IGFF
Sexual Abuse Prevention

9 May 2024

Australian Law Reform Commission
PO Box 209
Flinders Lane, Naarm
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Email: jrsv@alrc.gov.au

Re: Justice Responses to Sexual Violence

Dear Commissioners,

In July 2021, IGFF provided the following submission to Victoria's Criminal Justice systems, highlighting a current legislative gap posing some risk to our clients who may undertake civil litigation as part of their justice journey.

Further research revealed that, although recently closed in cases of domestic and family violence, Survivors impacted by abuse in institutional contexts may still be subject to cross examination by their offender/s in every State and Territory jurisdiction across Australia, with the exception of South Australia.

IGFF is aware of at least one case where this has occurred and another where this has proved a significant barrier to an individual undertaking civil litigation. As such we initially wrote to all relevant jurisdictions in October 2019.

This was followed up by additional emails in in April 2024 in which we also wrote to The Honourable Mark Dreyfus to raise our concerns and are scheduled to meet with the Attorney General's office shortly.

Using the case study of Victoria's legislative system, IGFF has drafted the below submission and recommendations to highlight potential solutions to this existing gap in protections for vulnerable persons. Whilst we recognise that there may be variations in approach to this across jurisdictions, it is our hope, that using Victoria as a case study, this may act as a catalyst for change as more and more people explore civil litigation as a justice option.

Yours sincerely,

[redacted]

Clare Leaney
CEO
In Good Faith Foundation

Submission: Inquiry into Victoria's Justice System

Offender Cross-Examination of Victim-Survivors

Submission to the Legislative Council, Legal & Social Issues Committee

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About In Good Faith Foundation

In Good Faith Foundation (IGFF) is a national charity and Redress Support Service working with and on behalf of institutional abuse survivors, their families, carers and communities. Our case management and advocacy services provide wrap around support to individuals, assisting them to voice their concerns and sustaining them as they navigate justice, redress and recovery pathways. We also undertake systemic advocacy focused on prevention of future abuses and promoting methodology for improving the wellbeing and access to justice for survivors.

The work of IGFF is informed by advocacy and support services provided throughout the Victorian Parliamentary Inquiry into the Handling of Child Abuse by Religious and other Non-Government Organisations (2012-2013); the Royal Commission into Institutional Responses to Child Sexual Abuse (2013-2017); and national support service input to the establishment of the National Redress Scheme (July 2018 ongoing). We also facilitate a community development forum called The Melbourne Victims' Collective that has been meeting for 14 years focused on strategic information and education sharing for survivors, their carers and support professionals such as advocates, therapeutic care, and law and justice representatives. Over the last 25 years, IGFF has advocated for hundreds of clients, almost half of whom suffered their initial abuse within Victoria.

Our Vision

To achieve justice, recovery, and ongoing support; promoting the well-being of survivors, families and communities impacted by institutional abuse.

Our Mission

- To ensure acknowledgement of harms done
- To provide wrap-around care and support to existing survivors, families and communities
- To strive for a world free of institutional abuse

Our Work

The work of IGFF is underpinned by our commitment to no further harm to

individuals, families and communities by being a source of help that will resource them to access the health care they need and establish hope in a recovery journey.

Introduction

IGFF wishes to take the opportunity afforded by this inquiry to raise a matter of particular concern which affects victim-survivors of sexual abuse, and which relates to treatment of offenders in the justice system.

It has come to our attention that currently, within the Victorian jurisdiction, **victim-survivors of child sexual abuse who pursue redress through civil litigation are at risk of being cross-examined directly by their alleged offender in the course of court proceedings.** Regrettably, we have been made aware of at least three cases in Victoria where this highly undesirable event has already occurred.

In this submission, we will briefly outline the state of the current law in Victoria governing protection of witnesses in civil matters, highlighting identified problems with the current legislation. We will then outline the changes we propose should be made to the current law which would protect victim-survivors from the risk of being cross-examined by their offenders, offering our reasons for why these changes should be made.

In brief, it is our position that a set of legislative protections similar to those provided in South Australia's *Evidence Act 1929* (SA) s 13B should be implemented in Victoria. This legislative approach mandates that in certain circumstances and in relation to certain kinds of offences, an alleged offender will not be permitted to directly question an alleged victim-survivor. Like the South Australian legislation, our preferred approach would not require the exercise of judicial discretion before the protection is activated. It would also mandate that alternative arrangements be made to ensure offenders have access to legal representation and procedural fairness in relation to these witnesses.

Victim-survivors of institutional sexual abuse have consistently reported to us that the processes involved in civil litigation to seek redress are frequently retraumatising. It is our hope that, in adopting the proposed changes, Victoria's legislature can help reduce the traumatic impact of civil litigation in one very significant way, while promoting fairness and consistency for all parties to such litigation.

The current law

The current Victorian law governing protection of witnesses and management of witness-related issues in civil cases is found in s 26 of the *Evidence Act 2008* (Vic). The Section, entitled 'Court's control over questioning of witnesses', provides that:

The Court may make such orders as it considers just in relation to—

(a) the way in which witnesses are to be questioned; and
(b) the production and use of documents and things in connection with the questioning of witnesses; and
(c) the order in which parties may question a witness; and
(d) the presence and behaviour of any person in connection with the questioning of witnesses.

This provision is quite general, and offers members of the judiciary significant discretion over questions of witness management. The section technically offers judges the option of making whatever orders they see fit in relation to witness questioning. It does not offer specific direction about situations where witnesses should be presumed to require additional protection, or situations where it may be inappropriate for a self-represented litigant to directly question a witness. Section 27 of that same Act provides that "A party may question any witness, except as provided by this Act."

We have not been able to identify any provision under the Act or within broader Victorian legislation that explicitly governs situations where an alleged sexual abuser intends to cross-examine an alleged victim-survivor in a civil law case, and certainly no provision that explicitly prohibits this practice. We note that according to s 41 of the Act, the Court is obliged to disallow improper questions put to witnesses in the course of cross-examination, including questions that are "unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive" or questions that are "put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate".

Problems with the current legislation/reasons for proposed change

While the current legislation does offer some protection to a witness in terms of the content or tone of questioning, we consider it is inadequate in terms of protections offered for victim-survivors, for reasons we will outline below.

1. The current protections are out of step with the majority of Victorian law and policy

It is worth contrasting these sections with Victorian law in relation to other kinds of cases, particularly criminal law and family violence matters.

The *Criminal Procedure Act 2009* (Vic) contains a series of provisions, under pt 8.2 div 3, creating a special class of witnesses known as "protected witnesses" and outlining rules for cross-examination of such witnesses. These provisions, which apply to cases dealing with sexual offences or family violence,[1] automatically classify the complainant and their family members, as well as the family members of the accused, as "protected witnesses".[2] They also offer the Court the discretion to assign any other witness this designation if the Court sees fit to do so.[3]

Section 356 explicitly prohibits cross-examination of a protected witness by a defendant in person, while s 357 ensures that an accused person will be granted legal representation in such a situation. This combination of provisions neatly balances the right of an accused person to procedural fairness with the needs and rights of victim-survivors. Section 133 of the *Criminal Procedure Act* also outlines a series of special rules applicable to sexual offences in the context of a committal hearing, implicitly acknowledging that witness testimony by complainants in this kind of case holds a special character and sensitivity.

Similarly, s 70 of the *Family Violence Protection Act 2008* (Vic) creates a protected witness category for proceedings related to intervention orders, automatically classifying people affected by family violence, children, and family members of any parties as protected witnesses and also giving the Court discretion to classify other individuals as protected witnesses if the Court is satisfied they require protection

[1] Criminal Procedure Act 2009 (Vic) s 353.
[2] Ibid s 354.
[3] Ibid ss 354-355.

or if they have any cognitive impairment. Section 70(3) prohibits cross-examination of protected witnesses by the respondent accused of family violence, unless the protected witness is an adult with capacity to consent and they actively consent to cross-examination. Sections 70(4) and 71 provide for the respondent to access legal representation for the purposes of cross-examination, including via Legal Aid grant if necessary.

Perhaps in deference to the fact that applicants seeking protection from family violence are often not legally represented, s 72 goes on to require that if a respondent has legal representation, the Court must order Victoria Legal Aid to provide legal representation to an applicant protected witness for the purposes of cross-examination. This provision neatly accounts for the risk of unfairness that could arise if a self-represented protected witness applicant was forced to undergo cross-examination at the hands of an experienced lawyer in a sensitive case. Meanwhile, s 69 offers a range of arrangements the Court may make in proceedings focused on family violence intervention orders to render the proceedings less stressful and more manageable for participants. This suite of provisions again admirably supports procedural fairness for all parties while acknowledging the sensitive position of witnesses who have survived certain forms of abuse and violence.

Turning to the Federal jurisdiction, we note that the *Family Law Amendment (Family Violence and Cross-examination of Parties) Act 2018* (Cth) follows this trend. This Act amended procedures in the family law jurisdiction to avoid the risk of harm caused by parties who may have committed family violence cross-examining their alleged or proven victims. It added a new provision, s 102NA, to the *Family Law Act 1975* (Cth.), entitled "**Mandatory** protections for parties in certain cases" (our emphasis). This section applies where there has been an allegation of family violence between an examining party and an intended witness to be cross-examined, regardless of whether the witness is the alleged victim or the alleged perpetrator. The section requires that where certain conditions are satisfied (there has been a charge or conviction of an offence involving violence or threat of violence, or a non-interim family violence order applies to the parties, or a personal protection injunction under the *Family Law Act* applies to the parties, or the Court decides an order should be made even if none of these conditions are satisfied), the parties are not permitted to cross examine each other, and the cross-examination must be conducted by a lawyer. If none of the conditions are satisfied, and the section does not apply, the Court is still obliged under s 102NB of the

Family Law Act to put protections in place for the witness.

The section even makes a specific note indicating that this is separate from, and does not limit, other evidentiary rules like the Court being required to disallow misleading questions. The legislation takes pains to identify that both alleged victims and alleged perpetrators ought not be put in a position where they are expected to cross-examine one another. There is no provision restricting this mandatory protection only to, for example, cases where parenting orders are at play; there is no suggestion within this law that the provision exists because of the unique issues faced by parties who may be required to maintain an ongoing relationship in order to manage shared parenting, and they might just as easily arise in a case concerned only with matters of property division or maintenance orders. Rather, these provisions are again an acknowledgment that where certain kinds of harm have allegedly been done by one person to another, it is inappropriate for those people to cross-examine one another, and the justice system should not require such an action.

Aside from criminal cases, family law matters and applications for protection from family violence, there are very few other occasions where the legal system might anticipate the advent of a victim-survivor of sexual assault or family violence being cross-examined by their abuser. It is therefore understandable that this gap in the law has developed in relation to civil cases where a survivor seeks a civil remedy for the harm done to them. In 2005, a joint review of the Uniform Evidence Laws by the Australian, New South Wales and Victorian Law Reform Commissions asserted that "the protections offered to witnesses in criminal matters should be no more comprehensive than in civil matters" and "a witness in a negligence or a civil assault matter may be as vulnerable to attack in cross-examination as a victim of a crime".[4] We note also that deleterious effects of this kind of prohibition that can arise in criminal trials, like the risk of prejudicing a jury against the defendant[5] leading to a need for a jury warning provision,[6] are unlikely to be a factor in civil trials, given the general absence of a jury. We consider that a dedicated provision in the Evidence Act would align procedure in civil law cases, offering consistency

[4] Australian Law Reform Commission, NSW Law Reform Commission, Victorian Law Reform Commission, *Uniform Evidence Law: Report* (ALRC Report 102, NSWLRC Report 112, VLRC Final Report, December 2005), [5.107].
[5] NSW Parliamentary Library Research Service, *Cross-examination and Sexual Offence Complaints* (Briefing Paper No 18/03, August 2003) 21.
[6] See for example *Criminal Procedure Act 2009* (Vic) s 358.

and uniformity.

In addition to the legislation already cited, it is worth considering the *Victims' Charter Act 2006* (Vic). One of the objectives of this Charter is to reduce the likelihood that victims of crime will experience secondary victimisation at the hands of the criminal justice system.[7] Section 12(a) of the Charter provides that courts and prosecutors should, as far as is reasonably practicable, minimise a victim's exposure to unnecessary contact with the accused (as well as contact with defence witnesses, and with family members and supporters of the accused person). Separately, s 12(b) advocates for prosecutors and courts to protect a victim from intimidation by an accused person or any of those other individuals. It is worth noting that the Charter identifies these as two separate matters – even non-intimidatory contact should be minimised, as contact between the victim and the alleged perpetrator is implicitly understood as difficult regardless of whether it carries any obviously intimidatory character. We consider that victim-survivors in the civil system who are pursuing redress for harms involving sexual assault should, similarly, be afforded the protection of minimising contact with their abusers.

2. The current protections allow for the possibility of significant unnecessary retraumatisation for victim-survivors, leading to flow-on harms both to victim-survivors and to the broader justice system

At the risk of stating the obvious, requiring victim-survivors of intimate abuse, or their closest relations, to subject themselves to questioning by the alleged sexual abuser to access redress seems likely to cause significant and unnecessary distress and retraumatisation.

Prior reviews of evidence law have tended to reach similar conclusions, including reviews which led to the adoption of the legislative protections cited above. For example, in recommending a ban on accusers cross-examining victim-survivors in person in sexual assault cases, the NSW Law Reform Commission reported that the vast majority of submissions they received were in favour of the ban.[8] Submissions to that commission pointed out that the fact of the accused conducting the cross-examination is itself distressing to these witnesses in a way

[7] Victims' Charter Act 2006 (Vic) s 1(c).
[8] New South Wales Law Reform Commission, Questioning of complainants by unrepresented accused in sexual offence trials (Report 101, June 2003) 40.

that cannot be addressed by managing the manner or form of the questions.[9] We consider that, similarly, the judicial powers offered under the Victorian *Evidence Act* in s 41 may address the manner and form of questions, but they cannot address the fundamental distress caused by the relationship between the victim-survivor as witness and the alleged offender as cross-examiner. Previous law reform commissions have also acknowledged that the use of the section to control improper questions had historically been "patchy and inconsistent" and "seldom invoked".[10]

Redress for institutional child sexual abuse in particular is an area of litigation considered so sensitive that the Royal Commission into Child Sexual Abuse recommended the adoption of model litigant rules for institutional defendants in order to "minimise potential re-traumatisation of claimants"[11] – there has been clear legal recognition of the risks of retraumatisation for victim-survivors who pursue redress through civil litigation.

We consider that victim-survivors of sexual assault questioned by their alleged abusers are inherently less likely to deliver full and accurate evidence because of the trauma response activated in them by confrontation with the accused. This is a likelihood previously raised and recognised by other law reform bodies.[12]

In addition, we consider that victim-survivors who fear the possibility of this kind of cross-examination are more likely to avoid pursuing civil litigation as a redress pathway. The state of the current law effectively serves as a particularly severe deterrent against civil litigation, and may encourage victim-survivors to pursue other avenues for redress which could provide lower financial recompense (such as via the National Redress Scheme, which caps maximum payouts at $150,000).[13] It would be a significant injustice if people who may be entitled to a comparatively much larger and potentially life-altering sum are deprived of a

[9] Ibid 40.
[10] Australian Law Reform Commission, NSW Law Reform Commission, Victorian Law Reform Commission (n 4) [5.91], citing Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [5.96]–[5.106].
[11] Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015) 524.
[12] New South Wales Law Reform Commission (n 8) 43.
[13] Australian Department of Social Services, *Guides to Social Policy Law: National Redress Guide* (Version 1.05, 8 February 2021) 5.1.

chance to pursue that compensation because they fear being cross-examined by the person who sexually assaulted them.

We acknowledge that the Victorian Law Reform Commission has previously considered and ultimately rejected a broader proposal to extend the full suite of special witness protections offered in Victoria uniformly to all victim-survivors of sexual offences or victim-survivors of family violence, instead favouring a case-by-case approach.[14] We propose that a distinction should be drawn between the broader special witness classification and the narrower and more specific issue of a bar on alleged offenders conducting a cross-examination. We note also that these recommendations were made in relation to criminal trial processes, and that one major reason cited by the Commission for declining to recommend a more all-encompassing or automatic special protected witness status was the volume of criminal matters concerned with sexual assault and family violence.[15] In contrast, we are doubtful that a very significant proportion of civil courts' usual business involves litigation in relation to redress for sexual abuse.

3. The current protections are overly reliant on use of judicial discretion, resulting in numerous undesirable flow-on effects

A key feature of the current law is the significant degree of discretion it offers judges when making decisions about litigation. We urge legislators to bypass any options for new legislation which would leave judges with discretion to decide whether or not cross-examination by the alleged offender is acceptable in these cases. Instead we strongly advocate for a blanket ban.

IGFF understands that in many situations connected with management of sexual assault cases, judicial discretion continues to serve important functions and to support fairness in individual circumstances (see, for example, the Law Council's strong support for retaining judicial discretion in sentencing rather than applying mandatory sentence lengths).[16] We consider that in relation to this specific issue, rather than supporting nuance and fairness, the availability of discretion severely undermines fairness. Our reasons are outlined below.

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[14] Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report, August 2016) 203-4.
[15] Ibid 201-2.
[16] Law Council of Australia, 'Parliament should not interfere with judicial discretion' (Media release, 3 September 2019).

First, we are concerned about the possibility of inadequate intervention. Prior reviews of evidence law in relevant areas have highlighted a history of inadequate judicial intervention in relation to cross-examination in sexual assault cases, or else a history of community concerns about inadequate intervention. Issues cited have included:

- a reluctance to create a perception of bias against the accused,[17] leading to a potentially greater risk of appeal;
- a tendency to offer greater leeway to self-represented litigants when conducting cross-examination owing to their lack of formal legal training and the stressors they are facing given their position; and
- difficulties judges may have with recognising the inappropriateness of questions or the covertly intimidating actions of the accused, who may utilise gestures or actions or even modes of dress which may remind the victim-survivor of the assault.[18]

Secondly, we consider that there ought to be no situation where it should be possible for the accused to directly cross-examine a victim-survivor of sexual assault regardless of the particular circumstances of the case. It is well-recognised that the right to cross-examination is an important aspect of procedural fairness within an adversarial legal system, and within that context, plaintiffs are generally compelled to participate in cross-examination. This means being cross-examined always carries some degree of compulsion, with witnesses being obliged to submit themselves to an often inherently unpleasant procedure where their credibility and perspective may be questioned as part of the ordinary course of litigation. Given these qualities of cross-examination, a victim-survivor being cross-examined by a person who may have previously exercised a particularly intimate and violating kind of coercion over them will *always* create uncomfortable and potentially retraumatising resonance with the prior assault. In our experience, even the requirement for victim-survivors to view images of an offender, or to share physical space with them, can be severely upsetting and destabilising. We submit that because of the character of cross-examination and the nature of sexual assault, it is always inappropriate for this questioning to be done by someone accused of sexual assault of the witness, and that such questioning will always have an elevated intimidatory character relative to questioning by a legal representative.

[17] Australian Law Reform Commission, NSW Law Reform Commission, Victorian Law Reform Commission (n 4) [5.80], citing J Wood, 'Sexual Assault and the Admission of Evidence' (Paper presented at Practice and Prevention: Contemporary Issues in Adult Sexual Assault in New South Wales, Sydney, 12 February 2003), 30–31.

[18] New South Wales Law Reform Commission (n 8) 41-2.

Thirdly, we consider that a blanket rule would promote consistency and thus both an appearance and a reality of justice and fairness. In a previous review of evidence law focusing on protections for vulnerable witnesses, a number of submissions raised concerns about creating situations where parties debate whether or not a witness is sufficiently vulnerable.[19]

In the case of a self-represented defendant, this could create particularly ugly scenes in a courtroom. It is highly undesirable for victim-survivors to be required to argue for their own fragility in order to be granted protection. It would be even more undesirable to create situations which encourage an alleged sexual offender to express in person their view that a victim-survivor does not deserve or require protection because they are not "vulnerable enough". Additionally, inconsistency of outcomes in these cases, where some victim-survivors are required to endure cross-examination by a defendant in person while others are spared this indignity, could severely erode trust in legal processes surrounding civil redress.

Fourthly, a specific blanket rule would offer certainty for parties at the outset of a hearing, or even much earlier when a victim-survivor is carefully considering the merits of pursuing a civil claim, rather than deferring certainty until the Court has an opportunity to consider and rule on this specific evidentiary matter. While it is IGFF's role and duty to advocate for the rights and duties of victim-survivors and their families first and foremost, we must also acknowledge the way discretion could result in unfairness for defendants. Importantly, we believe a blanket rule would support greater procedural fairness and reduce stress not only for victim-survivors but also for defendants, who would know from the outset that cross-examination must be conducted by a lawyer and would have time to secure preferred representation themselves if they are able to do so. In our recommendations below, we will suggest that, as in comparable provisions in the criminal and family violence contexts, provision should be made for a legal aid lawyer to conduct cross-examination in cases where a defendant lacks legal representation. Certainty about this requirement may also be helpful in ensuring that Legal Aid is put on notice in time to provide representation efficiently. A rule that applies automatically would result in fewer needless adjournments to secure representation once an application was successful, and therefore one less delay lengthening the already extended timetable of litigation. Discretion could result in unfairness for defendants in other ways as well. Significantly, a judge who permits

[19] Australian Law Reform Commission, NSW Law Reform Commission, Victorian Law Reform Commission (n 4) [5.97]-[5.105].

a self-represented person to cross-examine an accused person in this kind of case might then find themselves hypervigilant about further perceived unfairness toward a victim-survivor. This may lead them to try to counterbalance their earlier ruling by interfering unduly heavily with cross-examination, preventing appropriately robust questioning of key witnesses. Both the initial exercise of judicial discretion and the subsequent decisions made in managing cross-examination could open up possibilities for either party to appeal, causing further pain, delay and uncertainty to all involved.

What we propose

IGFF considers that the following additions to the current law would effectively remedy the current gap in the law:

1. The introduction of a blanket provision prohibiting a person accused or convicted of sexual assault of any kind from directly conducting their own cross-examination of the alleged or proven victim-survivor, in any legal case

We recognise that in family law matters, a threshold beyond an accusation of family violence (either a charge, a conviction, or an intervention/protection order already in place, or an exercise of judicial discretion) is required before the relevant provisions under the Family Law Act come into effect. This may be because accusations of family violence are so ubiquitous in family law matters that management of limited Legal Aid resources has led to the imposition of an additional, albeit regrettable, hurdle. In contrast, both Victoria's current criminal and family violence protection laws require no pre-existing finding or order before their cross-examination rule applies.

We consider that here, civil litigation should be understood as more analogous to criminal and family violence protection cases than family law. Most civil law cases are not concerned with redress connected with past sexual abuse, so there is a far smaller burden imposed on Legal Aid resources. Additionally, for some victim-survivors, the civil law arena is the first setting where they may pursue justice through the legal system. Given the different standards of proof in criminal and civil settings, and given challenges involved particularly in proving historical offences beyond a reasonable doubt, it is entirely possible that a litigant might be able to succeed in a claim alleging harm due to sexual assault even if a criminal conviction could not be secured. Imposing any requirement that there be a prior charge or

conviction before the cross-examination rule comes into play would, we believe, create an unnecessary and inappropriate hurdle.

However, there is one analogy that can be drawn with the family law provisions – even if a civil law case does not directly concern a finding about whether a person has committed sexual assault, the dynamics introduced when an alleged victim-survivor is cross-examined by their alleged perpetrator will always be harmful to the parties and to the broader justice system. We propose that the law introduced should therefore have capacity to apply even if the allegation being litigated is not about sexual assault. For example, a person may bring a civil claim alleging that a medical practitioner sexually assaulted them and also, separately, that the practitioner acted with reckless negligence toward them in some other way in the course of medical practice. The complainant may later, for whatever reason, abandon some aspects of their claim, opting to only pursue the negligence claim at trial. In such a circumstance, we consider that if a party puts the Court on notice that an allegation of sexual assault exists between a witness and a self-represented party, the ban on cross-examination should still come into effect.

2. Extending the proposed cross-examination rule to apply to family members, former or current caregivers, and household members of the victim-survivor

We note that both Victoria's criminal law and its family violence law extend their cross-examination rule beyond just the survivor. Both protections extend to family members/household members of both the complainant and the accused. IGFF believes a similar protection is appropriate here.

It is worth considering the typical circumstances in which sexual assaults occur: the overwhelming majority of perpetrators of sexual assault are known to the victim-survivor, with around one in three known offenders being family members, a number that does not include ex-spouses or ex-partners.[20] Offenders often have complex intersecting relationships with not only the victim-survivor but with their entire immediate social network. We also know that most Australian victim-survivors of sexual assault (around 70%) seek support from friends or family in the aftermath of sexual assault, making friends and family a more favoured support

[20] Australian Institute of Health and Welfare, *Sexual assault in Australia, August 2020* (Catalogue No FDV 5, 2020).

than police, physical or mental health practitioners or support services.[21]

In addition to supporting primary victim-survivors (that is, people who directly experienced sexual abuse), IGFF also supports secondary victim-survivors, people in the immediate orbit of the primary victim-survivor who are also affected by the consequences of the assault. Because of the nature of our work, we are keenly aware that secondary victim-survivors have often been subject to grooming by the abuser, creating complex relationships. Grooming behaviours aimed at the primary victim-survivor's family and closest supports tend to focus on establishing comfort and trust, or building relationships and contexts that will allow greater access to the primary victim-survivor.[22]

Family and caregivers or close contacts who were groomed, particularly where the primary victim-survivor was a child at the time of the abuse, can experience significant secondary traumatisation. This may be connected with guilt, feelings of responsibility, and rupturing of their relationships with primary victim-survivors. Those who acted protectively once they became aware of abuse, or acted as whistleblowers within their communities, may have experienced loss of connection with community or family as a consequence of acting protectively. Their relationships with perpetrators can be layered and fraught. They may experience similar feelings of betrayal, violation and poisoned past intimacy, and contact with the perpetrator can be deeply traumatic for them as much as it is for the primary victim-survivor. Many of the same subtleties of expression or tone that would be disturbing to a primary victim-survivor due to resonance with the abuse may also be resonant with secondary victim-survivors, reminding them of past occasions which were once understood as innocent intimacies and are now understood as manipulative grooming behaviours. We therefore consider that secondary victim-survivor witnesses are at similar risk of being destabilised and harmed by being subjected to direct cross-examination by an accused person.

It is true that not every family member in every civil case connected with sexual assault may have this kind of relationship with the defendant. However, the arguments made above regarding certainty and consistency for the primary victim-survivor should, we believe, apply here as well.

We support modelling the inclusion of additional parties on the wording of s 354 of

[21] Ibid 5.

[22] Patrick O'Leary, Emma Koh and Andrew Dare, Research paper: Grooming and child sexual abuse in institutional contexts (2017) 11.

the *Criminal Procedure Act 2009* (Vic), perhaps with an additional clarification including prior as well as current guardians or primary caregivers.
Direct work with offenders is outside IGFF's scope of practice, making it more difficult for us to comment on the appropriateness of extending the rule to family or household members of a defendant. However, we certainly would not object to extending the rule to cover this group if the Inquiry considers this a worthwhile approach to ensure fairness and reduce harm.

3. Inclusion of a provision entitling the person barred from direct cross-examination in these cases to Legal Aid representation if they are not otherwise legally represented

IGFF has no interest in undermining a defendant's right to procedural fairness, and acknowledges that provision of a lawyer to conduct cross-examination is a less harmful alternative. We support implementation of a provision similar to s 357 of the *Criminal Procedure Act 2009* (Vic), which allows an adjournment to allow the person to secure their own preferred legal representation but which also provides that if the person does not do this after being given a reasonable opportunity to do so, mandatory allocation of a Legal Aid lawyer will be the next step. We also support the inclusion of a provision similar to s 357(5), outlining the evidentiary consequences if the person refuses to co-operate with this scheme or refuses legal representation.

4. No option for the witness to consent to cross-examination even where the rule applies

We have already outlined our reasons for recommending a blanket rule that is applied without use of judicial discretion; we make this recommendation for similar reasons.
In the case of the equivalent provision under Victoria's family violence laws,[23] the legislation permits a cross-examination by the alleged offender to proceed if an adult protected witness consents to this. Under the relevant provision, this can only be done if the protected witness is an adult who is competent to consent or if their guardian consents on their behalf, and if the court is satisfied that there will be no harmful impact on the witness. We imagine this rule may be in place because family violence survivors comprise a significant proportion of the relevant jurisdiction's daily work, and any possible option for reducing delays may be desirable for the Court. We also understand the option may be desirable for victim-

[23] Family Violence Protection Act 2008 (Vic) s 70(3).

survivors in those cases, who may be balancing the competing needs for, on the one hand, avoidance of in-person cross-examination by their abuser, and on the other hand, a rapid resolution to their application for an intervention order which will provide ongoing protection. Civil litigations, which comprise less of the work of the relevant Courts and are generally not avenues used for immediate access to greater safety from an abuser, have a very different character.

IGFF considers this kind of consent exception inappropriate in cases where the witness is a victim-survivor of sexual abuse engaged in civil litigation. Particularly for those victim-survivors who experienced childhood sexual abuse, the legacy of the abuse can include a fraught relationship with obedience, coercion and acquiescence to the will of authority figures. Our experience leads us to believe that some victim-survivors may feel implicitly pressured by the existence of such a rule, feeling they ought to consent to cross-examination simply to avoid being a "burden" to the Court or the Legal Aid system.

In addition, as highlighted above, many of our clients have spent a lifetime concealing the full impact of their abuse from the people closest to them, which can make it difficult for a Court to assess questions of impact without the aid of additional and potentially costly and delaying expert reports. Even if the witness offers consent to be cross-examined, we doubt the Court's capacity to determine with confidence and without undue delay that allowing the cross-examination by the alleged abuser to proceed will not cause secondary trauma. We also envision this as another source of potential unnecessary and challenging appeal proceedings.

5. Relevant offences/harms

IGFF's primary focus is on institutional sexual abuse, and we acknowledge that we are best placed to comment on issues affecting survivors of sexual assault rather than other forms of assault. We consider that this offence should apply to a full range of attempted and actual sexual offences. Specifically, we consider that it should apply whenever there is an accusation of behaviour that could constitute a direct attempted or actual commission of any of the offences listed in Pt 1 Div. 1 Subdiv.s (8)–(8F) of the *Crimes Act 1958* (Vic). While we consider offences involving certain more remote forms of enablement,[24] failure to intervene and act protectively[25] or failure to report[26] extremely serious and very much associated with trauma for victim-survivors, we would understand the exclusion of such

[24] See for example some forms of offending under *Crimes Act 1958* (Vic) s 51I.
[25] See e.g. *Crimes Act 1958* (Vic) s 49O.
[26] See e.g. *Crimes Act 1958* (Vic) s 327.

offences from this protection and welcome the inquiry's ultimate views on this matter.

We acknowledge that while sexual assault has a character which renders this kind of reform particularly important and necessary, we would support extending the reform to cover victim-survivors of certain other kinds of harm. We see close analogies between sexual assault and family violence in terms of the potential for re-traumatisation and the difficulty of ever adequately managing the potential for covert intimidation in the course of cross-examination.

Other offences may also be relevant. South Australia's equivalent provision, contained in s 13B of the *Evidence Act 1929* (SA), outlines a similar non-discretionary ban on in-person cross-examination which applies to a much broader range of alleged victim-survivors. That section covers not only sexual offences or attempted sexual offences, but the entire category of "serious offences against the person", including attempted murder or manslaughter, stalking, threats to kill, abduction, blackmail, causing serious harm,[27] as well as criminal offences characterizable as "aggravated" under the *Criminal Law Consolidation Act 1935* (SA), and contraventions or failures to comply with intervention or restraining orders.[28] While many of these offences fall outside the direct scope of IGFF's work, we are deeply conscious that for survivors of institutional sexual abuse, the nonsexual abuse they were subjected to by an institution can be deeply traumatising to our clients in ways frequently under-recognised by legal systems. A person who pursues civil redress in relation to a schoolteacher or orphanage master who beat them severely may be subject to many of the same stressors as a person pursuing a remedy connected with sexual assault.

Conclusion

We thank the Inquiry for its consideration of this matter. We believe that the reforms proposed align well with considerations of fairness and justice for both victim-survivors and alleged perpetrators, and will enhance both the reality and the perception of Victoria as a jurisdiction that takes seriously the needs of victim-survivors.

Although we are aware that in at least one case in Victoria, a victim-survivor has already been subjected to cross-examination by their abuser, we cannot at this stage speak to the response to this event among our clients or the broader community of victim-survivors and people who care about them. This is because

[27] Evidence Act 1929 (SA) s 4.
[28] Ibid s 13B.

IGFF has been reluctant to publicise the past instance of inappropriate cross-examination or the risk to future litigants, only raising the risk of direct cross-examination with specific clients if we consider it may become relevant to their case. We have favoured an approach to advocacy for reform that is focused on liaison with the office of the Victorian Attorney-General, and submission to Inquiries such as this one. This is because we have been very concerned about the loss of confidence in the civil litigation pathway and the broader justice system that could arise if the broader community becomes aware of this gap in the law before it is adequately remedied.

In examining the law as it stands, and particularly the existing protections under criminal and family law, we have gained the impression that the lack of a current provision addressing the issue is a mere oversight. Rather than being caused by any legislative intention to exclude parties in civil cases from an intuitive form of protection, we suspect the current situation is a consequence of the justice system perhaps failing to anticipate the advent of victim-survivors using civil avenues to seek redress, particularly with the alleged perpetrator of sexual assault rather than an institution as the direct defendant. We are hopeful that this gap will be remedied by the Victorian legislature.

Bibliography

A. Articles/Books/Reports

Australian Department of Social Services, *Guides to Social Policy Law: National Redress Guide* (Version 1.05, 8 February 2021)
Australian Institute of Health and Welfare, *Sexual assault in Australia, August 2020* (Catalogue No FDV 5, 2020)
Australian Law Reform Commission, NSW Law Reform Commission, Victorian Law Reform Commission, *Uniform Evidence Law: Report* (ALRC Report 102, NSWLRC Report 112, VLRC Final Report, December 2005)
Law Council of Australia, 'Parliament should not interfere with judicial discretion' (Media release, 3 September 2019)
NSW Law Reform Commission, Questioning of complainants by unrepresented accused in sexual offence trials (Report 101, June 2003)
NSW Parliamentary Library Research Service, *Cross-examination and Sexual Offence Complaints* (Briefing Paper No 18/03, August 2003)
O'Leary, Patrick, Emma Koh and Andrew Dare, Research paper: Grooming and child sexual abuse in institutional contexts (2017)
Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015)
Victorian Law Reform Commission, The Role of Victims of Crime in the Criminal Trial Process (Report, August 2016)

B. Legislation

Crimes Act 1958 (Vic)
Criminal Procedure Act 2009 (Vic)
Evidence Act 1929 (SA)
Evidence Act 2008 (Vic)
Family Law Act 1975 (Cth)
Family Law Amendment (Family Violence and Cross-examination of Parties) Act 2018 (Cth)
Family Violence Protection Act 2008 (Vic)
Victims' Charter Act 2006 (Vic)