup>
- Increased dependence on others for basic needs;<sup>20</sup>
- Power inequities, over compliance and passivity of people with an intellectual disability;<sup>21</sup> and
- Physical and social isolation.<sup>22</sup>

Studies have revealed that a person with an intellectual disability is likely to be sexually abused by a person known to them, with a high percentage encountering their offender in an environment they are accessing as a result of their disability.<sup>23</sup> Women with mental illness report similar experiences of sexual assault and were reported to feel unsafe when accessing mental health services, and in particular, inpatient facilities where they may be hospitalised involuntarily.<sup>24</sup> A report examining the experiences women in such situations face, confirmed that typically the perpetrators of assault in these situations include both other inpatients and professionals working within the mental health system.<sup>25</sup>

It can be concluded from the available research, that people with cognitive impairment experience sexual assault:

- at significantly higher rates than other members of the community;<sup>26</sup>

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<sup>18</sup> *Victim/Survivors with Intellectual Disability: Practice Guidelines*, above n 7.

<sup>19</sup> Carmody, M., *Sexual Offences of People with an Intellectual Disability* (1990) Women's Coordination Unit, Parramatta, New South Wales (hereafter *Sexual Offences of People with an Intellectual Disability*). Turk, V. & Brown, H. *The Sexual Abuse of Adults with Learning Disabilities: Results of a Two-Year Incidence Survey* (1993) *Mental Handicap Research* 6, p 3 (hereafter *Sexual Abuse of Adults with Learning Disabilities*).

<sup>20</sup> Carmody, M. and Bratel, J., *Vulnerability and Denial: Sexual Offences of People with Disabilities* (1992) in Breckenridge, J. and Carmody, M., (ed), *Crimes of Violence: Australian Responses to rape and Child Sexual Offences* (Allen & Unwin, North Sydney) (hereafter *Vulnerability and Denial*).

<sup>21</sup> *Sexual Abuse of Adults with Learning Disabilities*, above n 19, *Violence, Abuse and People with Disabilities*, above n 12.

<sup>22</sup> *Victim/Survivors with an Intellectual Disability: Practice Guidelines*, above n 7, p. 6.

<sup>23</sup> *Ibid*, pp 7-9.

<sup>24</sup> The DHS acknowledges that many women feel unsafe in acute inpatient and residential services and consideration should be given to this when developing and/or reviewing service policies, procedures and physical environments. Department of Human Services, *Victoria's Mental Health Service: Tailoring Services to Meet the Needs of Women* (1997) Victorian Government, Melbourne Victoria, p. 9.

<sup>25</sup> This report includes interviews with victim/survivors of sexual offences who access mental health services. Graham, C., *Certified Truths: Women who have been sexually assaulted – their experience of psychiatric services* (1994) South East Centre Against Sexual Assault, East Bentleigh Victoria.

<sup>26</sup> *VLRC Issues Paper*, above n 16, p 2.

- mainly in environments where people with cognitive impairments reside where women are three times as vulnerable to assault and ten times more likely to be sexually assaulted than women without disabilities;<sup>27</sup>
- mainly at the hands of someone they know;<sup>28</sup>
- with a report rarely being made to the police;
- with more likelihood that they will have problems telling their story and establishing credibility when it is reported;<sup>29</sup>
- primarily as a result of systemic factors that generally increase their vulnerability to neglect and abuse rather than individual factors.

The systemic issues contributing to an increased risk of abuse within support service systems used by people with cognitive impairment relate generally to:<sup>30</sup>

- reduced freedom of movement, community integration and participation;
- limited awareness of acceptable boundaries regarding social relations and legal rights resulting from restricted social lives and experiences, and a risk therefore that sexual assault will not be recognised as a crime;
- lack of access to sexuality, sexual rights and safety information;
- service providers' unwillingness to acknowledge the public nature of abuse in a care setting, leading to a denial that sexual assaults occur in these settings and therefore an unwillingness to intervene by the State; and
- inadequate staff training and skills in recognising and responding to sexual assault.

## ***What has been achieved: the Victorian Perspective***

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There is limited recent research available on the issues people with cognitive impairment face when accessing the Victorian criminal justice system. Again, there is little or no research that discusses the combined issues for those who are grouped under the definition of 'impaired mental functioning'. The research that does exist on specific groups identifies the difficulties people have in understanding the complexities of the legal system, whether as an accused, victim or witness. Whilst there are very specific issues that relate to victim/survivors with cognitive impairment that are addressed in this and subsequent chapters, an analysis of how the criminal

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<sup>27</sup> Chenoweth, L. *Invisible Acts: Violence Against Women with Disabilities* (1993) Australian Disability Review 2(93): pp 22-28. Conway, Bergin and Thornton *Abuse and Adults with an Intellectual Disability living in Residential Services A report to the Office of Disability* (1996) National Council of Intellectual Disability, Canberra, Australian Capital Territory.

<sup>28</sup> Sobsey, D. and Doe, T. *Patterns of Sexual Abuse and Offences* (1991) *Sexuality and Disability* Volume 9, 3; and *Vulnerability and Denial* above n20, p 212.

<sup>29</sup> *Silent Victims*, above n 8, p 48.

<sup>30</sup> *Vulnerability and Denial*, above n 20, pp 207-218.

justice system treats people with cognitive impairment more generally, whether victim, accused or witness, provides valuable additional insight into the problems facing victim/survivors. Below is a brief overview of some of these reports and a discussion of the ongoing issues.

During the late 1980s, the Office of the Public Advocate produced three key reports on people with intellectual disabilities and the criminal justice system:

- *Finding the Way. The Criminal Justice System and the Person with Intellectual Disability* (1987)<sup>31</sup>;
- *Silent Victims. A Study of People with Intellectual Disabilities as Victims of Crime*, undated<sup>32</sup>;
- *The Right to be Heard* (1988)<sup>33</sup>.

These reports, whilst focussing on issues for people with an intellectual disability, highlight a range of systemic issues that are relevant across the diagnostic categories encompassed by the Crimes Act definition of 'impaired mental functioning'. These issues include:

- The need for research in particular on the numbers of people with disabilities in the criminal justice system and the nature and impact of the disability for individuals and the system;
- Inadequacies of service systems including those within the criminal justice system and other support services available when exiting the system;
- The need for training for those involved in the criminal justice system on understanding disability and supporting people with a range of cognitive disabilities; and
- Structural issues in the legal system including the efficacy of safeguards and the appropriateness of specific provisions within various pieces of relevant Victorian legislation.

The OPA more recently conducted an 'audit'<sup>34</sup> that re-examines the initiatives and recommendations detailed in these documents and reports on stakeholder progress toward their implementation. It notes that whilst there have been some advances there remain significant issues within the criminal justice, disability support and generic service systems that require urgent attention. Some of the progress points include: the introduction of the OPA ITP Program, an increase in police training on disability issues, the introduction of Video and Audio Taped Evidence (VATE) for people with 'cognitive impairment', the emergence of witness assistance programs, the establishment of Disability Liaison positions in the Melbourne and Geelong Magistrate's Courts, some policy and procedural developments within and between the Department of Human Services and the Office of Corrections, and reviews of relevant legislation.

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<sup>31</sup> *Silent Victims*, above n 8.

<sup>32</sup> Bodna, B., *Finding the Way: The Criminal Justice System and the Person with Intellectual Disability* (1987) Office of the Public Advocate, Melbourne Victoria (hereafter *Finding the Way*).

<sup>33</sup> Feben, D., *The Right to be Heard: Obtaining Evidence from Intellectually Disabled People* (1988) Discussion Paper, Office of the Public Advocate & Attorney General's Department, Melbourne Victoria (hereafter *The Right to be Heard*).

<sup>34</sup> In 2002 the Legal Officer of the OPA conducted an audit to identify progress over the past ten years since the release of these reports regarding the recommendations therein.

Despite these areas of progress, the OPA audit found that a number of significant recommendations had not been achieved. In particular, there seemed to be an ad hoc rather than consistent, coordinated approach to ensuring people with cognitive impairment are identified and supported within and between the criminal justice and corrections systems. In addition, the audit highlights the need for:

- further research into the treatment of people with cognitive impairments within the criminal justice system;
- the development and implementation of a consistent system for identifying cognitive impairment prior to and when entering the criminal justice system;
- the identification, development and consistent implementation of a range of supports for people within the system and on exiting the system;
- better training for staff within the criminal justice and the broader support service systems at all levels; and,
- better liaison between relevant systems.

In addition, ongoing evaluation and development of supports and services to ensure their efficacy is needed, as while a range of recommendations have progressed or been implemented there has been no formal evaluation of these initiatives.

The broader legal system is becoming more aware of the needs of people with cognitive impairment. In Victoria, contributions to this increasing awareness include the work of the Victorian Law Reform Commission (VLRC), in particular: the reference on Sexual Assault<sup>35</sup> including people with 'a cognitive impairment'; and the recent reference on a Compulsory Care Framework<sup>36</sup> for people with an intellectual disability at risk of harm to themselves or others. It is also apparent in the work of disability specific legal services like the Mental Health Legal Centre, Villamanta Legal Service, and the work of the OPA, the DDLS, several initiatives of the DHS and initiatives of the Department of Justice and Magistrates Court. The specialist disability community legal centres make a particularly significant contribution to increasing awareness of people with disabilities' access to justice within the legal and community sectors. These services directly assist many people with disabilities by providing legal advice, casework, education, law reform and advocacy services. These groups continue to agitate for an inquiry examining the Victorian criminal justice system's treatment of people with disabilities – or at the very least a community reference to map the initiatives and issues within the criminal justice system with a view to a full Inquiry examining victim/survivors, accused and witnesses.

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<sup>35</sup> Victoria Law Reform Commission, *Sexual Offences: Law and Procedure* (2002) Discussion Paper, Melbourne Victoria.

<sup>36</sup> Victoria Law Reform Commission, *People with an intellectual Disability at Risk: A Compulsory Care Framework* (2002) Discussion Paper, Melbourne Victoria.

Across Australia there are a number of statutory bodies and community legal and disability advocacy services researching and reporting on issues within the criminal justice system for people with disabilities.<sup>37</sup> These reports highlight:

- The high incidence of people with disabilities as victims and offenders appearing before the Courts and entering the criminal justice system, particularly the corrections system;<sup>38</sup>
- The specific discriminatory impact of many aspects of the criminal justice system upon people with cognitive impairments as both victims and offenders;<sup>39</sup>
- The high number of people with cognitive impairments whose disabilities are not identified prior to participating in the legal process and the consequential risk of inappropriate sentencing;<sup>40</sup>
- The need to research and develop appropriate systems for identifying and responding to people with disabilities in contact with the criminal justice system as both offenders and victims;<sup>41</sup>
- The need for the development and implementation of specific supports for people with cognitive impairment at various stages within the criminal justice system as both victim and offender<sup>42</sup>;
- An evaluation of the efficacy of existing supports, provisions and services;
- The need for ongoing education and training within the criminal justice system and other related systems and services for a range of personnel, on the needs and issues of people with an intellectual disability, mental illness, Acquired Brain Injury and other cognitive impairments;<sup>43</sup>
- The incapacity of the criminal justice system to deliver justice to the most vulnerable victims in the community – those who lack capacity to participate in the legal system due to their cognitive impairments and multiple disadvantages.<sup>44</sup>

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<sup>37</sup> New South Wales Law Reform Commission, *Report 80 – People with an Intellectual Disability and the Criminal Justice System* (1996) Sydney, New South Wales (hereafter *Report 80*). See also: Connelly, G & Keilty, J., *Making a Statement: An Exploratory Study of Barriers facing Women with Intellectual Disabilities when making a Statement about Sexual Offences to Police* (2000) Intellectual Disability Rights Service, Surrey Hills, New South Wales (hereafter *Making a Statement*); Queensland Advocacy Incorporated & Forbes, M. (Minter Ellison), *Justice for All: People with an Intellectual Disability and the Criminal Justice System* (2001) QAI, Brisbane, Queensland; Allen, K., Goodfellow, J., *The Impact of Mandatory Sentencing Upon People With A Disability*, (2001) submission to the Senate Legal and Constitutional References Committee, National Association of Community Legal Centres, Disability Discrimination Network, Darwin, Northern Territory; Towards Normalisation Committee, *A Report on the Special Needs of Persons with Intellectual Disabilities in the South Australian Criminal Justice System* (1995) State Government of South Australia, Adelaide, South Australia.

<sup>38</sup> *Report 80*, above n 37, Ch 1 para 1.5. See other titles above n 37.

<sup>39</sup> *Ibid*, Ch 1, para 1.24. See other titles above n 37.

<sup>40</sup> New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System: Appearances before Local Courts*, (Research Report 4, 1993) Sydney New South Wales. See also: *Silent Victims*, above n 8; *Finding the Way*, above n32; *The Right to be Heard*, above n 33.

<sup>41</sup> *Report 80*, Ch 2, para 2.4. See also: *Silent Victims*, above n 8; *Finding the Way*, above n32; *The Right to be Heard*, above n 33;. See other titles above n 37.

<sup>42</sup> *Ibid*, Ch5, para 5.66. See other titles above n 37.

<sup>43</sup> *Ibid*. See other titles above n 37.

<sup>44</sup> *Ibid*, Ch2, para 2.26-32. See other titles above n 37.

## The Current Legislative Context

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Two pieces of Victorian legislation are of particular importance to the discussion of sexual assault of people with impaired mental functioning<sup>45</sup>. These are the *Crimes Act (Vic) 1958* and the *Evidence Act (Vic) 1958*.

Sections 50 – 52 of the Victorian Crimes Act 1958 relate specifically to sexual assault against people with impaired mental functioning. The Section 50 definition includes people whose mental functioning is impaired because of mental illness, intellectual disability, dementia or brain injury<sup>46</sup>. Section 51 notes that it is an offence for a person who provides medical or therapeutic services to a person with impaired mental functioning to take part in an act of sexual penetration or an indecent act with that person, unless they are married or in a de facto relationship<sup>47</sup>. Section 52 notes that it is also an offence for a worker at a residential facility<sup>48</sup> to take part in an act of sexual penetration or an indecent act with a resident of the facility, unless they are married or in a defacto relationship. This obviously does not include residents who commit sexual assault against other residents.

These sections of the Victorian Crimes Act 1958 exists as a deterrent to incidents of sexual assault against residents with impaired mental functioning and provide some redress for victim/survivors who are assaulted by those employed to care for them due to their disability. The Interim Report<sup>49</sup> further discusses the issue of balancing protection and restriction of liberty and the substantive law relating to sexual assault and people with impaired mental function. This report does not attempt to cover all of these issues. However, through the consultations it is apparent that these provisions do not always act as a deterrent to abuse, nor are they always easy to apply to the range of relationships that exist within a complex care system for people with impaired mental function who are largely quite distant from community life.

Some sections of the Victorian Evidence Act 1958, are also relevant to people with impaired mental functioning as witnesses (victim/ survivors) in sexual offence trials.

Section 23 of the Victorian Evidence Act 1958, relates to people with impaired mental functioning and their competence to give evidence. This section allows a witness with impaired mental functioning, who may not understand the nature of an oath, to provide unsworn evidence to the court if the witness understands the duty of speaking the truth, and is capable of responding rationally to questions about the facts in issue. This section also provides directions

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<sup>45</sup>The legislative term 'impaired mental functioning' is used in this section. *Crimes Act 1958 (Vic)*, s 50.

<sup>46</sup>.Ibid.

<sup>47</sup> Ibid, s 51.

<sup>48</sup> For the definition of facilities covered by this section, see the *Mental Health Act 1986 (Vic)*, s 94.

<sup>49</sup> *Interim Report*, above n 3.

about the circumstances in which competency is to be determined and specifies what information is to be provided to the jury in such determinations.

Section 23A addresses the questioning of a witness with impaired mental functioning in sexual assault matters where it has been determined that the witness is not competent to give evidence. This allows for the witness to be present in the courtroom or to be seen by the court and jury and to be questioned about matters other than the facts in issue if the issue of capacity to consent is relevant.

There remain significant concerns regarding the pathways to justice for victim/survivors with impaired mental function who are not considered able to demonstrate capacity to give full consent. These cases are extremely difficult to prosecute without solid forensic evidence of a sexual assault having occurred. Given the victim/survivor's participations in the Court process is likely to be limited, one wonders what the meaning of justice may be for them in this context? After all, if the legal process cannot protect those who are most vulnerable to exploitation and abuse from such assault, then one has to begin to question the fundamentals of the law and legal process in a criminal trial context. The Project supports the further investigation of the kind of support and assistance models recommended for children victim/survivors in the Interim Report to provide such assistance to victim/survivors. This issue is addressed further in subsequent chapters.

When interviewing a victim/survivor of sexual assault with impaired mental functioning, the police can take a statement from the victim/survivor using Video and Audio Taping of Evidence (VATE) and this can be presented to the court as the victim/survivor's evidence-in-chief. Section 37B of the Evidence Act provides the circumstances under which the VATE statement may be used partly or entirely as evidence-in-chief and requires the victim/survivor to be available in court for cross-examination and re-examination.

Section 37C enables the use of alternative means for presenting evidence to the court in sexual assault matters. These options can include the giving of evidence from a remote facility through closed circuit television, use of screens to block the view of the alleged offender from the witness, the presence of a support person near the witness while giving evidence for emotional support, permitting only specified people to be in the court while the witness is being questioned. Access to these arrangements is not automatic in sexual assault proceedings and needs to be requested. A determination needs to be made by a magistrate or judge as to whether any alternative arrangements will be permitted.

Again, it is not the intention of this report to outline the range of issues that exist in the implementation of these provisions. Rather, through reporting the experiences of those consulted, the Project explored situations where the use of these provisions raise a number of concerns and difficulties both for victim/survivors with cognitive impairment and for people

involved in supporting and representing them, including personnel within the criminal justice system.

## ***The Current Human Rights Context***

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The human rights of victim/survivors with cognitive impairment are articulated in a number of United Nations (UN) conventions and resolutions. As a member nation-state of the UN, Australia is a signatory to these conventions and resolutions – or instruments – that seek to affirm the human rights of all people.

These human rights instruments provide a framework by which signatory nations must develop their internal policies and legislature in order to meet their obligations as defined by the instruments. In general, member nations choose to become signatories to specific conventions that reflect the values which the member nations espouse, and as a demonstration of member nations' commitment to adhere to the articles contained in the instruments.

The over-arching guiding principles underpinning all these instruments are contained in the United Nations Charter<sup>50</sup> and include:

- *To reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and*
- *To establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and*
- *To promote social progress and better standards of life in larger freedom.*

There are several specific human rights Instruments to which Australia is a signatory. The following have been identified as having particular relevance to this research as they relate to the rights of people with disabilities or specifically to the rights of women.

The Declaration on the Elimination of Violence Against Women<sup>51</sup> states the fundamental rights of women and in particular makes reference to vulnerable women as well as measures to prevent and reduce violence against women including the development of sanctions, the allocation of resources, the reorientation of education, and undertaking research. In particular the Declaration states that:

*Women are entitled to the equal enjoyment and protection of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.*

And that member nations will:

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<sup>50</sup> Charter of the United Nations (UN).

<sup>51</sup> Proclaimed by UN General Assembly, Resolution 48/104 of 20 December 1993, to which Australia is a signatory.

*(d) Develop penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence; women who are subjected to violence should be provided with access to the mechanisms of justice and, as provided for by national legislation, to just and effective remedies for the harm that they have suffered; States should also inform women of their rights in seeking redress through such mechanisms;*

*(h) Include in government budgets adequate resources for their activities related to the elimination of violence against women;*

*(i) Take measures to ensure that law enforcement officers and public officials responsible for implementing policies to prevent, investigate and punish violence against women receive training to sensitize them to the needs of women;*

*(j) Adopt all appropriate measures, especially in the field of education, to modify the social and cultural patterns of conduct of men and women and to eliminate prejudices, customary practices and all other practices based on the idea of the inferiority or superiority of either of the sexes and on stereotyped roles for men and women;*

*(k) Promote research, collect data and compile statistics, especially concerning domestic violence, relating to the prevalence of different forms of violence against women and encourage research on the causes, nature, seriousness and consequences of violence against women and on the effectiveness of measures implemented to prevent and redress violence against women; those statistics and findings of the research will be made public;*

*(l) Adopt measures directed towards the elimination of violence against women who are especially vulnerable to violence...<sup>52</sup>*

The Declaration on the Rights of Disabled Persons<sup>53</sup> articulates the specific rights that relate to people with disabilities. In particular it states that people with disabilities:

*3. have the inherent right to respect for their human dignity. Disabled persons, whatever the origin, nature and seriousness of their handicaps and disabilities, have the same fundamental rights as their fellow-citizens of the same age, which implies first and foremost the right to enjoy a decent life, as normal and full as possible.*

*4. have the same civil and political rights as other human beings.*

*5. are entitled to measures designed to enable them to become as self-reliant as possible.*

*7. have the right to economic and social security and to a decent level of living. They have the right, according to their capabilities, to secure and retain employment or to engage in a useful, productive and remunerative occupation and to join trade unions.*

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<sup>52</sup> Ibid, excerpts from: Article 3.

8. are entitled to have their special needs taken into consideration at all stages of economic and social planning.

9. have the right to live with their families or with foster parents and to participate in all social, creative or recreational activities. No disabled person shall be subjected, as far as his or her residence is concerned, to differential treatment other than that required by his or her condition or by the improvement, which he or she may derive therefrom. If the stay of a disabled person in a specialized establishment is indispensable, the environment and living conditions therein shall be as close as possible to those of the normal life of a person of his or her age.

10. shall be protected against all exploitation, all regulations and all treatment of a discriminatory, abusive or degrading nature.

11. shall be able to avail themselves of qualified legal aid when such aid proves indispensable for the protection of their persons and property. If judicial proceedings are instituted against them, the legal procedure applied shall take their physical and mental condition fully into account.

12. [and] organizations of disabled persons may be usefully consulted in all matters regarding the rights of disabled persons.

The Declaration on the Rights of Mentally Retarded Persons<sup>54</sup> specifically articulates the rights of people with intellectual disabilities (referred to in the Declaration as 'mentally retarded persons'). The Declaration calls for national and international action to ensure that it will be used as a common basis and frame of reference for the protection of these rights, including that people with an intellectual disability:

1. [have] to the maximum degree of feasibility, the same rights as other human beings.
2. [have the] right to proper medical care and physical therapy and to such education, training, rehabilitation and guidance as will enable him to develop his ability and maximum potential.
3. [have the] right to economic security and to a decent standard of living. He has a right to perform productive work or to engage in any other meaningful occupation to the fullest possible extent of his capabilities.
4. should live with [their] own family or with foster parents and participate in different forms of community life. The family with which [they] live should receive assistance. If care in an

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<sup>53</sup> Proclaimed by the UN General Assembly, Resolution 3447 (XXX), 9 December 1975, to which Australia is a signatory.

<sup>54</sup> Proclaimed by the UN General Assembly, Resolution 2856 (XXVI), 20 December 1971, to which Australia is a signatory.

institution becomes necessary, it should be provided in surroundings and other circumstances as close as possible to those of normal life.

5. [have the] right to a qualified guardian when this is required to protect his personal well-being and interests.

6. [have the] right to protection from exploitation, abuse and degrading treatment. If prosecuted for any offence, he shall have a right to due process of law with full recognition being given to his degree of mental responsibility.

7. Whenever... unable, because of the severity of their handicap, to exercise all their rights in a meaningful way or it should become necessary to restrict or deny some or all of these rights, the procedure used for that restriction or denial of rights must contain proper legal safeguards against every form of abuse. This procedure must be based on an evaluation of the social capability of the mentally retarded person by qualified experts and must be subject to periodic review and to the right of appeal to higher authorities.

The Principles for the protection of persons with mental illness and the improvement of mental health care<sup>55</sup> articulates fundamental freedoms and measures to improve mental health care services in member nations. In particular it articulates that people with a mental illness (or who are being treated as such persons):

2. shall be treated with humanity and respect for the inherent dignity of the human person.

3. .have the right to protection from economic, sexual and other forms of exploitation, physical or other abuse and degrading treatment.

4. There shall be no discrimination on the grounds of mental illness. "Discrimination" means any distinction, exclusion or preference that has the effect of nullifying or impairing equal enjoyment of rights. Special measures solely to protect the rights, or secure the advancement, of persons with mental illness shall not be deemed to be discriminatory. Discrimination does not include any distinction, exclusion or preference undertaken in accordance with the provisions of these Principles and necessary to protect the human rights of a person with a mental illness or of other individuals.<sup>56</sup>

The Principles also articulate specific protections from abuse:

2. Every patient shall be protected from harm, including unjustified medication, abuse by other patients, staff or others or other acts causing mental distress or physical discomfort.<sup>57</sup>

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<sup>55</sup> Adopted by the UN General Assembly, Resolution 46/119, 17 December 1991, to which Australia is a signatory.

<sup>56</sup> Ibid, excerpt from: Principle 1. Fundamental freedoms and basic rights.

<sup>57</sup> Ibid, excerpt from: Principle 8. Standards of care.

The Standard Rules on the Equalization of Opportunities for Persons with Disabilities states a number of preconditions which nation members are encouraged to adopt in ensuring the equal participation of people with a disability in society.<sup>58</sup> These include that member states should:

- take action to raise awareness in society about persons with disabilities, their rights, their needs, their potential and their contribution.
- ensure that responsible authorities distribute up-to-date information on available programmes and services to persons with disabilities, their families, professionals in the field and the general public. Information to persons with disabilities should be presented in accessible form.
- initiate and support information campaigns concerning persons with disabilities and disability policies, conveying the message that persons with disabilities are citizens with the same rights and obligations as others, thus justifying measures to remove all obstacles to full participation.
- initiate and promote programmes aimed at raising the level of awareness of persons with disabilities concerning their rights and potential. Increased self-reliance and empowerment will assist persons with disabilities to take advantage of the opportunities available to them.<sup>59</sup>
- ensure the development and supply of support services, including assistive devices for persons with disabilities, to assist them to increase their level of independence in their daily living and to exercise their rights.
- ensure the provision of assistive devices and equipment, personal assistance and interpreter services, according to the needs of persons with disabilities, as important measures to achieve the equalization of opportunities.<sup>60</sup>
- recognize the overall importance of accessibility in the process of the equalization of opportunities in all spheres of society. For persons with disabilities of any kind, States should (a) introduce programmes of action to make the physical environment accessible; and (b) undertake measures to provide access to information and communication.
- develop strategies to make information services and documentation accessible for different groups of persons with disabilities. Braille, tape services, large print and other appropriate technologies should be used to provide access to written information and documentation for persons with visual impairments. Similarly, appropriate technologies should be used to provide access to spoken information for persons with auditory impairments or comprehension difficulties.

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<sup>58</sup> Adopted by the UN General Assembly, 85th Plenary Meeting, 20 December 1993, to which Australia is a signatory.

<sup>59</sup> Ibid, excerpt from: Preconditions for Equal Participation, Rule 1. Awareness-raising.

- [also consider] the needs of people with other communication disabilities.<sup>61</sup>
- are responsible for ensuring the adequate training of personnel, at all levels, involved in the planning and provision of programmes and services concerning persons with disabilities.
- ensure that all authorities providing services in the disability field give adequate training to their personnel.
- [ensure that] In the training of professionals in the disability field, as well as in the provision of information on disability in general training programmes, the principle of full participation and equality should be appropriately reflected.
- develop training programmes in consultation with organizations of persons with disabilities, and persons with disabilities should be involved as teachers, instructors or advisers in staff training programmes.<sup>62</sup>

At the time of completing this research comments are being sought on the proposed draft Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities scheduled for further discussion in 2004. If the proposal is accepted by member nations of the UN and Australia does become a signatory, Australia's human rights obligations, and indeed its commitment to promote and protect the human rights of Australians with disabilities, will be further tested.

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<sup>60</sup> Ibid, excerpt from: Preconditions for Equal Participation, Rule 4. Support services.

<sup>61</sup> Ibid, excerpt from: Target Areas For Equal Participation Rule 5. Accessibility.

<sup>62</sup> Ibid, excerpt from: Rule 19. Personnel training.

# **3:Policy & Practice**

## **Background**

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In 2003 there can be little dispute that the majority of sexual assaults are not reported. Whilst the reasons that are attributed to the silence of victim/survivors in reporting sexual assaults are many and varied, the most common are usually attributed to: fear of not being believed; shame; and fear and stress associated with the court process. These fears are further compounded for victim/survivors with cognitive impairment.

When a woman is a victim of sexual assault, she may become involved with a range of advocacy, counselling, support, health and legal service systems. If she is a woman with an intellectual disability, acquired brain injury, mental illness or other cognitive impairment she may already be receiving formal services related to her disability such as accommodation services, everyday living support services or advocacy support. Many women with these disabilities do not use formal disability support services, but may, as a result of the sexual assault, be referred to or begin using these for the first time and be subject to the policies and practices they have in place. Others may never receive these supports and services either through choice or because of availability or eligibility.

Coming into contact with any service provider can be stressful following a sexual assault and the responses of those service providers are paramount to the continuation of the victim/survivors' complaint. Regardless of the nature of the victim/survivor's disability, they will likely come into contact with any number of agencies from the local CASA to the police to the Court. How then do these agencies ensure their practice is sensitive and appropriate to not only the woman's trauma because of the sexual assault, but also her disability and any particular needs that may arise as a result?

This section of the report examines the policies and practices in place within these service systems as they relate to victim/survivors with cognitive impairment and identifies the possible barriers and issues that may arise throughout the reporting and prosecution process. A flow chart<sup>63</sup> that tracks the activities and movement through this process for victim/survivors of sexual assault with cognitive impairment is included in Appendix 4 of this report.

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<sup>63</sup> Original flow chart adapted for this report from: Heenan, M., *Trial and Error: Rape, Law Reform and Feminism* (1993 Unpublished PhD Thesis) Monash University, Melbourne, Victoria (hereafter *Rape, Law Reform and Feminism Flowchart*).

## **Victorian Department of Human Services - Disability Services Branch**

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Many women in Victoria with intellectual disabilities and some with acquired brain injury or who may have other cognitive impairments, use services provided or funded by the DHS, Disability Services Branch. Current policy within these services requires that if a person discloses sexual abuse or reports it to a staff member or is identified by a staff member as having been sexually abused, this must be reported to the police.<sup>64</sup> This policy requires that the victim be informed that a report is being made to the police but they do not have to provide consent for staff to make the report. Disability support staff must notify police that the victim has a cognitive impairment at the time of initial notification. Staff also have to follow internal reporting guidelines. While the individual has no control over whether the matter is reported to police, they must be informed that they have the right to decide whether they make a statement to the police.

This policy is in place to reduce the risk of sexual assault occurring in residential care facilities through removing discretion in reporting, which in turn is intended to create a deterrent to potential perpetrators of such incidents. It also ensures that disability support staff are not put into a position where they have to judge what the best action is, and provides a framework for a consistent response. Despite this, it clearly places the victim/survivor in a different situation than other victim/survivors of sexual assault who have the right to choose whether to report to the police or not. Centres Against Sexual Assault would normally inform the victim/survivor of their rights and choices. The choice of exercising these rights and options is removed for victim/survivors who are receiving residential support services provided or funded by the DHS under existing policy. This policy could be viewed as a discriminatory practice, which removes self-determination in the reporting process and effectively restricts the liberty of the person with cognitive impairment. On the other hand, it can be argued that the action is based on the service providers' duty of care responsibilities and is an attempt to balance the historical legacy of abuse and neglect of people with cognitive impairment at the hands of residential staff on the one hand, with an acceptance that sexual assault is an important and public issue, particularly in the context of some of the community's most vulnerable individuals being dependent upon others for their care and protection.

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<sup>64</sup> This policy is available from the Department of Human Services library or website at: [http://hnb.dhs.vic.gov.au/disabilitysite.nsf/pages/prov\\_policies\\_p\\_reportingallegations](http://hnb.dhs.vic.gov.au/disabilitysite.nsf/pages/prov_policies_p_reportingallegations). Department of Human Services–Disability Services Branch, *Reporting allegations of Physical or Sexual Offences to police* (1993) Government of Victoria, Melbourne Victoria (hereafter *DHS Reporting Sexual Offences*).

## Victoria Police

In Victoria, members of SOCA Units are specifically trained to respond to allegations of sexual assault and child abuse. A SOCA Unit would normally be contacted and informed of any report of sexual assault made to Victorian police. In a situation involving a recent sexual assault, the SOCA Unit would contact their regional CASA or the state-wide after hours service (Sexual Assault Crisis Line) to organise crisis care for the victim/survivor. If the victim/survivor requires and consents to a Forensic Medical Examination, the police would organise this.

Members of the SOCA Unit are also responsible for taking statements from victim/survivors. Where the victim/survivor is a person with cognitive impairment, police have the option of recording the statement on video tape (Video and Audio Taping of Evidence – VATE) if it is perceived that this will be the best option for the victim/survivor. The police would generally engage an ITP if the person is going to make a statement.<sup>65</sup>

SOCA Unit members may investigate some lesser offences whilst Criminal Investigation Units investigate allegations of more serious offences. The police consider the available evidence and use their discretion regarding whether or not the offender will be charged and the matter will proceed to court. The Police Prosecutor rather than the Office of Public Prosecutions will try some summary matters in the Magistrates' Court.

All SOCA Unit members receive training on how to communicate with people with cognitive impairment and are well trained in how to work with victim/survivors of sexual assault. Despite this, there are currently only guidelines and no objective and consistent way of identifying whether a person may have a cognitive impairment in order to determine whether a forensic examination is required<sup>66</sup>, and as a result some people who may require the additional supports and options available may miss out. Likewise, for some people, their needs might be particularly complex and difficult to discern, raising concerns about the ability of the police to adequately investigate using the supports they have in place.

The ITP is an important support for many people when providing a statement. Again, the needs of the individual might be very complex and require other supports in addition to the

<sup>65</sup> In response, Victoria Police state: "... members are provided with clear operational guidelines, which stipulate that an Independent Third Party must be present (author's emphasis) at the interview of an individual with an intellectual disability, mental illness or a cognitive impairment." However, the Project heard that where an alternative support person who knew the victim/survivor such as a carer or family member was present, police officers did not in all cases engage an ITP. Reproduced from a letter from Ann Tibaldi, Director, Organisational Development Dpt & Chair, Victoria Police Research Coord. Ctee, to DDLS Coordinator, Jonathon Goodfellow, regarding the draft final Project report, 21<sup>st</sup> October 2003.

<sup>66</sup> In response, Victoria Police state: "Only a registered psychologist or a medical officer can formally undertake an assessment of a cognitive impairment/intellectual functioning. Police members do not have the training or the legal right to conduct such assessments. The Victoria Police Manual provides guidelines regarding steps members ought to consider when deciding whether an assessment by a Forensic Medical Officer is required for [the] purpose of establishing [the] mental functioning status of an interviewee. In view of this... expressed concerns about police ability to adequately conduct their investigative duties appear to be highly speculative." Ibid.

communication assistance that this role may provide. The effectiveness of these supports including the use of VATE and an ITP need to be evaluated along with the adequacy of training received by the SOCA Units to deal with complex situations involving victim/survivors who have cognitive impairment. Another concern is the lack of advocacy support and the availability of specialist supports at the time of giving a statement.

## **Office of Public Prosecutions – Sexual Offences Unit**

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The OPP Sexual Offences Unit specifically handles matters involving indictable sexual offences. Once the police have investigated a matter and laid charges against an alleged offender, the matter is referred to the OPP Sexual Offences Unit. The OPP presents the case on behalf of the Crown at Committal Proceedings in the Magistrates' Court to determine whether there is sufficient evidence for the matter to proceed to trial in a higher court. At the Committal stage a number of choices may be made about the case. The Magistrate may dismiss the matter or refer it to a higher court for trial by jury. Where a ruling to proceed to a higher court is delivered, the OPP may review the case and decide to withdraw it or to accept a plea bargain and settle the matter before proceeding to trial. Where the matter proceeds to trial, the OPP presents the case for the Crown. At no time in this process does the victim /survivor have the right to legal representation to protect their interests.

The OPP also has a Witness Assistance Service that offers support to all witnesses in sexual offence proceedings, including support to understand the prosecution process. Before a case is due to begin, a worker from the unit meets with the victim /survivor, provides support while viewing their VATE interview, introduces them to the prosecutor handling their case if not already acquainted, and takes them to the court where the matter is to be heard. Once at the court, the victim/survivor is familiarised with the courtroom, shown where everyone will be seated, and if needed, they are shown the remote facility room.

These supports are the same for all victim/survivors of sexual assault cases. Again, the need for advocacy, effective communication, and assistance to understand the reporting and legal process, are important considerations when determining the needs of the victim/survivor with cognitive impairment, the provision of any appropriate adjustments that will facilitate access to the criminal justice system and the effectiveness of support services.

## Courts

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Sexual assault falls into two categories: less serious, or lesser or summary offences, and more serious or indictable offences. Summary offences are heard in the Magistrates' Court and the police Prosecutor generally presents the case on behalf of the Crown (as outlined above). The presiding Magistrate hears the matter in its entirety, issues a verdict, and if the defendant is found guilty, issues the sentence. Proceedings in the Magistrates' Court may also include matters where the defendant has confessed to the crime or has made a plea agreement with the prosecution.

Committal proceedings for indictable offences are also heard in the Magistrates' Court. At the committal hearing a determination may be made as to whether the victim/survivor with cognitive impairment is able to provide sworn or unsworn testimony. The prosecution would present the evidence to the court, including evidence-in-chief, and the witness may or may not be cross-examined. The witness may present their evidence from the remote facilities during the committal proceedings. The Magistrate then makes a determination regarding whether there is sufficient evidence for the matter to appear before a higher court or dismiss the charges.

Once a determination that the matter should appear before a jury in a higher court is delivered, a number of things may occur. The OPP may review the matter, determine that the Crown is unlikely to argue the case successfully, and withdraw from proceedings abandoning all charges against the defendant. After the committal proceedings either party may offer a plea bargain and if accepted the matter does not go to trial. Where the victim/survivor decides to withdraw from proceedings, the Crown dismisses the charges against the defendant. If none of these scenarios eventuate, the matter will go before a judge and jury in the County Court where the victim/survivor will be cross-examined by the defence barrister. Once all evidence has been presented, the jury determines the outcome based on the evidence before them. If the jury finds insufficient evidence to convict the defendant the charges are dismissed. If the defendant is found guilty of the charges, a date is scheduled for a sentencing hearing, where the victim/survivor can present a Victim Impact Statement.

There are a number of concerns for victim/survivors with cognitive impairment in this process including the OPP's determination regarding whether the case will proceed or not. The legal system is a complex and often confronting one for anyone to deal with, adversarial in nature and demanding upon any witness. This presents many challenges victim/survivors with impaired mental functioning may not be able to overcome. These will be discussed later in this report drawing on participants' contributions in Project consultations.

## **Centres Against Sexual Assault**

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When a CASA is contacted by either the victim/survivor with cognitive impairment, or a worker or carer on behalf of the victim/survivor, they provide information about the options available to the victim/survivor. This includes providing the victim/survivor with immediate support, access to a Crisis Care Unit<sup>67</sup> (CCU), information about legal rights, the Forensic Medical Examination and police involvement, and the right to have an ITP present while making a statement to the police. If a victim/survivor with cognitive impairment accesses a CCU without a support person or police assistance, they can request that the counsellor advocate contact the police or other people that may assist the person. At the CCU, the counsellor advocate from CASA can advocate for the victim/survivor and provide support when giving their statement. Where a Forensic Medical Examination is considered appropriate and the counsellor advocate is unable to determine the victim/survivor's capacity to provide informed consent to the examination, a Forensic Medical Officer is contacted to make this determination. Ongoing contact and counselling by the CASA is offered to all victim/survivors, as determined by the person.

In 1997 the CASA's and Family Planning Victoria's Disability Unit developed a training program for CASA staff regarding how best to support victim/survivors with an intellectual disability. This Project also developed a kit that included a literature review on sexual assault and people with an intellectual disability and some practice guidelines for CASA's when supporting victim/survivors with an intellectual disability. All Victorian CASA's received this kit and training. It is reported that CASA's currently support a number of women with cognitive impairment and continue to focus on their service response to this group. Their experiences providing support are referenced in the next chapter.

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<sup>67</sup> While all sexual assault services in Victoria provide Crisis Care Units for victim/survivors of recent sexual assaults, each service may use different operating guidelines, including criteria stating how long after the assault the person can still access the CCU and whether contact will be during business or after hours.

# **4: Findings & Recommendations**

## **Introduction**

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Sexual assaults are crimes that have an enormous impact on the lives of victim/survivors, each individual's experience is traumatic and life changing in its own way. As already outlined earlier in this report the Project did not intend to provide space for the many individual stories of sexual assault and the subsequent difficulties and injustices experienced by victim/survivors. Rather, the Project sought to reference contributions that highlight the barriers and factors within the criminal justice and support service system that particularly affect victim/survivors with cognitive impairment.

Supporting victim/survivors with cognitive impairment is challenging for the range of services and systems that assist them, due to the nature of the crime and the personal, social and systemic issues that specifically affect people with cognitive impairment. The Project is pleased to report that the professionals participating in the Project did so candidly, even where this reflected upon their own needs regarding more appropriately assisting victim/survivors. However, the Project did not simply reproduce the contributions of all workers and stakeholders consulted. It sought to highlight those issues that are supported by the research literature, that relate to the Project's aims and objectives or that are known anecdotally to be of concern (see chapter 1 for details of the methodology used to determine content for this section).

It is important to note that the Project does not consider the findings documented in this report to be representative of the experiences of all victim/survivors with cognitive impairment. Rather they highlight some of these experiences that particularly relate to improving the reporting and legal process when victim/survivors with cognitive impairment seek access to justice.

It is also important to note that the Project's consultations did not focus on the black letter law regarding sexual assault and victim/survivors with cognitive impairment as this has rightly been the role of the VLRC in undertaking the Sexual Offences: Law and Procedure reference for inquiry. Rather the Project sought to complement and contrast the work of the Commission and instead focused on the specific policy, environmental and social factors that impact upon victim/survivors with cognitive impairments' capacity to report sexual assault and gain access to justice. The Project's response to the VLRC's draft recommendations as outlined in the Interim Report are detailed in its submission to the Commission and are generally supported by the

Project and the DDLS. For further details or a copy of the submission, contact the Disability Discrimination Legal Service (contact details listed on inside front cover).

The Project team has gone to great lengths to ensure that participant contributions and particularly quotes from transcripts do not identify the participant, their subject/s and their location. Some participants only contributed on the basis that the Project ensured their anonymity. As a result the agency the individual is associated with has not been quoted against contributions. Given that the Project consulted in regional and rural Victoria, a list of participating organisations has not been included in this report due to the limited services in some of these areas and the consequential risk that local community members who read the report may identify individual workers' comments.

The Project sought contributions within the following categories (see chapter 1 for further details of the Project's methodology):

- Those of the victim/survivors with cognitive impairment as described by the people who work closely with them;
- Those of the sexual assault support services involved with the victim/survivors;
- Those of disability support or advocacy services involved with victim/survivors;
- Those of the police force through a consultation with the Acting Senior Sergeant of the SOCACO;<sup>68</sup> and,
- The remaining stakeholders in the criminal justice system who work with victim/survivors including Court personnel, the OPP, community legal centres, legal representatives for both the prosecution and defence, Court Network Program volunteers, the OPA ITP Program volunteers, and Forensic Medical Officers.

Interviews and focus group data elicited the themes that are represented in the findings. These themes have informed the recommendations subsequently outlined in this chapter.

## ***Experiences of victim/survivors***

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The data from consultations and interviews highlighted a number of factors that contribute to an increased risk of sexual assault for victim/survivors with cognitive impairment. They also highlighted the barriers leading to a decreased incidence of reporting sexual assault by victim/survivors with cognitive impairment. In addition, a range of underlying issues were identified that impact on whether victim/survivors with cognitive impairment are able to access

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<sup>68</sup> It is important to note that some of the comments obtained from the police member involved in the consultation process may not necessarily reflect the policies of Victoria Police nor be representative of the views of all Victoria Police members, as outlined in Chapter 1.

information about their rights, participate in the legal process and receive support in a manner that is non-discriminatory and that meets their needs.

**FINDING 1: LIMITED STATISTICAL DATA...**

There is very little information collected regarding the disabilities of people entering and already within the criminal justice system, including corrective services. The Victoria police Specialist Operations Statistical Services reported that they do not keep specific disability-related statistics. Courts in Victoria and the Office of Public Prosecutions also do not routinely collect or record data related to the disabilities of people who come into contact with the criminal justice system.

Many of the groups consulted expressed their need for training to assist them when attempting to identify disability and/or sexual assault. This suggests that people with disabilities are not currently routinely identified in these systems and therefore presumably do not receive assistance that meets their specific needs when accessing these services.

<b>RECOMMENDATION 1: DATA COLLECTION</b>
<p>That all stakeholders who have contact with victim/survivors with cognitive impairment develop and adopt an agreed set of definitions and collection guidelines for key statistical data collection relating to victim/survivors with cognitive impairments including:</p> <ul style="list-style-type: none"> <li>• definitions of disability types covered by the Crimes Act 'impaired mental functioning definition;</li> <li>• key points for assessing which of the above disability types relates to a particular individual;</li> <li>• standardised demographic data;</li> <li>• services accessed and referred to;</li> <li>• the type of offence; and</li> <li>• the outcome of any legal action.</li> </ul>
<p>The stakeholders include:</p> <ul style="list-style-type: none"> <li>• Victoria police;</li> <li>• Office of Public Prosecutions;</li> <li>• Centres Against Sexual Assault;</li> <li>• OPA Independent Third Person Program; and</li> <li>• Courts.</li> </ul>
<p>Such data should be made publicly available.</p>

This recommendation differs from that of the VLRC in that it specifies some of the information that would ideally be collected regarding disability, whilst the VLRC have not specifically referred to cognitive impairment.

### **FINDING 2.1: INCREASED VULNERABILITY TO ABUSE...**

The common life experiences of many people with cognitive impairment include increased dependence on others to complete daily activities, reduced access to education, increased social isolation, reduced opportunities for self-determination and reduced freedom of movement. These experiences contribute to an increased risk of sexual and other forms of abuse.<sup>69</sup>

*For so many [women with cognitive impairment] are vulnerable and on the street or in a rooming house where there is no protection at all... It's just horrible. I think because the women that I've worked with over the years they are really left wide open to being sexually abused and wide open to domestic violence because they're the ones who are more than likely to end up homeless, they can end up on the street. They're the ones who end up, even through some of these [rooming houses] that are run by [mental health services], where they're forced to live with men who have got their own particular problems, then it becomes this real thing about putting pressure on women, the hard word... maybe even physically threatening them or their children... so they are really wide open to all these abuses.<sup>70</sup>*

Further, resources within the support service system are inadequate to ensure people who are in care settings and vulnerable to sexual assault and other forms of abuse are safe from staff and other residents in a manner that upholds their dignity and human rights.

*There's just not enough staff to keep an eye on them all, and one wouldn't imagine that they'd like that any how. The (funding body) need to increase the workers to look after people properly. I guess it's a pretty big issue though... if there's [an offender] on staff. How'd you cover that situation?<sup>71</sup>*

*Well... there is only one staff member of a night shift and there's 6 [residents] and three of them are big burly blokes and we're supposed to get some sleep?<sup>72</sup>*

### **FINDING 2.2: LIMITED QUALITATIVE RESEARCH...**

The literature review indicated that qualitative research regarding the social and environmental factors leading to an increased risk of sexual assault is extremely limited, with no thorough research conducted in Victoria. In particular, it was identified that there has been no research examining the adequacy of the disability and mental health support systems in preventing sexual assault of people with cognitive impairments. Similarly, research to identify the specific needs of people with cognitive impairment when accessing the criminal justice system is either not available or does not exist.

<sup>69</sup> *Vulnerability and Denial*, above n 20.

<sup>70</sup> Excerpt from interview transcript.

<sup>71</sup> Excerpt from interview transcript.

**RECOMMENDATION 2: QUALITATIVE RESEARCH ABOUT VICTIM/SURVIVORS WITH COGNITIVE IMPAIRMENT**

That qualitative research examining:

- 1) the factors contributing to an increased risk of sexual assault including the adequacy of support service systems in preventing sexual assault; and
- 2) the needs of victim/survivors with disabilities when reporting and accessing the criminal justice system;

be adequately funded by the state; and undertaken by suitably qualified and experienced researchers.

**FINDING 3.1: LESS KNOWLEDGE OF APPROPRIATE SEXUAL BEHAVIOUR...**

Many of the people consulted during the Project including the SOCACO, identified that education about sexuality, relationships and sexual rights and safety were not systematically delivered or accessible to people with disabilities resulting in a lack of knowledge about appropriate sexual and self-protective behaviours. This has also been confirmed in other research<sup>73</sup> and in a similar vein the VLRC reports:

*A recurring theme... was the lack of education available to people with cognitive impairments which would enable them to safely disclose and report sexual assault.<sup>74</sup>*

Where these programs were provided they were considered inadequate to ensure people with cognitive impairment would develop protective behaviours from a young age. There also appeared to be inadequate support services to reinforce these behaviours sustained over the person's life, where necessary.

The availability, delivery and suitability of human relations programs that meet the needs of a wide range of learning needs varies considerably from service to service and commitment to their ongoing provision appears to be limited to people with intellectual disabilities in receipt of DHS or DHS funded residential services, albeit in a piecemeal manner. Human relations programs are often limited in the information they provide to individuals and access to programs can be limited by concerned parents and/or carers uncomfortable with the person, whether a minor or adult, becoming aware of sexuality and safe sex information for fear that what it may prove an encouragement to sexual activity and expose them unnecessarily to a wide range of additional risks. As with primary and secondary education,

<sup>72</sup> Excerpt from interview transcript.

<sup>73</sup> *Vulnerability and Denial*, above n 20.

<sup>74</sup> *Interim Report*, above n 3, para 3.30.

people with cognitive impairment are less likely to have received education about human relations, assertiveness and protective behaviours:

*When our staff actually started talking to [this person] they hadn't even had any basic sex education. [Their knowledge] was all very basic so perhaps they missed out generally on the education bit to start with.<sup>75</sup>*

The Project found that there was a lack of awareness amongst service providers regarding the nature of the duty of care relationship they have to ensure the physical and sexual safety of their clients through developing protective behaviours and assertiveness skills to the greatest possible potential. In addition, the lack of appropriate sexuality, human relations and sexual safety education results in some people with cognitive impairment failing to identify that they are experiencing sexual assault and continue to place themselves at risk of sexual assault. Similarly, the VLRC reported:

*The Commission heard that in certain circumstances women did not have sufficient awareness about their rights and did not understand the abusive context which they were in...<sup>76</sup>*

A participant in the project reported:

*A lot of people who have a disability and have been in institutions and stuff like that have had experiences of sexual abuse and sometimes that makes it difficult [for them] to work out where [their] boundaries are in terms of saying no [to sex]. In terms of feeling free to say yes too. So I think people often can be passive and not realise that they can say no ...after all [people without disabilities] negotiate things all the time and negotiate the sexual act and other forms of negotiating... and if you don't know where your boundaries are it's very hard to negotiate those things. I think people [with cognitive impairment] are probably being abused more than they're reporting because they don't even know the law would consider that abuse.<sup>77</sup>*

The South East Centre Against Sexual Assault (SECASA) has produced an education resource<sup>78</sup> specifically targeting people with intellectual disabilities explaining what sexual assaults are and how someone can get help. The kit consists of a short video, a CD and a booklet written in plain English and can be used as an education tool to help people with cognitive impairment develop an understanding of sexual rights, identify sexual assault and potentially abusive situations, and tell someone what is happening to them if they have been sexually assaulted. Sexual assault workers consulted indicated that they these resources are extremely useful when talking to someone and assisting them to understand what has happened. Other similar resources are available for intellectual disability support workers.<sup>79</sup>

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<sup>75</sup> Excerpt from interview transcript.

<sup>76</sup> *Interim Report*, above n 3, para 3.30.

<sup>77</sup> Excerpt from interview transcript.

<sup>78</sup> South East Centre Against Sexual Assault *When Sex IS NOT OK Kit*, (undated) SECASA, East Bentleigh Victoria.

<sup>79</sup> For a list of available resources see: Department of Human Services, Disability Services Branch, *Human Relations and Sexuality Policy and Guidelines (revised)* (undated) State Government of Victoria, Melbourne Victoria, Appendix 5 (hereafter *DHS Human Relations Policy*).

People with intellectual disabilities accessing DHS funded services may be able to receive human relations and sexuality programs if the need for this is identified by the individual and/or support networks, including staff delivering services. Where this need is identified and recognised by staff<sup>80</sup> a program to meet these needs is drafted and included in the person's Individual Program Plan<sup>81</sup>. Whilst this appears at first to be an adequate response, the question that still needs to be answered here is "are these programs sufficient to ensure the ongoing reinforcement of individual confidence and assertiveness necessary to protect victim/survivors and deter offenders?" Disability residential support workers reported that generally a crisis needs to occur before resource intensive programs are provided and that once they are in place they often lack the necessary resources to make them truly effective. A crisis in this context is commonly that the person begins to display inappropriate sexual behaviour or indeed that they have themselves been sexually assaulted or have sexually assaulted another person.

### **FINDING 3.2: LESS KNOWLEDGE ABOUT THE LAW...**

The VLRC found, as did this Project, that one of the problems over and above those of other victim/survivors that people with cognitive impairment must address is:

*[a] lack of appropriate information about the criminal justice process.<sup>82</sup>*

People with cognitive impairment have limited access to a range of information and community resources – accessing information about the law is no exception. Generally, legal information is not readily available in alternative formats such as audio tape recordings or large print documents and is not presented in simple language that creates a direct relationship to the person's everyday life. In addition, as with sex education, people with cognitive impairment may need intensive support to gain this knowledge over a period of time, and only with ongoing reinforcement.

Those working with victim/survivors with cognitive impairment generally do not have the skills, resources or time to address the person's particular learning and/or comprehension needs in order to help them to understand the legal process and what they should expect in terms of their treatment and participation. The project also found that specialist advocacy services that focus on assisting the person to become aware of and assert their rights are either non-existent or inadequate.

*Sometimes I think that [it] just takes its time to explain how the system works rather than making assumptions that because it's an intellectual disability the person won't understand or know what they want. Like anyone that's coming in fully functioning – it's the fear of and not knowing the*

<sup>80</sup> This document outlines required client assessments, available intensive client human relations/sexuality education programs, measures for staff compliance with procedural guidelines and required staff training. Ibid.

<sup>81</sup> Individual Program Plan's are provided for in the: *Intellectually Disabled Person's Services Act 1986(Vic)*.

<sup>82</sup> *Interim Report*, above n 3, para 3.32.

system that workers maybe sometimes assist with, not the prejudice their ability provides when giving the information but to help them understand the system and their rights. That's what people need to know... their right to speak, their right to question, you know. That sort of basic skill is going to make the difference.<sup>83</sup>

<b>RECOMMENDATION 3: IMPROVED EDUCATION PROGRAMS FOR VICTIM/SURVIVORS WITH COGNITIVE IMPAIRMENT</b>
<p>That education and training strategies are further developed to assist people with cognitive impairment to understand:</p> <ul style="list-style-type: none"> <li>• human relations, sexual safety and protective behaviours; and</li> <li>• the law and their legal rights.</li> </ul>
<p>People with cognitive impairments include:</p> <ul style="list-style-type: none"> <li>• people with intellectual disabilities or borderline intellectual disabilities;</li> <li>• people with mental illness;</li> <li>• people with acquired brain injuries;</li> <li>• people with dementia and similar conditions affecting cognitive capacity;</li> <li>• people with personality disorders; and</li> <li>• people in the above groups residing in institutions, treatment facilities, community residential units and secure residential settings.</li> </ul>
<p>These programs should be provided regularly from a young age and emphasise how to recognise inappropriate sexual behaviour and abusive contexts including sexual assault in order that strong self-protective knowledge and skills are developed, and should be supplemented by freely available support services that assist individuals to continue to develop such skills and knowledge in adulthood.</p>
<p>These resources should be distributed through existing service frameworks and staff provided with appropriate training and support to ensure they are effectively accessed by this group.</p>

**FINDING 4.1: INCREASED RISK OF SEXUAL ASSAULT OCCURRING IN THE RESIDENTIAL SETTING...**

It is generally acknowledged that most sexual assault of people with cognitive impairment occurs in their place of residence.<sup>84</sup> The Project found that whilst this has been known for some years it is still not acknowledged by the providers of these services, particularly the DHS. As a result not enough is being done to identify and address the specific factors that increase these risks. Consequently, this Project could not identify any strategies for reducing

<sup>83</sup> Excerpt from interview transcript.

<sup>84</sup> *Victim/Survivors with an Intellectual Disability: Practice Guidelines*, above n 7, p. 6.

the risks inherent in these environments and no policies detailing what should occur in certain specific circumstances of sexual assault, such as resident-to-resident assault, other than the incident is subject to mandatory reporting.

A further disturbing element to some contributions in this vein was that some victim/survivors with cognitive impairments had 'dropped out' of the support service system altogether. The project heard that in some cases women with cognitive impairments may flee to escape further abuse or re-traumatisation.

In some cases, disability services and particularly psychiatric support service and treatment systems, will need to create safe and sensitive environments where victim/survivors feel certain that they will be protected from sexual assault. Participants in Project consultations raised the need for women-only inpatient treatment services:

*...that is a really important point, in that the more the services from the disabilities area and the mental health arena start being trained on issues to do with violence against women, and really pushing that point of saying to people women have absolute rights, then nothing's going to actually shift in that field. Because I think that that's only when you're going to have situations where they actually do start providing better women's programs, women's houses, proper support for women with all these issues. That's where I think part of the key rests as well as training all the DV and violence against women services in the area of mental health, and that sort of broad based campaign stuff that goes on. Until that happens the legal stuff is still a long, way further down the track, because you haven't even got the base yet.<sup>85</sup>*

*...clients are often so abused and violated by their experience as recipients of mental health services that an experience of sexual assault in an [involuntary treatment setting] may not be reported. They experience involuntary detention when they may be manhandled by police, taken to hospital in a divi van... stripped, secluded, medicated against their wishes, forced to accept [electric shock treatment] and placed in mixed wards. In these settings they may experience [sexual] abuse and staff fail to protect them. Furthermore they may experience inappropriate sexual advances from staff. Their complaints are not heard, their cries for a safe haven are not acknowledged, their sexuality is denied, their children are removed. Many women report abuse... by those employed to protect them: psychiatrists and psychologists... you have to be brave to make a complaint under these circumstances and it's often years later these women will disclose such an experience... How on earth would these women believe that any one would listen or care?<sup>86</sup>*

#### **FINDING 4.2: BEING ASSAULTED BY ANOTHER CLIENT OR RESIDENT...**

Whilst it is generally recognised that people with cognitive impairments in institutional settings are at greater risk of abuse at the hands of carers and workers, they may also be at risk from other residents who are also likely to have low levels of education about appropriate sexual behaviours. One of the dilemmas in a situation where such sexual assaults are suspected

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<sup>85</sup> Excerpt from interview transcript.

<sup>86</sup> Excerpt from interview transcript.

amongst adults is whether or not the sexual act was consensual, and how to be certain without being overly intrusive.

*And... those that are also living in housing for support. If it is the case that there's another resident that is the perpetrator – that's hugely difficult because it's about being able to get to the basics. As I understand it, it's about the understanding of what consent really means in this situation and whether or not it was given... and that is that. If they're facing that person each day, you know the workers have the ability to have them transferred somewhere else, but often the victim is removed against their will – or as is mostly the case – they stay with the perpetrator. So they're the sort of things that come up that are hugely difficult.<sup>87</sup>*

If sexual assaults are found to have occurred, then the dilemmas become greater. What will happen to the victim? Will they be supported and assisted to access justice? Should the perpetrator be charged? And if so what sort of punishment will likely be restorative? Should the victim or the perpetrator be made to relocate? And where should they live and with whom? There are very long waiting lists for supported accommodation and requested transfers can take many years if they are met at all. In addition, other providers of such services are reluctant to take on new clients with a history of inappropriate behaviour.

### **FINDING 4.3: NO SELF-DETERMINATION IN REPORTING...**

The Project found that victim/survivors with cognitive impairments who receive residential support services may be denied self-determination in the reporting process. Despite mandatory reporting – or perhaps partly because of it – a culture of not reporting has developed:

*There's no choice about reporting... the choice is made on [the clients] behalf. So the possibility is that it isn't reported or recognised within the particular residential places... whether or not it is something to be covered up, perhaps "not while on my shift" attitudes... I don't know. There seems to be some who ignore the signs [of sexual assault] and others saying once again why it is that they think this person has been sexually assaulted... and maybe through a lack of confidence to be able to talk about sexual assault. But if a person was assaulted and did come forward... there is a culture of not reporting, so that is enough to discourage them.<sup>88</sup>*

Residential services for people with disabilities and other agencies funded by the Department of Human Services are required to report incidents of sexual assault under the existing policy<sup>89</sup>. This policy aims to ensure that the appropriate independent authority investigates incidents of sexual assault by enforcing a consistent response. Whilst it is acknowledged that this policy is well intentioned it removes the person's right to choose the best option in their circumstances, a choice available to any other victim/survivors of sexual assault. The VLRC highlight the trauma this process can create:

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<sup>87</sup> Excerpt from interview transcript.

<sup>88</sup> Excerpt from interview transcript.

<sup>89</sup> DHS Reporting Sexual Offences, above n 64.

*... the experience of mandatory reporting of sexual assault to police by Department of Human Services can be quite traumatic... one worker told the Commission:" ...[[f a woman is placed in a far more powerful position and informed about the process and what her options are – we may see some better outcomes from the law too."90*

Despite this policy it was reported that responses can and do vary when a person with a disability discloses sexual assault within a disability service. The reasons for this are not clear, but are likely to include worker fears they will be held accountable for an assault occurring whilst they are on duty. The question remaining is to what degree does mandatory reporting contribute to a culture of not reporting?

In some reported instances internal investigations are conducted when a person discloses sexual assault, usually to establish whether the incident occurred or not:

*Somebody has been sexually assaulted, it's been disclosed, the worker has actually gone to their [supervisor]....., reported it... followed that, reported it to that person.... told it to the next person, nothing was done about it at all. It wasn't reported to the police because they just say the person can't testify and so it's not worth it. But the victim/survivor was actually left in the house where it happened, it was a residential unit and the person only actually was removed from the house after the second assault.91*

*I had something described to me about the process [of] mandatory reporting... that it had to follow this whole internal procedure first and that meant it going down to [the agency] and this whole process took a week, so had there been any forensic evidence it was gone.92*

This is of major concern given the importance of securing vital forensic evidence in incidents of sexual assault. It is also concerning that disability support services do not automatically believe the individual who is disclosing and may not provide appropriate responses to the assault. It also demonstrates, as reported by a number of disability service staff, that some of these workers may not be fully aware of their agencies' policy regarding the reporting of sexual assault. Some reported they had not received any induction or training on the implementation of such policies.

**RECOMMENDATION 4: ACKNOWLEDGING THE INHERENT RISKS OF SEXUAL ASSAULT IN RESIDENTIAL AND TREATMENT SETTINGS**

That the DHS and other providers of residential care and psychiatric treatment services develop:

Policy and procedural frameworks that:

- recognise the increased risk of sexual assault in residential and other service settings in policy formulation;
- provide clear practice directives and guidelines for reducing these risks and

<sup>90</sup> Comment from Domestic Violence and Incest Resource Centre representative at the VLRC's Advocacy Round Table held 19 September 2002. *Interim Report*, above n 3, para 3.30.

<sup>91</sup> Excerpt from interview transcript.

<sup>92</sup> Excerpt from interview transcript.

providing appropriate responses to specific situations such as allegations and/or incidents of sexual assault perpetrated by another resident;

- provide victim/survivors with cognitive impairment the right to self-determination in reporting incidents of sexual assault whilst accessing appropriate counselling and support services;

and

- options for reducing the risks inherent in these settings, such as including women only spaces in involuntary psychiatric wards and other proposals for creating safer environments.

These frameworks should explicitly recognise, promote and protect the rights of people with disabilities to be free from abuse and neglect of any kind in their home.

### **FINDING 5: DISABILITY SUPPORT SERVICES AWARENESS OF SEXUAL ASSAULT...**

Disability support services' staff reported that they had little knowledge of the extent of sexual assault experienced by people with cognitive impairment and there was a lack of training available to them on this issue. They also reported a need for education and training on identifying risk factors, common responses to sexual assault and how to recognise and support a victim/survivor as well as reinforce awareness and skills that strengthen safe and protective behaviours. After all, these workers are pivotal in prevention and protective skill development. The Project identified that these workers have perhaps the most central role in identifying and/or intervening in incidents, as witnesses to these crimes, in the preservation of any available evidence, as well as assisting victim/survivors with cognitive impairment to report the offence and seek access to justice. The VLRC made a similar finding in the Interim Report:

*The response by staff, families and caregivers to disclosures and the collection of any evidence that might add support to the allegations are crucial to the delivery of services and the criminal justice response.<sup>93</sup>*

Disability support services workers reported a lack of awareness of legal options and alternative ways a person with cognitive impairment is able to make a statement and/or present evidence in court. Training regarding how to recognise the signs of sexual assault for disability staff does exist<sup>94</sup> but is reported to be under-utilised. The need to focus on recognising sexual assault is noted in a 1996 National Council on Intellectual Disability study which found that:

<sup>93</sup> Interim Report, above n 3, para 3.31.

<sup>94</sup> SECASA provide a training program for disability support services staff based on the *When Sex is Not OK* resource. The Australian Research Centre in Sex, Health and Society at Latrobe University also offer a program called *People with an Intellectual Disability Living Safer Sexual Lives*.

*...family members and staff working with the intellectually disabled in residential services felt they lacked the skills and training required to recognise and report abuse.<sup>95</sup>*

The project found that existing policy, procedural and training frameworks relating to the sexual assault of people with cognitive impairments in residential and treatment settings are poorly developed when compared with the level of risk of abuse these environments present.

**RECOMMENDATION 5: IMPROVED EDUCATION PROGRAMS FOR DISABILITY SUPPORT SERVICE WORKERS**

That education and training strategies are further developed to assist professionals working in the area of disability support services to:

- better understand and identify likely cases of sexual assault;
- work more effectively to support clients following disclosure and through the reporting and legal process; and
- better understand and meet statutory and legal obligations relevant to their specific role in preventing incidents of sexual assault occurring in support services and to increase victim/survivors' access to justice in relation to sexual assault.

The training should: focus on practical skills development regarding responding to sexual assault and basic assessments of likely sexual assault; address myths, values, attitudes and assumptions about victim/survivors' experiences of sexual assault; and, provide information about workplace policies and procedures regarding sexual assault including how to report incidents and assisting clients' access to justice.

**FINDING 6.1: NEEDS RELATED TO VICTIM/SURVIVORS' COGNITIVE IMPAIRMENT ...**

*...[the] people we're talking about here with disabilities may need someone who's aware of how that assault may have been... for them in their memory....while the police may ask certain questions it may be the way that questions are formatted... all people but especially people [with a disability] need a bit more encouragement. Once they've decided to report there would have to be that understanding about how the brain works to assist them in recalling what has happened... [or] a structure to the questions. <sup>96</sup>*

Due to the nature of many cognitive impairments, victim/survivors will need more time and support to understand what has and is happening and what their rights are. It may even take more time simply to locate the right support person.

*Yes, that's been that someone that's gone along that you know, just because of their ability to be able to understand the [victim/survivor] I guess... I mean if that's where the level of support is needed – so that there is someone there that can support them in understanding the process. I*

<sup>95</sup> Interim Report, above n 3, para 3.31.

*mean the fear itself in going through that police process: statement, questions, all those sorts of things; the fear of that can also impact on the ability to understand. So, yes, that's the time of needing support.<sup>97</sup>*

Sexual assault counsellors acknowledged the diversity and complexity of issues and needs victim/survivors with cognitive impairment may present and attempt to adapt their services to meet the needs of individuals with cognitive impairment. They also identified the value of consulting with a support person who knows the individual in order to determine the most appropriate approach to the supports being provided, particularly where the victim/survivor has some form of cognitive impairment and may have specific communication needs.

*One of the things about supporting [victim/survivors with cognitive impairment] is how what happens is recorded in some ways. As I say sometimes when you're talking to someone who has an intellectual disability and they're telling a story they will often tell it in a very jumbled way and you have to try and put the pieces together and I think that takes a lot of time. It's very time intensive and you can't do it all in one session either. You've got to have breaks and give people extra time you can't even hold a thought. I mean people get tired, if you've got a disability or a mental impairment and people are at you all the time. If people were having a conversation with you in French I'd be exhausted fairly quickly because I'm having to think really hard about everything I say to try and make it understandable. I would just get tired. I think there's not enough allowed for that you know to take smaller pieces of time. People if they can't remember something they get frustrated about it. So if you keep asking about what happened then and what happened next well your thinking what they're saying doesn't make sense. If you keep honing on that point it won't help because they're just getting angry at not remembering, angry with you for pushing it all the time and they could say anything about anyone and you know it's because of the frustration... I mean people feel frustrated with their own disability. I think that's something that we don't take into account very readily.<sup>98</sup>*

### **FINDING 6.2: NOT BELIEVED & DISCREDITED BECAUSE OF DISABILITY...**

Victim/survivors with cognitive impairment will face the same impediments to reporting sexual assault, but because of their disabilities they will find other problems emerge. As the VLRC found:

*...they must also manage additional problems such as misconceptions about their credibility, their memory and their presentation as witnesses...<sup>99</sup>*

Many victim/survivors of sexual assault are not believed, or feel that they are not believed when they report or initially disclose the offence. For most people, to experience an attitude of disbelief would be a major impediment to taking a disclosure any further. It is precisely for this reason that sexual assault services believe the victim: because it is likely that someone else will not believe, and consequently this is likely to stop the victim/survivor continuing, and

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<sup>96</sup> Excerpt from interview transcript.

<sup>97</sup> Excerpt from interview transcript.

<sup>98</sup> Excerpt from interview transcript.

<sup>99</sup> *Interim Report*, above n 3, para 3.32.

may result in her return to the abusive situation. This support is crucial in changing not only an individual's perception of the internalised shame of sexual assault but also the general apathy and concealment that pervades sexual assault in the community. Whilst these attitudes are also likely to prevent some victim/survivors with cognitive impairment from disclosing or reporting, this Project found that there was more influencing the attitudes of disbelief displayed:

*There's a kind of suspicion, I guess, about somebody who has a mental health issue... just how connected they are to reality... is what they're saying really true? There's that attitude that... they're making it up and women without any disabilities have that stuff levelled at them as well. That's hard enough for women who've been abused and controlled and all the issues that go with that sometimes to be seen favourably within the legal system, than anybody who's got the question mark about did they imagine it, are they delusional, are they telling the truth? A lot of women in that position wouldn't even say anything to anybody ever, because there's the assumption that these are the sorts of responses that they're likely to get and that opens them up for attack... to be discredited. And these women are living with abuse issues every day and managing them quite often quite well, to then have to come under scrutiny. Why would you?<sup>100</sup>*

This Project found that when some victim/survivors with cognitive impairment disclosed that they had been sexually assaulted to someone, they were not believed, whether the person was their support worker, a police officer, or a friend or family member. Whilst this is a common experience for many victim/survivors, this lack of belief where women with cognitive impairment are concerned, rests on myths and assumptions about disability – developed over time into core attitudes and values. In some cases these values and attitudes affect the responses and any support provided to the victim/survivor.

The project also heard many experiences where mental illness was used as the basis for discrediting a victim/survivor:

*One of the things – and I don't know whether you may have heard some of these cases... where a mother has reported being sexual assaulted and it turns around onto her. A persons history of mental illness, periods of hospitalisation and things like that are being utilised in much the same way as sexual history is utilised during the trial.<sup>101</sup>*

*...the word was she was crazy and therefore what she said wasn't to be taken seriously....the fact that she couldn't make any head ways with any body with the police, they didn't want to know her, you know, she got a very informal, really rude response from them and .....they wont take her seriously she found it very hard to approach them because she knew that they saw her as crazy.*

<sup>102</sup>

Access to justice requires access to the legal system. Progression through the criminal justice system rests heavily on being believed and being believable at every stage. Primarily, this progress is reliant on an assessment of how successful the case is likely to be and how

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<sup>100</sup> Excerpt from interview transcript.

<sup>101</sup> Excerpt from interview transcript.

<sup>102</sup> Excerpt from interview transcript.

credible the witness is. The Project found that when a person has a cognitive impairment they can be perceived as not knowing, not remembering and not being truthful. Many support services reported this lack of belief as a major barrier to progression through the system, based on a view that the person with a disability cannot or would not be believed:

*They feel they are discredited and that they won't be believed. That is the initial reaction they have so they don't continue, so they don't even make a statement because they get the impression from the police or other legal services by what ever is said that they are not going to be heard and so they just withdraw.<sup>103</sup>*

*We've been hearing things like someone's disability being used to discredit them in some circumstances. Certainly in some actual events they were being treated in the same way as sexual history would be used.<sup>104</sup>*

### **FINDING 6.3: NOT BEING BELIEVED & BEING DISCREDITED BECAUSE OF CRIMINAL HISTORY...**

The Project heard accounts that victim/survivors who were known to the police or who had a prior criminal charge or conviction were more likely to not be believed about sexual assault:

*... the police don't do anything for the client because they've had a long history of involvement with crimes and they don't believe the client tells the truth so I guess that's part of whatever mental health issues or other health issues or disability the person has. But it has permanently coloured the local police knowledge of them. It means the police look upon them as a person who they are not really going to believe what they say.<sup>105</sup>*

Many people with cognitive impairments, particularly in small rural communities, are well known – because they are different. Add to this the notoriety of some criminal indiscretions, and you have a situation where many people are likely to either: 1) not believe the person; or 2) are not concerned enough about the person's welfare to give them the benefit of the doubt.

### **FINDING 6.4: FEAR OF NOTIFICATION TO OTHER AUTHORITIES...**

A number of cases were raised that highlight some other reasons victim/survivors with cognitive impairment may not report sexual assault. Fear of child protection intervention was cited a number of times as illustrated by this contribution:

*She had not reported it because it was her partner... [who] was known to police and she was frightened that... [he] would end up in the lock up... and that she would be reported to child protection and her kids would be taken away. I guess if you can't protect yourself how can you protect your kids? ... I guess too when you're Aboriginal and got a mental illness you are going to*

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<sup>103</sup> Excerpt from interview transcript.

<sup>104</sup> Excerpt from interview transcript.

<sup>105</sup> Excerpt from interview transcript.

*be pretty reluctant to have any contact with the police. But she just kept getting sexually assaulted and really awful domestic violence too.*<sup>106</sup>

Involuntary treatment and care was also found to be a factor in a number of cases:

*Well... it was that she was not wanting to be put back on the drugs and into [involuntary treatment] for her [mental illness].*<sup>107</sup>

### **FINDING 6.5: SEXUAL ASSAULT COUNSELLORS AWARENESS OF COGNITIVE IMPAIRMENT...**

Sexual assault counsellors and victim support services staff reported that they felt they would benefit from gaining a better understanding of disabilities and how they can work with individuals with cognitive impairment in particular. CASA's can see victim/survivors of sexual assault once in a Crisis Care Unit (CCU) or in an ongoing counselling relationship. CASA's identified that up to 50% of CCU work in some regions is with victim/survivors with cognitive impairment, particularly mental illness. CASA workers have also identified the potential benefits of receiving training from OPA on the role of the Independent Third Person and communication techniques.

CASA workers also reported that there was a need to receive training on understanding disability and how a person's disability may impact upon their capacity to identify and disclose sexual assault. They also reported a need to understand how best to support and advocate for people with cognitive impairment as they proceed through the criminal justice system.

### **FINDING 6.6: POLICE IDENTIFICATION OF COGNITIVE IMPAIRMENT...**

Police skills in identifying victim/survivors with cognitive impairment were highlighted as an issue in a number of consultations. The VLRC also recently highlighted this issue:

*...police continue to have difficulties in correctly identifying whether a person has an impairment and the nature of the impairment. If police officers lack the necessary skills and knowledge to accurately identify a cognitive impairment, they cannot implement the appropriate procedures no matter how comprehensive police guidelines may be for dealing with victims or offenders with impairments.*<sup>108</sup>

The Victorian Law Reform Commission has identified that the Victoria police Operating Procedures do not contain guidelines to assist members to identify whether a person has some form of cognitive impairment.<sup>109</sup> The lack of guidelines to assist police to make an assessment as to whether a person has a cognitive impairment may result in a failure to

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<sup>106</sup> Excerpt from interview transcript.

<sup>107</sup> Excerpt from interview transcript.

<sup>108</sup> *Interim Report*, above n 3, para 3.37.

<sup>109</sup> *VLRC Issues Paper*, above n 16, p6. This paper goes on to discuss some possible steps which could be implemented to assist police assess whether a person has some form of cognitive impairment. These include: police training; police guidelines on identifying disability; screening tests for intellectual disability; and the use of standard questions to identify the possibility of cognitive impairment.

implement appropriate alternatives and supports and place the individual in a position where they experience significant disadvantage, or may even be wrongfully charged with a crime.

### **FINDING 6.7: POLICE AWARENESS OF SEXUAL ASSAULT AND COGNITIVE IMPAIRMENT...**

Whilst many participants applauded the police's efforts in assisting victim/survivors with cognitive impairment, it was also widely felt that they could be more sensitive to the needs of victim/survivors in relation to the sexual assault and their cognitive impairment. In particular, it was reported that communication is the key area that may need some reinforcement through training and professional development. The representative of the police interviewed for the Project agreed that some members require further training regarding working with people with cognitive impairment particularly to reinforce interview techniques and other communication needs. And the VLRC identified the same problem in its Interim Report:

*Another problem identified during consultations was the issue of inappropriate communication techniques when dealing with victim/survivors with cognitive impairments. This applies to all personnel within the criminal justice system, in particular police, prosecutors and judges.*

The Commission also identified the following factors that contribute to the difficulties experienced by intellectually disabled people when being questioned by police:

*Difficulty in understanding the language used by police;*

*Difficulty with reading;*

*Fear of authority;*

*Lack of guidelines for police interviews;*

*Susceptibility to influence by authority figures and to suggestive questioning;*

*Difficulty with questions concerning times and dates; and*

*Common misconception that communication strategies for the intellectually disabled are the same as for children.<sup>110</sup>*

Some participants mentioned just focusing on helping people to feel safe and relaxed as a good communication strategy.

*[The police] should be making the person feel safe and feeling relaxed so it's possibly worth that time to be spent in the beginning, same as in the counselling process. It would be the same thing. They're much more likely to get the message across...*

Participants generally reported that SOCA Unit officers have a greater understanding of people with cognitive impairment and how disability may impact upon an individual's capacity to report. Members of SOCA Units receive intensive training in identifying disability

<sup>110</sup> *Interim Report*, above n 3, para 3.38.

and conducting interviews with people with cognitive impairment.<sup>111</sup> Other members of the police force receive less training on these issues. It was also reported that SOCA Unit staff, compared to other members of the police force are more sensitive to and aware of the needs of this group, due to the amount of contact some members of SOCA have with victim/survivors with cognitive impairment. The SOCACO noted that further training would be beneficial for their members as well as for general Officers, particularly to reinforce interview techniques and communication skills. In particular, it was noted that some officers may benefit from training that focuses upon strengthening interview techniques and the communication needs of complainants. It was noted that even some SOCAU Officers, whose training is comprehensive, may not receive refresher training regularly enough to reinforce the skills acquired. Due to the low numbers of victim/survivors who actually report assault, some Officers may not have the opportunity to utilise the skills acquired regularly enough to ensure they are practiced and polished.

NSW research reports that training for all police is needed to gain a better understanding of a range of disabilities. The *Making a Statement* report found that NSW police have a general perception that people with intellectual disabilities were incapable of telling the truth and that these myths '...create the belief that 'women with disabilities should not be believed when they report any form of violence against them''<sup>112</sup>. This project heard similar accounts although only specifically in relation to victim/survivors with a mental illness.

### **FINDING 6.8: COURT AWARENESS OF COGNITIVE IMPAIRMENT...**

Court personnel participating in the Project reported that they have been involved in very few sexual offence matters involving victim/survivors with cognitive impairment. This limited contact appeared to be due to the fact that a limited number of cases proceed to court.<sup>113</sup> However, as the VLRC report, it may also be that the Court also has difficulties identifying people with cognitive impairment appearing before them:

*...accurate and timely identification of the existence of an impairment. A witness' cognitive impairment can remain undetected or misdiagnosed and accordingly, the witness' particular requirements are not accommodated.*<sup>114</sup>

Much of what court personnel reported was therefore based on their observations and work with people with cognitive impairment in other matters before the courts. Court personnel

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<sup>111</sup> Ibid, para 3.42.

<sup>112</sup> *Making a Statement*, above n 37.

<sup>113</sup> The Office of Public Prosecutions Sexual Offences Unit does not keep statistics regarding a witness's disability. Informal record keeping by the OPP Sexual Offences Unit for the three year period July 1999 – June 2002 indicate that 22 matters were referred to the OPP for trial where the victim/survivor had made their statement on VATE and may have had some form of impaired mental functioning. This information does not identify the age of the victim/survivor or the type of disability they may have. There are also no records available to identify other sexual offence matters where a victim/survivor with impaired mental functioning may have proceeded to court and no VATE statement was taken. However, it is the perception of the OPP Sexual Offences Unit that this situation would be very rare.

<sup>114</sup> *Interim Report*, above n 3, para 4.26.

and other support networks reported that they need education and training on different types of disabilities and how they may impact upon an individual's capacity to appear before the court. They noted that this is required at all levels within the court system.

*...it's the lack of understanding by Court personnel and probably a lack of education and training on behalf of the judiciary at times in relation to how that type of impairment is handled in Court. <sup>115</sup>*

*...Magistrates are like any other professional organisation. They are judicial officers but it doesn't mean to say that they have a full understanding of people with mental disabilities. Some have got a better understanding than others, so you can expect a different outcome before some Magistrates as you can before others.<sup>116</sup>*

It was reported that generally Magistrates, particularly those who quickly identify a person's disability, have some understanding of and sensitivity to the needs of people with a cognitive impairment appearing before the court. They were reported to be more likely to intervene when they assess the person with a disability does not fully comprehend questions being put to them, or they feel the individual may require a break from being questioned.

*... I think what's needed is education... The Judges and Magistrates have made new steps in relation to education and this should just form part of that education. Because what happens in Court is that the way the Court is run, is really in the hands of the Judge and Magistrate. If the Judge and the Magistrate have the proper training... everything will play from there. Because if they understand what is going on, they have got control over what... and how questions are asked. So it really must come from the top. You can't educate the police officer or the defence barrister alone. They will fall into line with what is being allowed and what is being permitted by the judiciary in Court. So really like a lot of other areas where we have some difficulties with minority groups or some other group, it really has to come from the top.<sup>117</sup>*

Other court personnel, such as Court Network Staff, Remote Witness Independent Persons, and registrars, identified that they would also benefit from developing a greater understanding of disability and the supports an individual may require when appearing before the court.

### **FINDING 6.9: OTHER CHARACTERISTICS OF VICTIM/SURVIVORS WITH COGNITIVE IMPAIRMENT...**

Where a victim/survivor with cognitive impairment presents with other issues such as being an Aboriginal or Torres Strait Islander or from a non-English speaking background, and/or were experiencing homelessness, poverty or low literacy, amongst other characteristics, they were less likely to receive the support needed to report and continue with a complaint. The diversity of contexts in which participants noted this issue suggests that it was an issue for all services in contact with victim/survivors from the police to Sexual assault counsellors to the Courts.

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<sup>115</sup> Excerpt from interview transcript.

<sup>116</sup> Excerpt from interview transcript.

<sup>117</sup> Excerpt from interview transcript.

In relation to the police, the dominant culture within the force generally lacks sensitivity to a diversity of disability, women's, sexual assault and social issues. When a victim/survivor with any combination of these attributes presents to make a complaint, members are more likely to feel the need for support and consultation. In fairness to the police it cannot be expected of its members to provide a social service that would potentially compromise their independence and statutory function. However, the police Force can and should be - and has been over recent years as noted by the VLRC<sup>118</sup> - making progress toward facilitating a culture that ensures women who are extremely distressed and traumatised will feel able to disclose without being fearful of the response. The representative of the SOCACO agreed that where a person with cognitive impairment presents with other social characteristics such as being from a non-English speaking background, an Aboriginal or Torres Strait Islander, homelessness, poverty, low literacy, etc, they are less likely to get the support they need to report and continue with their complaint. As a non-police participant put it:

*... I think too in terms of your relating it back to the law and the legal side of things and women gaining access to it, it still comes back to the fact that until the services are geared towards supporting women, you're going to still not have women coming forward because they don't have the support or the right attitude there to be able to support them and starting to address some of those issues.*

### **FINDING 6.10: POLICE DISCRETION WHEN ASSESSING WITNESS CREDIBILITY...**

The Project also found that there can be an assumption amongst police that victim/survivors with cognitive impairment will be unable to present as credible witnesses or provide evidence to the courts.

*There are so many factors that are taken into account in deciding whether or not to proceed with something, it could be that the police think that oh well they are not going to make a credible witness.<sup>119</sup>*

These perceptions can lead to reluctance to take a complaint of sexual assault from victim/survivors with cognitive impairment seriously and to take a statement or investigate the matter. Furthermore, they may lead to wide discretion not intended by the police Code of Practice for the Investigation of Sexual Assault:<sup>120</sup>

*...[A]gain as we've said before the fact that maybe if it's considered that they're not going to be able to be a credible witness and they just make the decision well they're not going to be a credible witness because of the intellectual disability. So somehow or other perhaps some support in making that assessment not only by the police but with the assistance of a specialist...in a*

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<sup>118</sup> Particularly through the implementation of the *Police Code of Practice for the Investigation of Sexual Assault Cases* as reported in: *Interim Report*, above n 3, pp 116-120. Victoria Police *Code of Practice for the Investigation of Sexual Assault*, 2<sup>nd</sup> Ed (1999) Publications Unit, Victoria Police, Melbourne Victoria (hereafter *Police Protocol*).

<sup>119</sup> Excerpt from interview transcript.

<sup>120</sup> *Police Protocol*, above n 118.

*consultation you know for those that know that person better and how they function outside of the fear of being in a police station.<sup>121</sup>*

But the dilemmas for the police in determining discretion about credibility often leaves them between a rock and a hard place:

*I mean I think it is hard for the police but I think maybe that it is also the way we bring evidence before a Court and how [people without cognitive impairments] describe things like consistency. You know in the minute details of consistency. Where as many people have an intellectual disability but might remember the overall thing rather than minute details... a response to the overall thing. They may have a greater memory of the emotion that was caused than the actual incident that had happened.<sup>122</sup>*

The VLRC found that:

*Myths can also be used to suggest that victims of sexual assault who have cognitive impairments are not credible or are sexually provocative,<sup>123</sup>*

And that people with cognitive impairments face:

*...misconceptions about their credibility, their memory and their presentation as witnesses.<sup>124</sup>*

### **FINDING 6.11: POLICE DISCRETION WHEN USING AN INDEPENDENT THIRD PERSON...**

When interviewing a person with cognitive impairment, whether as a victim, witness or offender, the police can access an Independent Third Person from OPA to assist with the interview process. Failure to identify a cognitive impairment can result in the police not accessing an Independent Third Person to assist the individual during an interview. Without the presence of an ITP, police may not always be asking questions in a manner that is easy for the individual to understand, or may not assess that the individual is struggling with the process and may not have an understanding of the person's ability to understand questions put forward.

#### **ITP SKILLS ASSISTING PEOPLE WITH SIGNIFICANT COMMUNICATION NEEDS**

The SOCACO reported that where victim/survivors who are non-verbal or whose communication needs are particularly complex or difficult are being interviewed, some ITP's may not have the skills to adequately facilitate communication with Officers. It was noted that whilst the training for ITP's is comprehensive, some individuals needs are so profound they may need someone with specialist skills or who has knowledge of their needs in order to facilitate communication.

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<sup>121</sup> Excerpt from interview transcript.

<sup>122</sup> Excerpt from interview transcript.

<sup>123</sup> *Interim Report*, above n 3, para 3.29.

<sup>124</sup> *Ibid*, para 3.32.

**RECOMMENDATION 6: TRAINING TO INCREASE AWARENESS OF PEOPLE WITH COGNITIVE IMPAIRMENT**

That education and training strategies are further developed to assist professionals in the area of sexual assault to work effectively with victim/survivors with cognitive impairments in order to meet their specific needs in reporting assault, seeking counselling, support services and legal assistance, and to increase their access to justice in relation to sexual assault.

The professionals targeted should include:

- sexual assault counsellors and support staff;
- forensic medical officers;
- police;
- court personnel including judicial officers; and
- legal representatives for both the prosecution and the defence.

The training should focus on practical skills development relating to communication and basic assessments of disability, as well as address myths, values, attitudes and assumptions that may lead to prejudicial treatment on the basis of disability. The training should also address multiple and complex needs, including victim/survivors from non-English speaking backgrounds or who are Indigenous.

**FINDING 7.1: BEING CONFUSED AND DISTRESSED BY THE LANGUAGE USED IN COURT...**

As identified and noted earlier in this report, in many cases victim/survivors with cognitive impairments experience difficulties understanding the law and legal process including the language used, following events, recalling and describing the assault – particularly under pressure and when being cross-examined – even where VATE is used.

*The model of communication our courts use, where information is elicited in a question and answer format is a limited form of communication and is not necessarily the best one for witnesses with cognitive impairments.<sup>125</sup>*

*That's right, that [Court personnel and legal representatives] might not be able to see ... that the legal process, the jargon is probably the biggest problem of the lot with any person, let alone someone who is suffering any sort of disability. The legal jargon can become very difficult, not only to be expected to understand it, but to be expected to understand it at the top of your head in a Court environment is very difficult.<sup>126</sup>*

It has been well documented that the language of the courtroom and methods for questioning witnesses are designed to confuse and discredit. The average person often has

<sup>125</sup> Ibid, para 4.26.

<sup>126</sup> Excerpt from interview transcript.

difficulty following the language and processes of the court and can be intimidated by the formality and ceremony of the trial process. This view was supported by the SOCACO in the Project's consultation with the police force and from non-police contributions such as the one below:

*Now I think if the victim is failing to understand, it's not going to be a fair trial. It's not only going not to be fair, but its going to be downright traumatic and stressful even over and above what it normally would be just being human. There is nothing worse not understanding what you are being asked and for someone there who has got the capabilities, and I've stressed the word capabilities to do that, I think it would have to be of enormous benefit to receive the support of someone that can really assist that understanding and reduce the fear and trauma.<sup>127</sup>*

### **FINDING 7.2: BEING CONFUSED WHEN BEING CROSS-EXAMINED...**

*As it was described to me, in so many words, it's been well documented that someone with an intellectual disability, for example, will often give the answer that they think is going to please the questioner, generally yes or no. And so, in those sorts of circumstances, it might be about someone asking for the questions to be rephrased so that its clear what is being asked and there are no yes or no questions.*

Project participants reported defence barristers in particular, fail to modify their language or the questions when examining or cross-examining a person with cognitive impairment. Consultations identified that judges and magistrates need to intervene more often and provide guidance to court personnel about what is acceptable when dealing with a person with cognitive impairment in the court room.

*Well a typical process of cross-examination is to get the person to answer trick questions. So when a person has an intellectual disability they usually say yes because they think that's what you're after whether they understand the question or not. And they, because its too hard, you know they're tired, they want to answer the question, so they'll try and pick up the cue as to what the person wants as the answer. So cross-examination in the context of someone with an intellectual disability I can assure you is absolutely valueless evidence and I think it should be seen by the Court to be pretty valueless that sort of cross-examination. I think you should somehow have to have non-legal questions.<sup>128</sup>*

And in relation to people with intellectual disability:

*...may have particular difficulty with leading or lengthy questions, questions which are spoken rapidly or those which contain many concepts or double negatives.<sup>129</sup>*

### **FINDING 7.3: SUPPORT NEEDS WHEN AT COURT...**

*It's so overwhelming you know those who have not ever experienced the judicial system to walk into it – it's frightening and that has an impact on being able to present as a credible witness. So once again it's a difficult thing for anyone to know how to be a credible witness so the information about the court system [is important]. But trying to provide this information at a basic level to assist*

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<sup>127</sup> Excerpt from interview transcript.

<sup>128</sup> Excerpt from interview transcript.

<sup>129</sup> *Interim Report*, above n 3, para 4.26.

*wherever that degree needs to be to meet the needs of people with an intellectual disability is extremely important and a highly specialised skill.*<sup>130</sup>

Interviews highlighted the very real need for support during the court process for victim/survivors with cognitive impairment. Further, there has been no comprehensive study examining the needs of people with disabilities appearing before Victorian courts. In 1999 the DDLS presented evidence to the Parliamentary Law Reform Committee Review of the provision of legal services in rural and regional Victoria and was asked by the Committee the degree of accessibility to Victorian courts. At that time there were a number of regional and rural Courts not even physically accessible. A clear plan is now in place to overcome these physical barriers but there is no plan to overcome attitudinal and procedural barriers relating to the operation of the courts.

*I am sure they need more support, because it is a very difficult area to deal with and I gather that whilst there has been some inroads made to assisting people with disabilities at Court, they only, certainly on the people that are offenders, but I am not sure of the extent that it has been explored with victims and there are obviously groups are very vulnerable and there are groups that obviously need as much support as they can get. The Court is no different from any other area. It is probably... one of the worst, experiences other than the actual assault or whatever it might have been, that they are going to experience. They need terrific professional support in that environment.*<sup>131</sup>

At present the supports available to victim/survivors include the Court Network whose volunteers support people to understand the Court and the legal process but are not permitted to provide advice or guidance.

*We certainly have had one woman with an intellectual disability. She came into Court ... she was so extremely nervous and wanted [support], to take her through the procedure here in the Court... [she was taken] into Court, explained what happened, how the procedure goes and then [someone was] with her the following week when she came back in again.*<sup>132</sup>

There are also Disability Liaison Officers at the Melbourne and Geelong Magistrates Courts. The Disability Liaison Officer provides information and advice to the court regarding disability and its impact upon the accused or victim, including the person's likely needs and the range of supports available to them. Although the Project did not seek specific comments on the program, it was reported by Court personnel and legal advocates that the service provided is essential in assisting the Court's communication with and treatment of the individual with a disability. Whilst it requires further investigation regarding its suitability for sexual assault proceedings in particular, the concept is one supported by the Project with some clear boundaries to the role and with an emphasis on the recognition and promotion

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<sup>130</sup> Excerpt from interview transcript.

<sup>131</sup> Excerpt from interview transcript.

<sup>132</sup> Excerpt from interview transcript.

of the rights of people with a disability, this approach may assist victim/survivors with cognitive impairments.

*It has been of significant benefit to everyone in the Court. Whether it be Court staff, whether it be Magistrates, whether it be police officers, barristers, let alone the disabled, or the person with the disability themselves. There are matters here where our Court liaison officer has been able to put programs together to help people and identify problems that would never have been worked out [otherwise]. No doubt it's also given Magistrates a much clearer view of what's available as far as sentencing options... what's in the system, what's available, what's out there for disabled people and people with mental illness... tap into it straight away and then go and respond to a Magistrate's request.<sup>133</sup>*

However, the Project also found that the need for support goes beyond that able to be provided by such a role, particularly as it is attached to the Court itself and not able to independently support and advocate for the rights of people with cognitive impairments in relation to their treatment by the Court when a party to proceedings.

*Thinking in terms of just people with different forms of [cognitive impairment]... it might be the case where... through the court systems, they need to have people with them who are able to sometimes interpret to that person just what exactly is going on, or know that person well enough or be knowledgeable enough about that person's particular [cognitive impairment] to know exactly how that person needs to be supported, and how the whole thing needs to be conducted. And it is like an interpreter type system almost, but they do need specific support... depending on the seriousness of the [cognitive impairment] or whatever or what's happened.<sup>134</sup>*

### **ACCESSING SPECIALIST COMMUNICATION SUPPORT**

Victim/survivors with no or limited verbal communication skills have no real access to the criminal justice system after experiencing sexual assault. Even when evidence that a sexual assault has occurred is available, an individual is required to be able to present evidence themselves about what has taken place. Without the capacity to verbalise the assault, an investigation is unlikely to proceed. Lack of knowledge of alternative forms of communication or the sanctioning of 'interpreters' to assist with communication also limits the rights of an individual to make a complaint or present evidence in court. Limited or alternative communication may also lead to an assumption that an individual is incapable of giving evidence. Further research needs to be conducted to determine how the legal system can be adapted to enable victim/survivors with no or limited verbal communication to give statements, give evidence and ultimately be treated equally within the justice system.

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<sup>133</sup> Excerpt from interview transcript.

<sup>134</sup> Excerpt from interview transcript.

**FINDING 7.4: INCONSISTENCIES USING ALTERNATIVE MEANS TO GIVE EVIDENCE...****VATE**

The SOCACO highlighted that despite the use of VATE, the Courts have a preference for the delivery of evidence in Court during prosecution. This is likely to have some impact upon the outcome of cases and further work needs to be done to ensure that VATE is seen as a viable alternative rather than a diminished form of evidence.

Some concerns regarding the use of VATE were reported. Not all police are trained in the use of VATE (available training targets SOCA Unit members) or authorised to conduct VATE interviews. It has been reported that not all members of the SOCA Unit routinely receive this training and therefore access to this option may be dependent upon the availability of an appropriately trained officer. If a trained member of the SOCA Unit is not available, another member of the force may be taking the statement from the victim/survivor and cannot do this with VATE. Giving a statement on video tape is not an automatic right for the victim/survivor. The member of the police taking the statement will make an assessment as to whether the victim/survivor makes a written statement or makes a video statement.

One of the aims of the use of VATE is to reduce the amount of time the victim/survivor may have to spend in the witness box if the matter proceeds to court. The use of a VATE interview as evidence-in-chief is not automatic, particularly in the County and Supreme Courts. Feedback from the consultation process indicates that in most cases where a VATE statement has been taken, some or all of it will be ruled inadmissible and the victim/survivor will still have to take the stand to provide evidence-in-chief as well as to undergo cross-examination and re-examination. A primary reason given for all or sections of the tape to be ruled inadmissible was the way the questions have been asked by the member taking the statement, that is it may be assessed that the questioning was too leading or the defence counsel may argue that the viewing of the video tape by the jury will be detrimental and prejudicial to the alleged offender's defence.

It was noted by SOCACO that there are a range of issues that result in some people with cognitive impairment gaining access to VATE while others do not, and in the admissibility of the evidence in Court. The discretion to use VATE rests with officers and whilst there are guidelines these are applied with some variation depending upon a number of factors including staffing levels, the assessment of the victim/survivor's cognitive impairment and the likelihood of the admissibility of the statement.

The recording of videotape statements where the victim/survivor has some form of cognitive impairment is an important option available to police. It was widely reported

that this is considered a better way for a statement to be taken from someone with cognitive impairment as video will capture the gestures the person may be using to describe what has happened to them, the individual's body language and facial expressions which may show the impact of the victim/survivor's experiences much better than written language. The video taping of a person's statement also means that, if the matter proceeds to trial, the victim/survivor can review their evidence and remember more clearly what happened.

### **OTHER ALTERNATIVES**

The experiences of victim/survivors giving evidence in court in sexual assault trials have been described as being as traumatic as the actual assault was. In order to attempt to reduce some of the trauma victim/survivors experience when in the witness box, alternative means to present evidence<sup>135</sup> have been made available. Access to these alternatives is not automatic and has to be requested by the victim/survivor or a support person. The court will then make a ruling on each case as to whether evidence can be given in an alternative manner.

*Well the only alternative that I can see is by way of having a remote witness room. And that means it takes them out of the immediate environment of the Court house and puts them into a room away from the Court. Other than that, I can't think of any other way. Because obviously evidence is evidence, its got to be presented, and because a person's livelihood in such a serious situation like we are talking about here, there obviously has to be enough evidence for a conviction. Therefore the evidence has got to be given as difficult law as it is. Obviously a less traumatic way is to do it by way of video to a remote witness room.<sup>136</sup>*

Of the available options, it is generally felt by support services that the use of the remote facilities is the most appropriate as it allows the court to continue to view the victim/survivor while s/he presents their evidence from an emotionally safe place.

The view of legal personnel differs about the use of remote facilities, which removes the victim/survivor from the courtroom. It was reported that both prosecution and defence representatives are reluctant to use the remote facilities as the impact of the evidence on the jury is reduced to 'watching a courtroom drama on television' and a belief that if the victim/survivor is telling the truth they should be able to look the alleged offender in the eye while making their allegations.

The views of prosecution staff regarding the use of the remote facilities for victim/survivors with cognitive impairment also varies. Some staff believed that it is easier to keep the

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<sup>135</sup> Some of the options available include: presenting evidence from a remote facility through Closed Circuit Television, having a screen to block the alleged offender's view of the victim/survivor, having a support person stand near the victim/survivor while they are in the witness box, requesting that barristers refrain from wearing ceremonial gowns and wigs, and requesting that barristers remain seated during questioning.

<sup>136</sup> Excerpt from interview transcript.

person focussed and to identify whether they need a break if the victim/survivor is in the courtroom. Other prosecution representatives prefer the use of the remote facility as there are less distractions for the individual and they are able to concentrate better on the questions being asked. It was also noted that some defence barristers prefer the use of remote facilities as the distance reduces the impacts of the person's disability.

### **FINDING 7.5: THE NEED FOR ADJUSTMENTS TO THE CRIMINAL JUSTICE SYSTEM...**

*Even where the impairment is correctly identified, there are aspects of court procedure that act as severe barriers to the effective participation of witnesses with cognitive impairments.<sup>137</sup>*

In order for a person with cognitive impairment to participate in the legal process and to make informed decisions about what they want to do it may be necessary to make adjustments to the criminal justice system. Possible adjustments include:

#### **TIME**

Allowing the individual time to comprehend and discuss with a trusted support person all aspects of the reporting and legal process, is essential in order to facilitate informed consideration of the implications of proceeding with a matter. Time for preparation and when appearing in the courtroom including taking longer to present their evidence, and importantly understanding the contributions of others and the processes of the court. It may be that this is uncomfortable for some, including Magistrates, but that this is in order to facilitate greater access to justice for victim/survivors with cognitive impairment.

#### **EXPEDITION OF CASES DUE TO MEMORY ISSUES**

Many participants reported that the longer the process is, the more difficult it may be for people with cognitive impairments and some forms of mental illness to remember the incident and the relevant facts. Whilst the benefit of expediting sexual assault matters to reduce the stress placed upon child victim/survivors is recognised, as is the impact upon recall for all victim/survivors<sup>138</sup>, such fast tracking becomes all the more important when the victim/survivor has particular difficulties with memory or in describing details because of their disability.

#### **LANGUAGE**

As has been identified in other research, the language used in the criminal justice system is complex, difficult to understand results in significant numbers of complainants not understanding proceedings<sup>139</sup>. The project also found that language is often delivered

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<sup>137</sup> *Interim Report*, above n 3, para 4.26.

<sup>138</sup> *Ibid*, para 4.15.

<sup>139</sup> *Ibid*, para 4.23.

too quickly resulting in poor comprehension, confusion and frustration and is generally not suited to people with cognitive impairments<sup>140</sup>. Consequently, courtroom language should be modified to meet the needs of the individual with a cognitive impairment, and wherever possible, it should reflect the language used by the individual to enhance their understanding of what is being said and to allow maximum participation in the process.

#### **REDUCING DISTRACTIONS**

Some people with cognitive impairments will find the 'busy-ness' of the courtroom or police station very distracting and this may impact significantly on their capacity to concentrate for long periods of time. Ensuring a greater sensitivity to noise and activity, using of remote facilities and closing the courtroom may aid in removing some of these distractions and enable greater participation.

#### **ADJOURNMENTS**

It has been identified that people with cognitive impairments and some forms of mental illness may only be able to concentrate for short periods of time. The process of giving a statement, evidence-in-chief, cross-examination and re-examination can be lengthy and mentally exhausting for the average person. For someone with cognitive impairment, where short concentration spans may already be a factor, extensive questioning can be inappropriate. It has also been identified that the longer questioning continues without a break, the more likely someone with a cognitive impairment is to give answers they think will end the process, due to over-compliance and a desire to please on the part of some people with an intellectual disability. Frequent breaks or adjournments as required will allow the individual the opportunity to provide more focussed evidence in less time.

#### **FINDING 7.6: THE NEED TO SUPPORT THE MOST VULNERABLE...**

The entire criminal justice system, is not geared towards assisting those people who have more severe or profound disabilities and act as significant barriers to their effective participation.<sup>141</sup> This group is extremely vulnerable in relation to the risk of sexual assault. Often, their experiences are not recognised or responded to: when reports are made they may be largely based on someone else's observations; the victim/survivor may not have the capacity to provide a statement; their credibility as a witness is rarely recognised. As a result, they are outside the system and out of reach of justice. Alternative processes need to be developed which will enable this group of people to be heard and responded to.

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<sup>140</sup> Ibid, para 4.26.

<sup>141</sup> Ibid.

<b><i>RECOMMENDATION 7.1: CRIMINAL JUSTICE AND DISABILITY INQUIRY</i></b>
That the Attorney General provides a reference to the Victorian Law Reform Commission to investigate the treatment of people with cognitive impairments within the criminal justice system including the issues raised in this and other reports.
That in the interim, the VLRC undertake a community reference to 'scope' the range of issues that such an inquiry would consider and the existing measures designed to facilitate people with disabilities greater access to justice.
<b><i>RECOMMENDATION 7.2: FACILITATING ACCESS TO JUSTICE</i></b>
That further research is undertaken to identify and address systemic barriers to access to justice for victim/survivors with cognitive impairments. Such research and reform should be undertaken in collaboration with constituents and stakeholders to effect systemic change.

***FINDING 8: THE NEED FOR ADVOCACY***

Victim/survivors with cognitive impairments, are often in need of consistent specialist support throughout the reporting and legal processes. Some victim/survivors have few supports and it may not be appropriate or possible for the people who provide them with a support service, such as residential care, to support them, if indeed these supports are accessed by the person. Even if these workers are available it was noted that the requirements of such a role are specialised, requiring knowledge and skills in relation to both cognitive impairment and the law and legal process. Given the inaccessibility of the legal process to most victim/survivors with cognitive impairment, it was noted that for many such a role would mean the difference between progressing to prosecution or not.

It has been identified by a number of professionals working in the disability support services, victim support and criminal justice systems that victim/survivors who have experienced sexual assault would benefit from the support of an advocate throughout the process of reporting, proceeding through the trial, and in accessing support services. Consultations revealed that when a victim/survivor is supported by a person who provides an advocacy role, there is a greater likelihood that a statement will be taken, and the individual is kept more informed of the progress of the investigation. An advocate can also ensure that the individual is properly informed of the processes, the implications of their participation therein and assist the victim/survivor to make informed decisions at critical stages.

Currently, this advocacy role is not provided or is provided alongside a range of other support roles. CASA counsellors provide a level of advocacy in relation to choices and options on reporting, medical treatment, housing and ongoing counselling support. The Office of the Public Advocate would provide a formal advocate if the person had no other formal supports to assist in decision making, and some disability support workers provide

advocacy along with the personal support. There is no formal, independent and objective advocacy role available that is outside these services and that could focus on the range of issues the person is likely to experience specifically related to their disability although the role of the ITP's was discussed. The VLRC identifies in the Interim Report, that there is support for:

*...the scope of the role of the ITP to be reviewed. In particular, some participants supported the ITP being trained to play a greater advocacy role when dealing with the police.<sup>142</sup>*

The role of the Independent Third Person could be improved and expanded. This may include the ITP incorporating an advocacy role during interviews with police. At this time, the ITP is only utilised during police interviews to aid in communication. Reviews of the ITP program have raised this issue previously, and it seems that it is ongoing. The police can contact an ITP if the person has or is suspected of having a cognitive impairment, and this part of the process appears to work well. It is the limited role that the ITP currently has that excludes advocacy, which raises concerns about the process of supporting the person when they are at the police station or giving a statement at a Crisis Care Unit. Whilst expanding the role of the ITP is an attractive option, it is likely to be limited in its application throughout the reporting and legal process without a major funding injection and restructure of the program that addresses the likely conflict of interest and need to continue meeting the existing basic communication facilitation role, the voluntary nature of the role and the depleted and stretched pool of willing and capable ITP candidates.

**RECOMMENDATION 8: THE NEED FOR ADVOCACY**

That research be undertaken to identify the specific legal and disability support needs of victim/survivors with disabilities affecting cognitive capacity when reporting sexual assault and accessing the justice system, and develop proposals for an appropriate service model that meets these support needs.

That the Department of Justice provide funding for the appropriate service model proposed to meet the specific legal and disability needs of victim/survivors with disabilities affecting cognitive capacity, whether through existing or new service frameworks.

**FINDING 9: ADDITIONAL POLICE ISSUES...**

In the consultation with the Sexual Assault and Child Abuse Coordinating Office, a number of additional issues were identified that contribute to the overall difficulties experienced in the process of reporting and prosecuting. Where these are contained in the text of this report they have been referenced as such. There were a number of additional issues canvassed including those listed below:

<sup>142</sup> Ibid, para 3.36.

**DIFFERENCES IN METROPOLITAN AND REGIONAL SERVICES BETWEEN AREAS**

- CASA's called in before the Forensic Medical Examiner in metropolitan areas but not always in regions due to resource constraints;
- lack of available Independent Third Persons in some regions; and
- lack of interpreters or communication aids in some metropolitan and regional areas.

**RELIANCE ON OTHER AREAS OF THE FORCE**

When Sexual Assault and Child Abuse Unit officers are off duty, there is a reliance on general officers to assist victim/survivors with their statement and linking into supports. These officers do not necessarily receive the specialist training regarding cognitive impairment or sexual offences that the SOCAU officers routinely receive. This can lead to differences in the treatment a victim/survivor may receive, with potential consequences for the progress of the matter.

**RESOURCE LIMITATIONS**

It was noted that there are resource constraints that prevent some matters from adequate investigation. This was raised particularly in the context of the competing demands and priorities regarding investigations within Criminal Investigation Units.

**CAPACITY OF SOCAU TO FOLLOW-UP MATTERS UNDER INVESTIGATION BY CIU'S**

Where SOCAU Officers have referred matters to CIU Officers they are limited in their capacity to follow-up where they feel the matter may have had strong chance of successful prosecution. It was noted that the CIU's may not receive the specialist training available to SOCAU officers and may not give the matter priority where they have competing demands upon resources. It was noted that it would be difficult, for example, for a CIU officer to prioritise a sexual offence investigation over a murder, particularly where there may be some doubt about the capacity of the victim/survivor to perform as a credible witness.

# **5: Conclusion**

The Sexual Assault and Disability Project Stage 1 was conducted over an 18-month period from late 2001 until mid 2003. The Project sought to gain an understanding of the issues and barriers experienced by victim/survivors of sexual assault with cognitive impairment through consultations with people who work with these victim/survivors and stakeholders within the criminal justice system. A range of outcomes were achieved by the Project including the collection and analysis of data from the consultations, contributing to the Victorian Law Reform Commission's reference regarding sexual assault, the production of this report and it's recommendations, and the identification of further systemic initiatives for reform.

The Project drew on the scant Australian and international research available regarding victim/survivors with cognitive impairment which confirmed that this group are often at an increased risk of sexual assault and are less likely to recognise it as a crime due to restricted social lives, reduced community participation, greater dependence on others and having limited access to information about sexual rights and safety. The available research also indicated that these victim/survivors are more likely to experience sexual assault and yet less likely to report them than women without cognitive disabilities. It also uncovered that many of these assaults occur in an environment where the victim/survivor lives or receives services related to their disability and are more likely to be perpetrated by either another resident or a person involved in the care of the victim/survivor.

The consultations with people who work with victim/survivors with cognitive impairment revealed some of the experiences this group have when reporting sexual assault and accessing the criminal justice system. These workers reported that many victim/survivors with cognitive impairment had less knowledge about sexual assault, the law, their legal rights and the criminal justice process. They also said that victim/survivors with cognitive impairment felt that if they reported the offence they might be discredited because of their disability or prior criminal activity, and feared they would not be believed and/or may be notified to other authorities for interventions such as involuntary psychiatric care or child protection intervention. When asked what these workers felt would make a difference to the experience of reporting sexual assault many said they feel they would benefit from increased training about people with disabilities and/or sexual assault, that specific support and advocacy services be provided to victim/survivors from reporting to prosecution, and that the criminal justice system should better collect and record data about and accommodate the specific needs of victim/survivors with cognitive impairment.

The project developed recommendations that generally support those of the VLRC as outlined in their Sexual Offences interim report and hopes that these will be taken seriously by the Victorian Government in the interests of greater access to justice for all victim/survivors. The recommendations specific to the project include further research regarding the experiences and needs of victim/survivors with cognitive impairment, consistent data collection by all stakeholders in the criminal justice system, better training regarding sexual assault and cognitive impairment, better support services particularly throughout the reporting and prosecution process, adjustments to the criminal justice system to accommodate special needs, the production of resources in appropriate alternative formats and an inquiry regarding the criminal justice system's treatment of people with disabilities by the VLRC.

Whilst the community still has a long way to go to ensure to the greatest extent possible, people with disabilities who are victim/survivors of sexual assault can gain access to justice, this project and everyone associated with the DDLS are hopeful that this report can achieve change where others have tried and succeeded only in part. Government and other stakeholders must commit resources to ensure adequate attention is focused on the issues highlighted in this and the VLRC reports. In particular further efforts are required to: conduct research into the needs of victim/survivors with disabilities and the patterns of abuse they are exposed to; ensure better data collection to identify victim/survivors with disabilities; greater emphasis on sensitive service delivery and worker practices; increasing worker skills in identifying sexual assault and disability; better deliver justice through systemic reforms of the criminal justice and support service systems; change the accessibility of practices through adjustments to the environments and processes designed to facilitate access to justice; greater levels of support and advocacy; and individual skills development and education that empowers people with disabilities to become more aware and assertive. The DDLS intends to maintain a watching brief with victim/survivors with cognitive impairment and will report against these and other initiatives for reform that help to create a more just and equitable – and of course a safer community.

The DDLS stands ready to work with victim/survivors with disabilities, the Victorian Government, specialist disability support and advocacy services, sexual assault services, legal centres and the private legal profession, statutory offices, the courts and the wider community to continue to challenge and remove the overwhelming odds that prevent victim/survivors with disabilities from seeking and achieving justice. And though it may seem difficult it is really only as difficult as we choose to make it: we already have a system designed to ensure that the most vulnerable to such sexual assault and other abuses are protected; we now need to double our efforts to ensure that it actually does protect everyone. After all... those who don't know only lack knowledge because we do not chose to learn a language everyone understands; those who are silent are only silent because we do not chose to listen hard enough; those who are invisible are only invisible because we do not chose to see clearly enough; those who are abused are

only abused because we do not do enough to prevent the abuse; those who don't believe they will ever be believed only lack hope because we have not given them enough to believe in; and those who do not seek the balanced hand of justice only forsake their rights because we have not chosen to give their just cause enough weight. And so long as we do not speak out, listen up, see clearly, protect diligently, and believe in and uphold justice... victim/survivors with disabilities will continue to be...

*beyond belief, beyond justice.*

# 1: Appendix

## Glossary of Terms

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'impaired mental functioning'	This is the definition cited in section 50 the Crimes Act 1958 and includes an impairment because of mental illness, intellectual disability, dementia or brain injury.
Cognitive impairment	This is the term preferred by the Project Team and used throughout this report. It is a more accepted and respectful term.
Victim/survivor	A person who is the victim of sexual assault.

## Acronyms and Abbreviations

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DDLDS	Disability Discrimination Legal Service
OPA	Office of the Public Advocate
CASA	Centres Against Sexual Assault
EOC	Equal Opportunity Commission
CCU	CASA Crisis Care Unit
VLRC	Victorian Law Reform Commission
OWP	Office of Women's Policy
DHS	Department of Human Services
SOCACO	Victorian Police Sexual Offences and Child Abuse Coordination Office
SOCAU	Victorian Police Sexual Offences and Child Abuse Unit
CIU	Victorian Police Criminal Investigation Unit
FMO	Forensic Medical Officer
VATE	Video and Audio Taping of Evidence
IIP	Office of the Public Advocate Independent Third Person
the Project	Sexual Assault and Disability Project
OPP	Office of Public Prosecutions
ABI	acquired brain injury
IPP	Individual Program Plan

# 2: Appendix

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# 3: Appendix

## **Consultation Questions For Sexual Assault Workers**

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Note: The following questionnaire was that used for interviewing sexual assault workers. Questionnaires for other workers were based upon this template with relevant variations.

(Provide a brief overview of the project, what will happen with the information collected, contribution to VLRC Reference, proposed Stage 2 Project)

What are your experiences in supporting victim/survivors with “impaired mental functioning” to access the system (police, FMO, OPP, courts)?

What steps are taken to ensure a victim/survivor with impaired mental functioning has an understanding of procedures in the CCU and can provide informed consent to the FME?

What differences do you perceive / encounter in supporting victim/survivors with “impaired mental functioning” to access the criminal justice system in comparison with other victim/survivors?

What are your perceptions of attitudes towards victim/survivors with “impaired mental functioning” when proceeding, or deciding to proceed, through the criminal justice system by:

police

FMOs

The OPP

Court personnel?

If you have supported a victim/survivor through a trial, what alternative options were offered or made available to her in court for giving evidence-in-chief, cross-examination, re-examination, etc? (eg. Closed circuit television, screens, support person next to victim/survivor)

What are your perceptions of the barriers victim/survivors with “impaired mental functioning” encounter in reporting sexual assault and in gaining access to appropriate support?

What are your perceptions of the needs of victim/survivors with “impaired mental functioning” to reach a decision about whether or not to report the assault to police, while making a statement, appearing in court, and understanding their rights?

What is your knowledge of any resources available to meet the needs of victim/survivors with intellectual disabilities and other cognitive impairments in understanding the criminal justice process or for addressing the impacts of sexual assault?

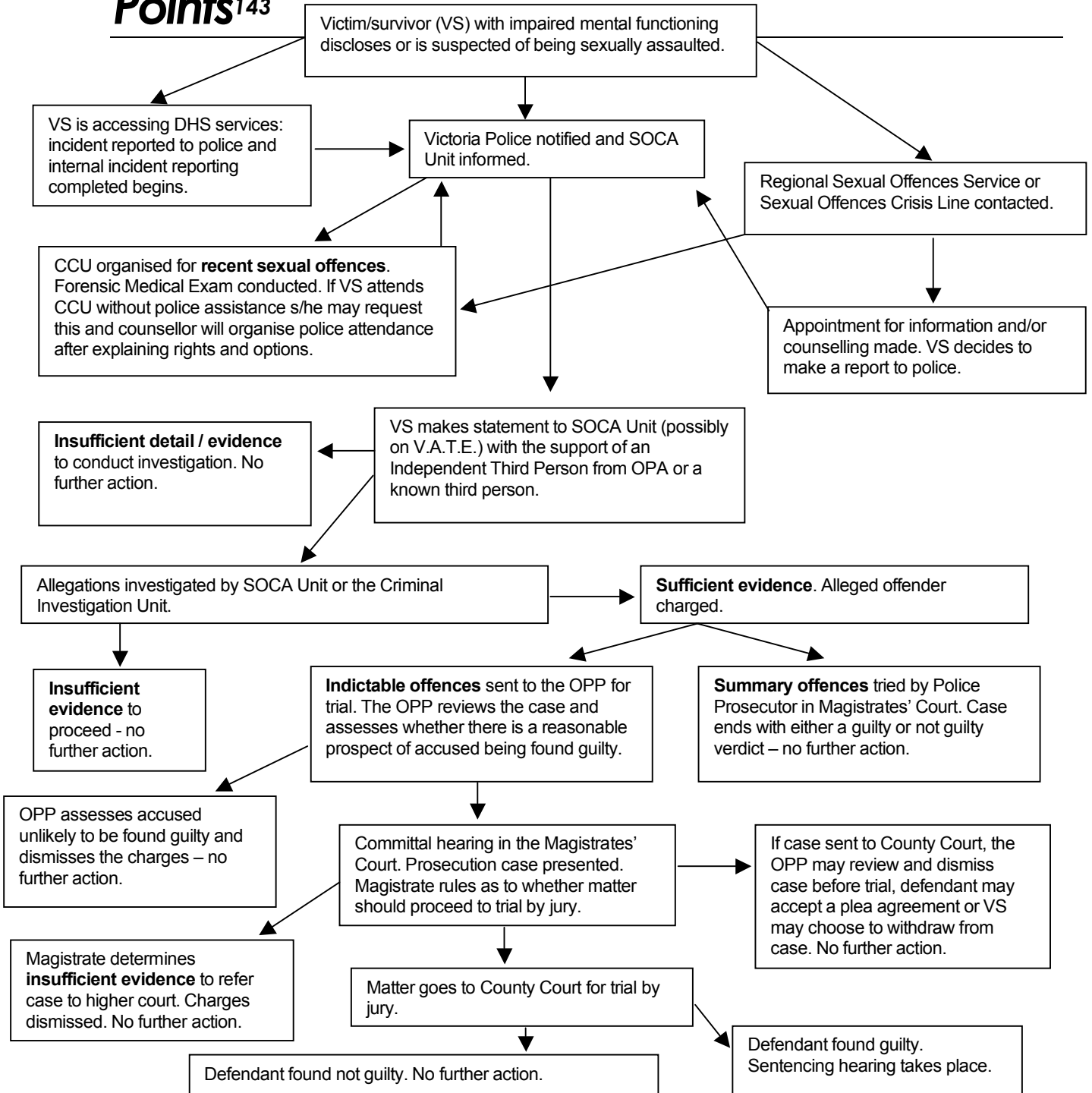
What capacity do you have as an agency / individual counsellor advocates to develop resources in alternative formats suitable to meet the needs of victim/survivors with "impaired mental functioning"?

What ability does your agency have to adapt services to meet the needs of victim/survivors with "impaired mental capacity", ie. longer appointments, extended periods of counselling in services where this is time limited?

# 4: Appendix

## Flow Chart of Critical Decision Making

### Points<sup>143</sup>



<sup>143</sup> : Original flowchart adapted from: *Rape, Law Reform and Feminism Flowchart*, above n 63.