

Office of the Public Advocate

Safeguarding the rights and interests of people with disability



Submission to the Victorian Law Reform Commission

Improving the Response of the Justice System to Sexual
Offences

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Recommendations

Recommendation 1

The Victorian Government should adequately resource the Independent Third Person Program to respond to current and future demand based on modelling.

Recommendation 2

The Victorian Government should introduce legislative reform to require Victoria Police to have an Independent Third Person (ITP) present when interviewing a person with a cognitive impairment or mental illness, irrespective of age. This should include alleged offenders, victims, and witnesses.

The legislative provisions should include:

- a requirement for an ITP to be present when interviewing a person with an apparent cognitive impairment or mental illness:
 - irrespective of age
 - whether they are an alleged offender, victim, or witness
- a requirement for the ITP program to be adequately resourced to meet its legislated functions, based on modelling of demand.

Recommendation 3

The Victorian Government should expand the role of the Independent Third Person Program to provide referrals to service and support agencies.

Recommendation 4

The Victorian Government should provide funding for targeted and appropriate training of Independent Third Persons who attend Video Audio Recorded Evidence statements.

1. Introduction

The Office of the Public Advocate (OPA) is a Victorian statutory office, independent of government and government services, that works to safeguard the rights and interests of people with disability. The Public Advocate is appointed by the Governor in Council and is answerable to the Victorian State Parliament.

The Public Advocate has seven functions under the *Guardianship and Administration Act 2019* (Vic), all of which relate to promoting the independence and human rights of people with disability and protecting people with disability from abuse, neglect and exploitation.

To this end, OPA provides a range of critical services for people with cognitive impairment or mental illness, including guardianship, advocacy, and investigation services. In 2019-20, OPA was involved in 1,792 guardianship matters (950 which were new), 430 investigations, and 284 cases requiring advocacy

OPA's two Disability Act officers assist the Office to fulfil its advocacy and safeguarding roles in relation to tenancy rights of people living in disability residential services, including NDIS-funded Specialist Disability Accommodation (SDA). The officers also provide individual advocacy in relation to safeguard protections involving civil detention and compulsory treatment contained within the *Disability Act 2006* (Vic). The officers' interventions remain the largest single contributor to OPA's individual advocacy.

A key function of the Public Advocate is to promote and facilitate public awareness and understanding about the Guardianship and Administration Act and any other legislation affecting persons with disability or persons who may not have decision-making capacity. To do so, OPA runs a telephone advice service, which answered 12,624 calls in 2019-20. OPA also coordinates a community education program for professional and community audiences across Victoria to engage on a range of topics such as the role of OPA, guardianship and administration, and enduring powers of attorney. In 2018, OPA co-hosted a forum for stakeholders entitled *Disabling Justice: Why the system fails people with disability and mental illness*.

OPA is supported by more than 700 volunteers across four volunteer programs: The Community Visitors Program, the Community Guardian Program, the Independent Third Person Program (ITP Program) and the Corrections Independent Support Officer (CISO) Program. The ITP Program is a 24/7, state-wide volunteer service operating in all police stations in Victoria. ITPs assist persons with cognitive impairment when giving interviews and making formal statements to Victoria Police. In 2019-20, ITPs attended a total of 3718 interviews and statements. CISOs are experienced ITPs who support prisoners who have an intellectual disability at General Manager's Disciplinary Hearings at Victorian prisons and/or remand centres. In 2019-20, CISOs were invited to attend 170 hearings.

Community Visitors are independent volunteers empowered by law to visit Victorian accommodation facilities for people with disability or mental illness. They monitor and report on the adequacy of services provided in the interests of residents and patients. They ensure that the human rights of residents or patients are being upheld and that they are not subject to abuse, neglect or exploitation. In their annual report, Community Visitors relate their observations on the quality and safety of the services they visit and make recommendations to the Victorian State Government. A total of 400 Community Visitors visit across three streams: disability services, supported residential services (SRS), and mental health

services. In 2019-20, Community Visitors made 4142 statutory visits, including to sites of criminal and civil detention.

2. About this submission

OPA welcomes the opportunity to make a submission to the Victorian Law Reform Commission's (VLRC) review into Improving the Response of the Justice System to Sexual Offences. OPA was pleased to participate in a roundtable consultation facilitated by the VLRC focused on the experience of women with disability with advocacy groups and mainstream services providing support to women in November 2020. Prior to that consultation, the VLRC provided specific questions to guide discussion, not all of which were explored on the day. The first part of this submission addresses those questions.

This remainder of the submission will focus on OPA's ITP Program. Independent Third Persons (ITPs) are an essential volunteer safeguard who support alleged offenders, offenders, victims and witnesses with a cognitive impairment including an intellectual disability, a mental illness or an acquired brain injury in police interviews. This role also supports the effective operation of the criminal justice system, and OPA believes, ultimately increases the integrity of the criminal justice system.

In the context of this inquiry, OPA sees it as an opportunity to discuss the important role ITPs perform for victims of sexual assault. While the remit of the ITP Program is primarily during the interview phase, ITPs also provide support in Video Audio Recorded Evidence (VARE) interviews, which are used to record evidence-in-chief for cases of sexual offence and assault where the witness or victim is a child or has a cognitive impairment.

This submission contains data captured in OPA's 2019-2020 Annual Report. OPA would be happy to provide further data should the VLRC wish to consider it in the formulation of its recommendations.

Finally, this submission makes 4 recommendations for reform.

2.1 Previous work

The VLRC's 2015 inquiry into the Role of Victims in the Criminal Trial Process is relevant to this current inquiry, given its focus on identifying opportunities to embed and build upon previous reforms, identifying the barriers to reporting and resolving sexual offences, and making recommendations to improve the justice system's response.

As such, OPA's comprehensive submission to that inquiry remains relevant. That submission addressed the following:

- current research
- a human rights approach
- ITP Program
- recent innovations in relation to the role of victims in the criminal trial process in Victoria and other jurisdictions
- the role of victims in the criminal trial itself
- support for victims in relation to the criminal trial process.

That submission drew from OPA's extensive experience in supporting victims in police interviews and VARE statements as well as anecdotal experience gathered from our various program areas. It focused on people with disability who are victims of crime and examined the role of OPA's ITP Program. A copy of that submission has been forwarded to the VLRC for consideration in the context of the current Sexual Offences review.

2.2 A human rights approach

The submission applies a human rights approach that:

- holds that all people with disability have the right to enjoy equality of opportunity and to effectively participate in, and be fully included in, society
- recognises that the vast majority of challenges experienced by people with disability are a result of disabling systems and environments, rather than being due to an inherent 'lack' in the individual
- considers impairment as an expected dimension of human diversity
- seeks for people with disability to be supported and resourced to have the capabilities to lead a dignifying and flourishing life.

OPA has said previously that people with cognitive impairment are overrepresented as victims of crime and underrepresented in policy and procedures. This does not result in equitable outcomes. This shows that our systems are inadequate to respond to victims of crime where the person has a cognitive impairment.

People with cognitive impairment and mental illness represent a substantial proportion of victims of sexual assault and crimes against the person, however significant barriers exist that prevent equal access to the justice system. OPA considers a holistic approach is necessary to adequately support victims with disability in the criminal trial process, and prior to, so that they can bring their claims to court. Disability specific considerations could be added into a variety of elements of the current legislative and policy framework. OPA's submission to the VLRC's inquiry into the Role of Victims in the Criminal Trial Process explored solutions to address some of these matters.

3 General comment to questions posed in roundtable consultation

What follows is not an exhaustive response. OPA wishes to make just a few key points in response to each question posed prior to the roundtable consultation focused on the experience of women with disability.

3.1 Barriers to reporting sexual harm: people with cognitive impairment

People with cognitive impairment who have experienced trauma will face multiple barriers when reporting sexual harm. If a person is able to use verbal communication, they will need to articulate their trauma and experience to police and frequently find the process intimidating. Victoria Police members who work within the in Sexual Offences and Child Abuse Investigation Teams (SOCIT) are generally highly skilled and effective at making this process as accessible as possible. In acknowledging VARE suites are much improved

physical environments to an interview room, some people still feel as though they will not be believed, there will be retribution, or they are just too fearful in general to report their experience.

For people who do not use verbal communication, there are significant barriers to reporting sexual harm (or any crime committed against them). Victoria Police openly acknowledge that they have a great deal of work to do when working with people who do not use verbal communication.

OPA is aware that Scope (disability service provider) engaged with Victoria Police and provided training at limited police stations on augmented communication devices. However, the issue remains that if a person does not communicate verbally, they are unlikely to be interviewed by police. A group of ITPs received the same training package from Scope and the overwhelming feedback was that it was extremely valuable, however, they expressed the view that they would never see it in practice because if people don't speak, they are unlikely to be interviewed.

The VLRC would be aware of the Intermediary Pilot Program within the Department of Justice and Community Safety (DJCS) that has qualified allied health professionals, for example speech pathologists, or social workers, who are responsible for supporting people with complex communication who are victims of sexual assault and witnesses in homicides throughout the Court proceedings. Intermediaries also attend a small number of interviews to support this client group at six police stations across the state but only for these two offence categories. OPA suggests the VLRC speaks to that Program to learn more about its effectiveness.

3.2 Why reports of sexual harm may not proceed through the justice system

OPA spoke extensively about the topic of 'credible witness' in its submission to the VLRC's inquiry into the Role of Victims in the Criminal Trial Process. OPA makes the following additional comments.

If a person does get through the reporting process, often police will not proceed the investigation and prosecution if the person is not considered a 'credible witness'. This applies to people with cognitive impairment frequently. OPA is aware of one matter (of physical harm) where a victim was not interviewed by police regarding their experience. When the ITP Program pursued this matter with Victoria Police it was advised that the charges were indeed proceeding, but that the person was not interviewed because there was CCTV footage of the incident and that was more valuable than any statement the person may have been able to provide.

3.3 How to reduce the trauma of victim survivors in the justice system

OPA considers that trauma informed care would reduce the trauma of victim survivors in the justice system. Examples that are currently pursued include:

- The VARE statement in itself sets out to do this. This is because the VARE statement becomes evidence-in-chief for court proceedings, so that the statement can be played in court and the person does not need to rearticulate what happened to them.

- The Intermediary Program aims to ensure the prosecution, defence and the presiding Judge are aware of the person's support and communication needs. This type of follow through model of support is valuable. (Again, OPA suggests the VLRC speak to the Intermediary Program at DJCS for further information on outcomes and experience).

3.4 Best ways to respond to sexual offences, including alternatives to the justice system

OPA highlights here the importance of targeted behavioural early intervention. There are a number of specific support programs for people with cognitive impairment (and without) that aim to reduce a person's risk of sexually offending, however, these are all post release. As one example, there are men's behaviour change programs; however very few people attend these without being court mandated to do so. These programs can be used as a diversion from a custodial sentence, and they frequently are however OPA considers it likely that such programs are underutilised.

OPA considers that there is scope for the ITP Program to have much greater impact if it were able to engage in a robust referral system.

ITPs are often the only support outside of police that people come into contact with during what may be their very first engagement with police. A person's first interview may be in relation to a sexual offence. Typically, unless an initial offence is a very serious indictable offence, people are not sentenced to prison following an initial offence. If a person with no police history is interviewed by police in relation to a sexual offence and there was an ITP present who had the capacity to refer onto relevant support services, OPA argues that it could contribute to a reduction in the behaviour. In OPA's experience, the VPeR referral system (internal to Victoria Police) is not fully capable to undertake such a task and is not often used.

For example, if a person interviewed has multiple areas of need, OPA understands that police prioritise what is the more urgent referral. The system does allow them to make multiple referrals and that does on occasion occur, however workload pressures, difficulties in the operation of the online referral system and the time needed to do multiple referrals means that generally it is limited to the most pressing issue for the individual. The other challenge is that each referral type in the police system is contracted to one primary mainstream service provider, so, if they are experiencing heavy demand at the time of the referral, there is likely to be a response time delay which often leads to no effective connection to those services for the individual referred by police.

4 Reach of the Independent Third Person Program

OPA has written extensively about its ITP Program, including most recently in response to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability Criminal Justice System Issues Paper. Below is drawn directly from that submission as OPA considers it relevant to the VLRC's review:

To participate in a police interview or make a statement can be demanding; a person has to take in complex information quickly, understand their legal rights, and communicate with people in positions of authority. The setting in itself can be

distressing, and the tasks required challenging, especially for people with cognitive disability and/or communication needs.

OPA's Independent Third Persons (ITP) Program aims to support people with cognitive impairment and mental illness who are interviewed by Victoria Police. ITPs are available 24/7 to attend any police station throughout Victoria. ITPs are trained volunteers who support alleged offenders, victims, and witnesses of any age with disability or mental illness at a Victoria Police Interview. ITPs are independent of police and of the investigation, and act as a safeguard to ensure a person with disability is not disadvantaged when communicating with police.

The Victoria Police Manual sets out the circumstances in which ITPs are required to attend police interviews: "An ITP is to be present during the interview of any person with a cognitive impairment, who is fit to be interviewed or have a statement taken as a suspect, an accused, an offender, a victim or a witness."¹ The manual's definition of 'cognitive impairment' is inclusive of intellectual disability, Acquired Brain Injury (ABI), mental illness, and neurological disorders.² In determining whether a person may have a cognitive impairment, police members rely on experience and knowledge, observations of the person, and active questioning. The manual also refers police officers to the *Ready Reckoner* guide for further guidance on the indicators of cognitive impairment, including questions that may assist in their assessment of the person.

In the 31 years of the program, ITPs have completed more than 40,000 interviews. Anecdotally, the program observes that the ability of people with disability and/or mental illness to communicate their experience and understand their rights increases with the assistance of an ITP. Volunteers are pleased to see a growing awareness and understanding of disability among police members, although there are some improvements that could be made.³

¹ Victoria Police, *Victoria Police Manual – Interviews and statements*, 12.

² *Ibid.*

³ The updated figure is, in 32 years, ITPs have completed more than 46,000 interviews. OPA submission to Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Criminal Justice System Issues Paper* (May 2020) 22-23.

4.1 Annual Report snapshot: data

OPA's recently tabled 2019-2020 Annual Report tells the story of the program's operations. Below is a snapshot drawn from the annual report to illustrate the experience of the ITP Program generally and in the context of its involvement in supporting people where they have been an alleged offender, witness to or victim of a sexual offence.⁴

Overview

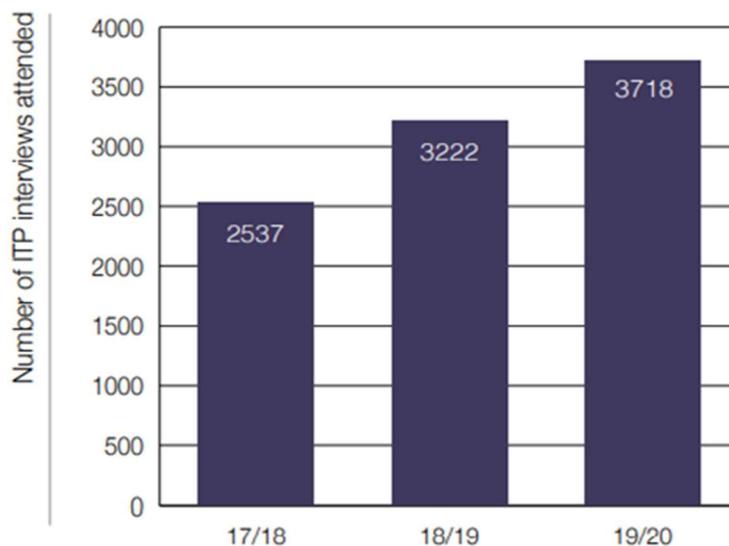


Figure 6. ITP interviews, 17/18-19/20

The above figure shows the number of OTP interviews over the last three years. During the year, 183 ITPs attended 3718 interviews assisting 2689 clients. In 2017-2018, they attended 2537 interviews, meaning that there has been a 46.6 per cent increase in interviews attended over two years, and a 15.4 per cent increase over last year. From 1 April to 30 June, ITPs have attended 747 interviews remotely. Alleged offender interviews made up the largest group (85 per cent) followed by victim interviews (8.2 per cent), sex offender interviews (4.4 per cent) and witnesses (2.4 per cent).

While alleged offenders consistently made the largest interview group with an increased proportion over the last three years, the proportion of victim interviews has dropped significantly from 15.7 per cent in 2017-2018 to 8.2 per cent this year.

While most clients (81 per cent) had one interview, almost a fifth were supported by ITP volunteers in two or more interviews.

⁴ Office of the Public Advocate, *Annual Report 2019-2020* (2020) 38-40.

Client profile

Males comprised 77.4 per cent of all ITP clients across all interview categories, with females 22.5 per cent. Two ITP clients identified themselves as 'both genders' and 'other'. The figure below shows the male and female breakdown across the four client type groups. Males made up 82.6 per cent of alleged offenders while females constituted 17.4 per cent. Conversely, ITPs supported females in most victim interviews.

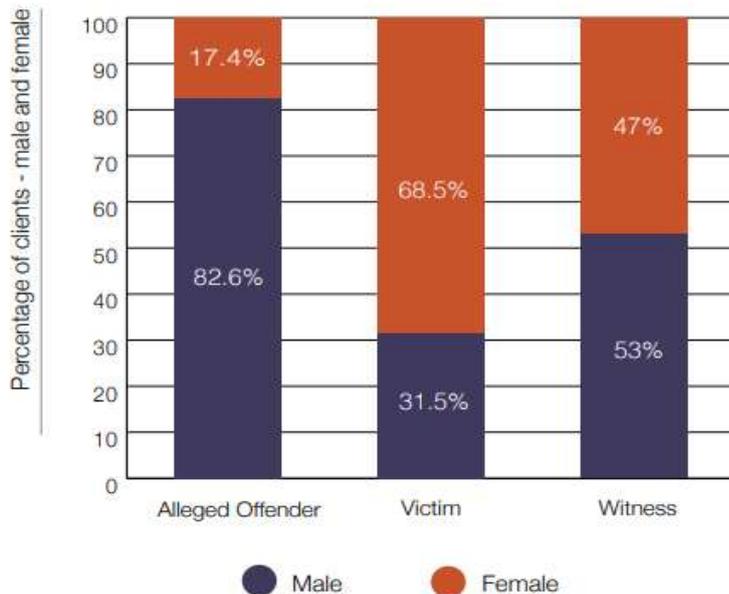


Figure 7. ITP Interview by client type and gender, 19/20

ITP clients are often very vulnerable. This year, more than half of the clients who required an ITP had an intellectual disability (55.7 per cent), higher than last year (44 per cent). The proportion of clients with acquired brain injury increased to 23.9 per cent this year from 15 per cent last year. Other disabilities included physical disability at 2.1 per cent and mental health at 35.8 per cent which was lower last year at 29 per cent, and acquired brain injury at 24.3 per cent. The disability was unknown for 13.4 per cent of clients. In most cases, ITPs were informed of a client's cognitive impairment by police or the client.

Type of offence

The top two offences for all interviews were assault, followed by theft ('shopsteal'), the same as the last two years. For victims, the top two offences were sexual assault and physical assault. There has been a substantial rise in breaches of intervention orders and family violence interviews attended by ITPs over the last two years. Increases have also been reported in property damage, drug possession, obtaining property by deception, burglary (residential) and theft of motor vehicle related offences. The top two offences for alleged offenders were theft ('shopsteal') and assault. Most victims (61 per cent) were supported for sexual assaults including child sexual assaults or sexual offences. This is consistent with last year at 60 per

cent. There has been a substantial decline in 'against person' victim interviews which included assault over the last two years, with 7 per cent this year compared to 15 per cent in 2017-2018.

Victims and witnesses

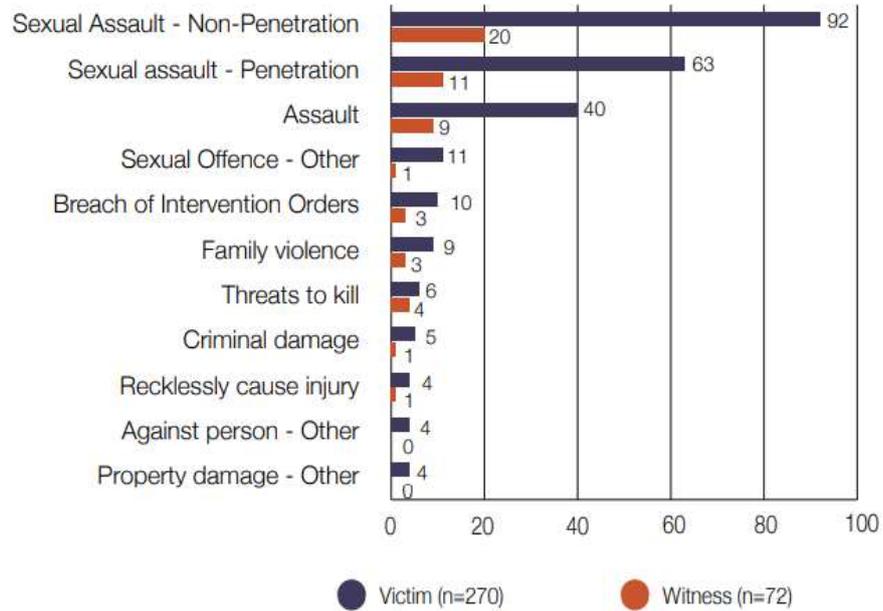


Figure 8. Top ten offences for victim and witness interviews, 19/20

Alleged offenders

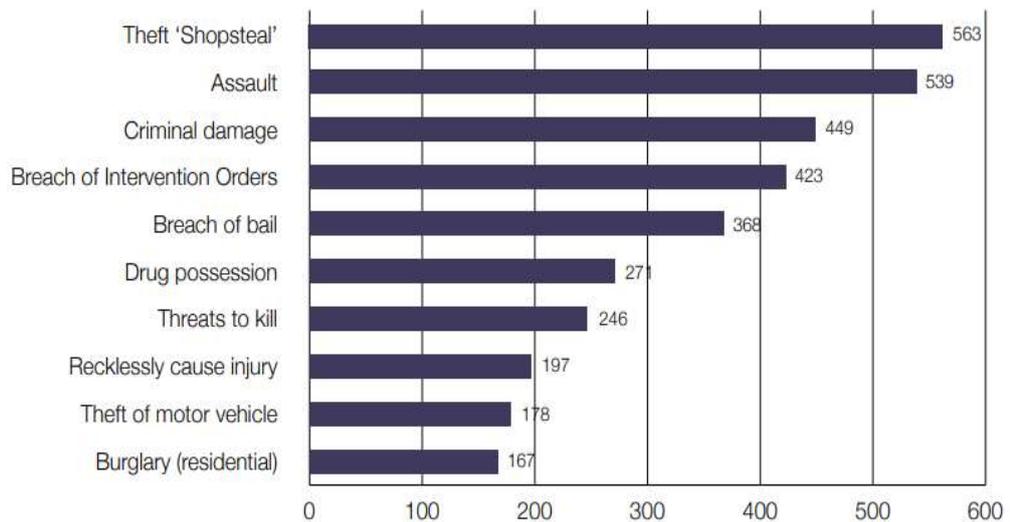


Figure 9. Top ten offences for Alleged Offender interviews, 19/20

4.2 Lack of use of ITPs: examples

The Community Visitors Program often document crimes related to the people with disability they visit where there has been no police involvement. The Community Visitors Program makes regular abuse referrals to external agencies such as the Disability Services Commissioner (DSC) for investigation and action. As at March 2020, only 22% (70) of the 322 DSC abuse referrals over the past three years reported police involvement. This means that less than one in every four of these abuse incidents had police involvement, with 44 of them classified as high risk. For example, Community Visitor's reported that a resident had been sexually assaulted by a co-worker at her part-time job. She was non-verbal but used a range of strategies to communicate effectively however police declined to interview her about the sexual assault. Subsequently, she communicated to Community Visitors that she was very distressed and angry about both the assault and the lack of police action.

The ITP Program has documented numerous instances of victims of crime, often involving sexual offences, who received little or no support from the criminal justice system and subsequently required an ITP to support them as an alleged offender.

For example, a young man with Autism Spectrum Disorder (ASD) was supported by an ITP in an interview as the victim of rape. He received little support at the time to deal with the trauma experienced. Eighteen months later, he was again supported by an ITP but as an alleged offender for a sexual assault. By this time, his disabilities were listed as ASD, mental illness and Post-Traumatic Stress Disorder. This was despite him being one of the rare young ITP clients who did present with family support.

OPA's 2012 report *Breaking the Cycle: Using Advocacy-Based Referrals to Assist People with Disabilities in the Criminal Justice System* explored this topic and made a number of recommendations, including that the Victorian Government should expand the role of the ITP Program to provide referrals to service and support agencies. This is discussed further below.

4.3 Demand and funding for the ITP Program

Despite the steady and increasing demand for the ITP Program, funding has not kept pace, hampering the ability of the program to ensure trained ITPs are available when required to attend face-to-face interviews.

The ITP Program is not sufficiently resourced to respond to the demand nor the increasing complexity of what confronts ITPs. OPA considers that urgent funding is needed for the ITP Program to recruit in areas of high demand and ensure the maintenance of current volunteer levels, as well as utilise new and innovative recruitment techniques, while also improving the delivery of quality training and support to ITPs, and the service ITPs provide.

One recent example of increasingly complex matters relates to ITPs attending historical sexual assault interviews as the focus on this issue via Royal Commissions, Court hearings and the media has substantially increased the reporting of these matters. However, these are often very lengthy interviews, may involve multiple victims and alleged offenders so they require multiple ITPs to be involved in the process. One such matter required ten ITPs for extended periods over two months to deal with historical sexual assault reports from

multiple victims at one institution. These are also often harrowing interviews for all those involved so ITPs need appropriate training and intensive staff support to deal effectively with these matters and not be traumatised themselves.

The functions of ITPs are constantly evolving to meet demand so in recent years, police have increasingly requested an ITP for annual sex offender interviews where the person has a cognitive impairment or mental illness. This is essential in ensuring that the individual understands their obligations as a registered sex offender and abide by the conditions applicable to them, otherwise they are likely to end up back in prison. While the ITP Program is happy to take on new functions like this, such additional functions do impact on its ability to train and resource volunteers adequately to meet such new challenges.

Lack of adequate funding challenges OPA's mission to protect and promote the rights of persons with disability, who are alleged offenders, offenders, victims and witnesses. OPA makes the following recommendation.

Recommendation 1

The Victorian Government should adequately resource the Independent Third Person Program to respond to current and future demand based on modelling.

4.4 Remote safeguarding

Prior to the Coronavirus pandemic, the ITP Program was unable to respond to about 10 per cent of requests for an ITP with physical attendance by a volunteer ITP. This averages about 26 interviews per month where a person with disability previously missed out on this important safeguard due to volunteer unavailability, remote location of police stations, or gaps in the roster.

In response to the Coronavirus pandemic, the ITP Program introduced remote safeguarding that allowed police interviews to continue with ITP support by phone throughout this period (a significant benefit being the ability to meet all request for an ITP in regional areas). While the ITP Program is now back to attending interviews in person, remote safeguarding will continue in those areas where there is no ITP available to attend in-person, although this can be particularly difficult for those with communication impairment.

OPA acknowledges that in-person interviews are preferable. For many people with disability, not having an ITP present may make the interview experience more difficult and distressing.

4.5 Underutilisation of the ITP Program

Despite the increasing demand for ITPs year on year, OPA identifies an underutilisation of the program by police members to support people, predominantly those with mental illness, despite the requirement to be present. While this may not prevent a matter from being heard in court if there are other sources of evidence, it does imply that the prosecution must proceed without additional and crucial sources of information. OPA appreciates that some

magistrates may refuse to hear a matter unless an ITP was present during the police interview or alternatively discard the interview, but these are not consistent practices.⁵

Neither OPA nor the ITP Program have access to Victoria Police data and, therefore, it is impossible to determine the actual demand for the program. OPA is, however, encouraged by the significant increase in the number of ITPs requested to attend police interviews; it indicates growing disability awareness in the police force. The 2019-2020 financial year saw a 15% per cent increase in demand over the preceding year however when the COVID-19 pandemic hit in the last quarter, there was a temporary depressing of demand for ITPs.

4.6 Legislating for the ITP Program

The ITP Program plays a critical role in giving effect to the right of people with disability to access to justice, which includes the “provision of procedural accommodations in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.”⁶

OPA has long advocated for the ITP Program to be legislated to give full effect to Australia’s obligations under the United Nations *Convention on the Rights of Persons with Disability* and to increase consistency in the use of ITPs across Victoria. Legislating the program would ensure it is adequately resourced.

OPA’s comprehensive report *Breaking the Cycle: Using Advocacy-Based Referrals to Assist People with Disabilities in the Criminal Justice System* (2012) reported that:

not involving an ITP could compromise the integrity of the evidence raised in the interview. On this point, case law recognises the importance of ITPs in protecting the rights of people with disabilities during the police interview. For example, the Supreme Court of Victoria has held that the failure of police to use an ITP when one is required may diminish the credibility of any evidence obtained in that interview. This is because the absence of an ITP raises serious questions regarding the “propriety, reliability and fairness” of the police interview. Accordingly, Victoria Police policy requires that members arrange for an ITP to be present during the interview with any person whom they believe may have a cognitive impairment or mental illness.⁷

OPA considers it necessary that legislative reform requiring police to have an ITP present when interviewing a person with an apparent cognitive impairment or mental illness would result in consistent application of the use of ITPs across Victoria.

⁵ OPA’s 2012 report *Breaking the Cycle: Using Advocacy-Based Referrals to Assist People with Disabilities in the Criminal Justice System* articulates the importance of ITPs in further detail: Not involving an ITP could compromise the integrity of the evidence raised in the interview. On this point, case law recognises the importance of ITPs in protecting the rights of people with disabilities during the police interview. For example, the Supreme Court of Victoria has held that the failure of police to use an ITP when one is required may diminish the credibility of any evidence obtained in that interview. This is because the absence of an ITP raises serious questions regarding the ‘propriety, reliability and fairness’ of the police interview. Accordingly, Victoria Police policy requires that members arrange for an ITP to be present during the interview with any person whom they believe may have a cognitive impairment or mental illness.

⁶ Office of the Public Advocate (Victoria), report *Breaking the Cycle: Using Advocacy-Based Referrals to Assist People with Disabilities in the Criminal Justice System* (2012) 19.

⁷ *Breaking the Cycle* 19.

This level of legislative protection for people needing an ITP would be consistent with the legislative right for young people to have access to the support of an independent person in police interviews.⁸ It is no less important that people with disability are afforded the same protections that legislating for an ITP would provide.

Recommendation 2

The Victorian Government should introduce legislative reform to require Victoria Police to have an Independent Third Person (ITP) present when interviewing a person with a cognitive impairment or mental illness, irrespective of age. This should include alleged offenders, victims, and witnesses.

The legislative provisions should include:

- a requirement for an ITP to be present when interviewing a person with an apparent cognitive impairment or mental illness:
 - irrespective of age
 - whether they are an alleged offender, victim, or witness
- a requirement for the ITP program to be adequately resourced to meet its legislated functions, based on modelling of demand.

4.7 Referrals: preventing continued engagement with the criminal justice system

The current role of an ITP is limited to the conduct of the interview; however, ITPs often see people with disability in their first contact with the criminal justice system and therefore are well placed to identify support needs and systemic issues, as well as make referrals.

OPA notes with concern the current lack of cohesion between victim support services for individuals with a disability. While the current victim support framework is complex, individuals with disability have unique needs and added difficulty in accessing the services vital to their continued inclusion in the trial process. One identified gap is that ITPs cannot refer victims (and alleged offenders and witness) to appropriate support services.

The involvement of an ITP, including the capacity to make referrals, would assist a range of people with cognitive impairment in police interviews to be supported to prevent further contact with the criminal justice system.

OPA's *Breaking the Cycle* reported that:

Police have identified the need to offer referrals to people who are believed to have cognitive impairments and mental illnesses. Most of the police who took part in this research indicated that volunteers should make referrals following an interview for ITP clients, rather than police. This is because ITP volunteers are perceived by clients to be independent and objective, and because they operate outside of the criminal investigation.⁹

⁸ *Crimes Act 1958* (Vic) s 464E.

⁹ *Breaking the cycle* 7.

OPA makes the following recommendation:

Recommendation 3

The Victorian Government should expand the role of the Independent Third Person Program to provide referrals to service and support agencies.

5 Support for Victims of Sexual Assault

OPA and Victoria Police have a constructive working relationship, and OPA considers it necessary to build on this in order to promote the use of the ITP Program and achieve just outcomes for people with disability. Additions to the Victoria Police *Code of Practice for the Investigation of Family Violence* and the *Code of Practice for the Investigation of Sexual Assault* recognise people with disability as a particularly vulnerable group¹⁰ and that some victims of sexual assault may require ‘additional support and consideration’, including people who are living with a disability or cognitive impairment.¹¹ OPA considers these significant advances in the policies of Victoria Police and we wish to continue to work with Victoria Police in this area.

OPA appreciates the skill and dedication of those officers in SOCITs. ITPs also provide support in VARE statements, which are used to record evidence-in-chief for cases of sexual offence and assault where the witness or victim is a child or has a cognitive impairment.¹²

An ITP can be an OPA volunteer, or a close friend or family member of the person being interviewed. OPA’s position, reflected in Victoria Police policy, is that it is preferable to use a trained ITP volunteer, rather than a friend or family member. This is because trained ITPs are independent and objective, familiar with police processes, and better able to help the person understand their rights. Furthermore, OPA knows from the experience of its Advocate Guardian Program and the Community Visitors Program that family members and staff can be the perpetrator or know the perpetrator which may lead to a minimising of the seriousness of the situation.

5.1 Training

Sexual assault and VARE specific training is critical to ensuring ITPs are aware of the variety of legislative requirements relevant to offenders, victims and witnesses including intervention orders, sex offender record keeping and VARE interview practice. OPA continues to strive to improve the quality of training of ITPs, the provision of access to debriefing for ITPs and honorariums.

An OPA initiated review, which involved two detailed research reports, recommended removing victim and witness interview training from the induction program and offering a tailored individual session to better explain and train volunteers in how to meet the requirements of victims and witnesses. This has been implemented in recent years, and during 2019, the ITP Program facilitated 12 training sessions on VARE statements for over 100 current ITPs. However, with inadequate funding, OPA was required to lean on the resources of Victoria Police and the Centres Against Sexual Assault to provide much of the content. While all three organisations benefit from these shared working practices, it has

¹⁰ Victoria Police, *Code of Practice for the Investigation of Family Violence* (Victoria Police, 2nd ed, 2010) 12 [2.5.3].

¹¹ Victoria Police, *Code of Practice for the Investigation of Sexual Assault* (Victoria Police, 2005) [16].

¹² *Criminal Procedure Act 2009* (Vic) ss 367–370.

proven difficult at times to secure staff from both these organisations to deliver content at the times and locations across the state which best met the needs of ITP volunteers. Funding for the creation of multimedia resources with these stakeholders which can be used across all locations at times that best suit the ITP Program would address this issue.

OPA resourced training can also be tailored to maximise the ability to meet the needs of victims with disabilities. The voices of people with disabilities who have experienced sexual assault is an important part of a successful training package, however, the sensitive nature of this content often means it is difficult to provide this in a real-life scenario. Carefully planned and implemented multimedia training resources would be the appropriate and effective mechanism to ensure that this content can always be included in the ITP training.

Recommendation 4

The Victorian Government should provide more funding for targeted and appropriate training of Independent Third Persons who attend Video Audio Recorded Evidence statements.