



COMMISSION FOR CHILDREN AND YOUNG PEOPLE

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Royal Commission into Institutional Responses to Child Sexual Abuse

By email: [criminaljustice@childabuseroyalcommission.gov.au](mailto:criminaljustice@childabuseroyalcommission.gov.au)

**Criminal Justice – Response to Consultation Paper**

Dear Sir/Madam

Thank you for the opportunity to provide a submission in response to the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) *Consultation Paper – Criminal Justice, September 2016*.

As well as providing responses to the questions and issues raised in the Consultation Paper, some observations are offered about the views and perspectives of children in regard to justice and the criminal justice system, the challenges of treating those perspectives with respect and appropriate consideration, and the importance of considering the particular principles and operation of the youth justice system at the same time as considering the adult criminal justice system.

The Commission seeks to underline the different perspectives that children bring to their interactions with the adult worlds of protection, regulation, law enforcement and justice. These observations are as relevant to the consideration of complaints systems, regulation and monitoring, civil litigation and redress, as they are to criminal justice.

If you would like to discuss this submission, please contact James McDougall on (03) 8601 5289 or [james.mcdougall@ccyp.vic.gov.au](mailto:james.mcdougall@ccyp.vic.gov.au) or Virginia Dods on (03) 8601 5285 or [virginia.dods@ccyp.vic.gov.au](mailto:virginia.dods@ccyp.vic.gov.au)

Yours sincerely

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**Principal Commissioner**

Andrew Jackomos  
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## **Criminal Justice Consultation**

The Commission for Children and Young People (Victoria) is an independent body established to promote continuous improvement and innovation in policies and practices relating to the safety and wellbeing of Victorian children and young people, with a focus on vulnerable children and young people. The Commission:

- provides independent oversight of services for children and young people, particularly those who are in youth justice and out-of-home care or who are involved with Child Protection
- advocates for improved policy, program and service responses to children and young people
- supports organisations that work with children to prevent abuse and harm, and
- promotes the rights, safety and wellbeing of children and young people.

The Commission has already provided submissions and comment on a number of issues and Consultation Papers released by the Royal Commission, including its views on responding to complaints of child sexual abuse, redress and civil litigation, children in out-of-home care and on the development of regulatory and monitoring frameworks.

This particular Consultation Paper seeks comments and feedback on how to improve the criminal justice system to respond more effectively to child sexual abuse in institutional settings. The Commission's comments are provided on the basis of its knowledge and experience in promoting and monitoring the safety and wellbeing of children. However, in order to respond appropriately to the key question of the role of the criminal justice system in responding to the sexual abuse of children, it is necessary to make some broader observations about justice for children.

### **What is required to hear the views of a child about what is just and fair?**

- Safety - it is essential for a child to be able to provide their views for them to feel safe.
- Communication – ideally using the language and forms of expression chosen by a child.
- Respect - a child needs to be respectfully heard, once again as determined by the child.
- Valued - a child's views need to be given prompt and valued acknowledgement
- Consequences - a child needs to be given clear and understandable information about immediate and ongoing consequences
- Timeframes - processes should be appropriate to the child's development, particularly in regard to providing information and responses

### **Justice from the child's perspective**

It is important adults should never assume they know what a child wants or expects, as it is unlikely to comfortably align with adult categories and processes. Broadly speaking it is likely that a child will be less interested in redress, punishment and restrictions on offenders and more interested in safety and happiness (for them and for others); having their concerns heard and affirmed and the maintenance of relationships (including, in some instances, with those who may have harmed them).

A child is more likely to focus on people rather than process. A child will often value adults who respond clearly and with authority. A child will often recognise and value when someone is responding to a child's experience of abuse in a manner that is immediate and obvious. The nature of that early response may be positive or negative and as such will have a fundamental influence on the child's confidence and trust (and sense of justice) in the processes dealing with the abuse.

A child may not distinguish different justice system settings in the way that an adult may. Given an interest in safety and protection, a child's sense of fairness and justice may be more directly influenced by police, child protection authorities or health services than courts. In some circumstances, a child's experience of justice will be more influenced by responses and decisions in family or more familiar institutional settings such as school or child care centres.

## **The impact of our failure to hear**

*"Children and young people who have been sexually abused sometimes disclose that abuse soon after the event or events occurred, or at least later during childhood. However, many children and young people do not tell anyone about the abuse until decades later, long after they reach adulthood. An unknown number, the 'dark figure', never tell anyone or if they do, do not report it to the police."* Judy Cashmore, Alan Taylor, Rita Shackel, and Patrick Parkinson<sup>1</sup>

It is important to not ignore the implications of this observation made in the course of research undertaken for the Royal Commission in terms of justice denied. The Royal Commission has heard and reported the traumatic experiences of so many of these children for whom justice has at the very least been delayed for much of their lives.

Justice McClennan has already spoken of the Royal Commission's journey in hearing and learning of the unbearable impacts of child sexual abuse over those years since childhood. He has noted the impacts on trust, 'human capital', parenting, behaviour and mental health functioning, the increased incidence of substance abuse, suicide, mood and personality disorders, problems with sexuality and intergenerational trauma<sup>2</sup>.

It is the Commission's hope that the work of the Royal Commission can change the way that everyone in the community listens and attends to children. Through this process, everyone will be able to learn how to better understand what a child needs to feel safe and to trust, and how to better support a child to find the tools to their own protection, safety and healing.

In this submission, the Commission seeks to underline the different perspectives that children will bring to their interactions with often less familiar and more uncertain adult worlds of protection, regulation, law enforcement and justice. These observations are as relevant to the consideration of complaints systems, regulation and monitoring, civil litigation and redress as they are to criminal justice. A more direct response to the questions and issues raised by the Consultation Paper is included.

## **The importance of a criminal justice response**

The Commission supports the view that historically the criminal justice system has not been effective in responding to child sexual abuse. Some of the challenges are shared with responses to adult sexual assault.

Some of this is due to a broad range of issues that relate specifically to attitudes towards children. These include assumptions about a child's capacity and credibility, lack of child-appropriate

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<sup>1</sup> Judy Cashmore, Alan Taylor, Rita Shackel, and Patrick Parkinson, (2016) 'The impact of delayed reporting on the prosecution and outcomes of child sexual abuse cases', Royal Commission into Institutional Responses to Child Sexual Abuse, Sydney

<sup>2</sup> <http://www.childabuseroyalcommission.gov.au/media-centre/speeches/international-society-for-the-study-of-trauma-and>

communication and relationship skills, community and cultural attitudes about children, family and behaviour as well as rules of evidence and procedure, case law and statute laws.

Many of these concerns have been identified for some time. The Commission notes the careful and comprehensive work undertaken by the Australian Law Reform Commission and the (then) Human Rights & Equal Opportunity Commission in their joint report "*Seen and Heard: Priority for children in the legal process*"<sup>3</sup> from 1997. This landmark report made a broad range of recommendations addressing issues and concerns arising from the adult-centric nature of legal process. There have been reforms undertaken in various jurisdictions that have addressed particular issues including the taking of evidence and the rules of evidence. Generally however, these developments have not been consistent or uniform and the sharing of best practice learning has been uncoordinated and inconsistent.

There remains a fundamental challenge that is faced more widely than just the criminal justice system. That is, the circumstances where children are able to complain about experiences of abuse remain limited and exceptional. The reasons for this are complex and often deeply cultural, in that they reflect the ongoing invisibility of children as agents and rights bearers and the dominance of adult-focused behaviours and decision making.

The Commission supports the need for much greater reform and endorses the critical role that an effective criminal justice response could and should play in providing justice, redress and deterrence for crimes of child sexual abuse. While it is recognised that a criminal justice system exists to punish offenders, condemn abuse, raise awareness and deter future abuse, much more work needs to be done to support victims and survivors of abuse particularly as children. This has to occur before the system can be said to meet the justice needs of children who have experienced sexual abuse.

The challenges facing the criminal justice system are relevant to addressing reform of civil justice, victim's services, schemes and processes, regulatory and monitoring frameworks and community attitudes. It is vitally important as part of reform to change the way that the interests, experiences and views of children and particularly those who continue to experience sexual abuse at the hands of perpetrators, are understood and respected.

**RECOMMENDATION - That the Royal Commission give consideration to the findings and recommendations of the "*Seen and Heard: Priority for children in the legal process*" report**

## **Police responses**

While the importance of developing more effective police responses to adults reporting sexual abuse suffered as a child is understood, it is also important to encourage the development of specialist responses focused on child sexual abuse reported as a child. The Commission endorses the principle that a victim's initial contact with police will be vitally important in determining their satisfaction with the entire criminal justice response. Indeed, the experience of initial contact with police will often determine the extent of disclosure. This is particularly the case for a child.

While all police should have training in dealing with complex trauma and treating victims with respect, the particular challenges of supporting children call for a coordinated specialist response. An example of this is the establishment of Sexual Offences and Child Abuse Investigation Teams within Victorian Police<sup>4</sup> which is an important initiative. This development has been supported by

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<sup>3</sup> <http://www.alrc.gov.au/publications/report-84>

<sup>4</sup> [http://www.police.vic.gov.au/content.asp?Document\\_ID=36237](http://www.police.vic.gov.au/content.asp?Document_ID=36237)

the establishment in Victoria of Multidisciplinary Centres<sup>5</sup> comprising specialist police, representatives from child protection authorities and sexual assault counsellors and advocates.

These centres aim to improve investigations, collaboration and support for victims. While not child-specific, this collaborative approach warrants examination and evaluation to inform developments nationally. Encouraging reporting of child sexual abuse is a complex challenge. There is considerable work underway in the development of reporting and regulatory frameworks that extends beyond the criminal justice system and the role that police play as an entry point to that system. Learning best practice in the interactions of these frameworks is at an early stage. The barriers to reporting can be personal, psychological, cultural, institutional or systemic.

### ***Information sharing***

Developing protocols for the sharing of deeply personal information in ways that respect privacy and volition, prevent further abuse and reduce the likelihood of re-traumatisation is a fundamental challenge that must transcend institutions, jurisdictions and professional boundaries.

The Commission notes the recent work on information sharing undertaken by the Royal Commission into Family Violence in Victoria<sup>6</sup>. The recommendations from this work have been endorsed by the Victorian State Government and an information sharing regime for family violence information is being developed. Consultation is scheduled to commence soon on an information sharing regime for information relevant to child protection and wellbeing.

This work on information sharing will need to take into account developments and learning in approaches to mandatory reporting and the handling of protections of the identity of reporters. This must be better researched, trialled and evaluated, best practice knowledge shared and implementation coordinated. Ideally this work should be monitored nationally.

The Commission is expected to receive additional statutory functions related to the promotion and monitoring of legislated Child Safe Standards and the introduction of a reportable conduct scheme. These schemes are likely to allow the Commission to exchange information with other regulators in certain circumstances to reduce risk to children. The roles, responsibilities of and relationships with police and a number of other regulators will be a key component of this process.

It is expected that it will be important to maintain a flexible range of channels and support mechanisms for reporting particularly for children, and remains open to the possibility that police may not be the only entry point to the criminal justice system in particular circumstances. These circumstances could include the need to overcome personal and historical barriers such as for Aboriginal and Torres Strait Islander victims, victims of police brutality or corruption or where the perpetrator is a police officer.

Police will also play a key role in providing information to communities and to victims and families of the criminal nature of child sexual abuse, the criminal justice processes and the risks and impacts experienced through the processes. It will be important to ensure that this information is consistent and coordinated with those of other bodies and institutions.

The Commission notes the issue of continuity in police staffing response and suggests that this can be addressed in part by ensuring continuity of community-based support which can build on ongoing relationships of trust with a child.

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<sup>5</sup> [http://www.police.vic.gov.au/content.asp?Document\\_ID=36237](http://www.police.vic.gov.au/content.asp?Document_ID=36237)

<sup>6</sup> State of Victoria, Royal Commission into Family Violence: Report and recommendations, Volume 1 Chapter 7 Information Sharing (2016)

There is developing knowledge of best practice in police investigations involving children including in interviewing and communicating with them and the use of pre-recorded investigative interviews, interpreters and support persons. It is vital there is a high level of cooperation and coordination between police and prosecutors, and other professional bodies and institutions.

To assist with this, a coordinated national training approach and an appropriately funded research program based in an appropriate multidisciplinary institution such as the Australian Institute of Criminology or the Australian Institute of Family Studies is suggested.

There would also be considerable merit in greater cooperation and coordination between police and prosecutors in decisions to lay charges, and the development and publication of nationally consistent principles for the laying of charges. This should occur at the same time as coordinated efforts are made to generate nationally consistent statute and case law and procedure.

**RECOMMENDATION - That the Royal Commission supports the establishment of specialist police responses to child sexual abuse with particular attention to the communication and interviewing skills required for supporting children who are victims. These responses should be collaborative and multidisciplinary.**

**RECOMMENDATION - That the Royal Commission supports the ongoing development of information sharing protocols with particular attention to be given to the interaction between police and other regulatory mechanisms. This work should be monitored nationally.**

**RECOMMENDATION - That the Royal Commission supports the development of information sharing protocols and practice that pay particular attention to the provision of appropriate information to victims and communities and recognise the barriers to access to information experienced by particular groups including children, Aboriginal and Torres Strait Islander communities, people with disability and from culturally and linguistically diverse backgrounds. This work should also be monitored nationally.**

**RECOMMENDATION - That the Royal Commission supports a national training approach and an appropriately funded research program for justice responses to child sexual abuse.**

## **Child sexual abuse offences**

The Commission supports the direction of developments in child sexual abuse offences around the nation. In Victoria, there have been developments in relation to the offences that are based on a course of abusive conduct to avoid the requirement of identifying individual instances of abuse and of broad grooming charges. The Commission notes that additional work is required to ensure that the legislative formula appropriately criminalises conduct that is grooming children (and families) for the sexual abuse of children without also inadvertently capturing conduct that is part of non-abusive relationships with children.

Important is the removal of limitation periods on criminal prosecutions for child sexual abuse offences in particular recognition of the understandable delays and barriers that prevent victims from coming forward to report abuse.

As discussed earlier the Commission supports the development of nationally consistent statute and case law and procedure in relation to child sexual abuse offences.

## **Third party offences**

In principle, the Commission supports the development of third party offences based on failure to report and failure to protect where these focus on offences committed in an organisational context.

The Commission is currently involved in the development of regulatory schemes in Victoria that are designed to build capacity and awareness of the obligations (moral and, in due course, legal) to provide better protections for children from sexual abuse. As discussed, these schemes will seek to monitor Child Safe Standards and manage reportable conduct by organisations including government bodies.

There will be similar developments underway in other states and territories. Given the complexity of the relationships between these various developments (including criminal law reform and the evolving nature of community standards underpinning these developments), ongoing sharing and learning of appropriate legislation, policy and practice is necessary.

The Commission concurs with the Consultation Paper's observation that there will also be a role for the civil law in driving cultural change to support better protective and preventative behaviours particularly in institutions and organisations. Noted, is the discussion in Victoria of the possible creation of a statutory duty of care in organisations to take all reasonable steps to prevent child abuse<sup>7</sup>.

The introduction of consistent criminal offences and sanctions across Australia should promote the safety of children while allowing time for the development of more effective behaviours, policies and practices on the part of individuals and organisations in preventing and responding to child sexual abuse. It may be appropriate to consider these developments in the context of child abuse more generally rather than only in the context of child sexual abuse.

## **Prosecution responses**

Previous comments in relation to police responses have already raised the importance of coordination and consistency with the role of prosecutors. There may be a particular value in giving a greater role to the prosecution in many of the functions currently shared with the police.

The Commission supports the development of specialist prosecution responses focused on child sexual abuse reported as a child. Given the key role that prosecutors play in oversight and monitoring of police decisions, their involvement in training, the development and implementation and monitoring of protocols and in relation to investigations, interviewing, information sharing and the provision of support would be welcomed.

There is a strong argument for decisions of particular complexity or sensitivity in interviewing, evidence gathering, the laying of charges and the management of victim support, to be shared with or referred to prosecutors as a matter of routine practice.

The Commission's suggestion of coordinated national training and research for dealing with children would involve police and prosecutors, court officers, lawyers and judges but also other professionals involved in working with children that may come into contact with the justice system.

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<sup>7</sup> <http://www.abc.net.au/news/2013-11-13/15-recommendations-of-the-victorian-parliament27s-inquiry-into/5088928>

## **Evidence of victims and survivors**

A coordinated national approach to training with a linked research program should include the development of shared knowledge base and commitment to best practice in working with child victims and the methods and supports provided to enable them to give evidence safely and effectively.

The involvement of multidisciplinary research bodies such as the Australian Institute of Criminology or the Australian Institute of Family Studies in research and training would support broad professional development.

This approach could examine the development of best practice in working with children with disability, Aboriginal and Torres Strait Islander children, children from cultural and linguistically diverse backgrounds and other groups of children with particular vulnerability.

## **Sentencing**

### ***Exclusion of good character as a mitigating factor***

A range of compelling arguments have been made in the Consultation Paper for excluding good character as a mitigating factor in sentencing for child sexual abuse offences. The use of evidence of good character to suggest a low risk of reoffending is based on an assumption that is not empirically supported. Particularly in the area of child sexual abuse, relying upon a lack of prior convictions as proof of good character is fraught given the high prevalence of child abuse, low reporting, high attrition and low conviction rate. By accepting that an offender is otherwise of good character can also send a message to the victim and community that the wrongfulness of the crime is being minimised. It may also be the case that the offender has used their reputation and perceived good character to facilitate the grooming and sexual abuse of a child. This abuse of a position of trust can exacerbate the trauma of the victim, which may be especially the case for those engaged in institutional child sexual abuse. This issue has been discussed previously in terms of the additional trauma impact upon victims of abuse perpetrated by those in the role of spiritual adviser such as priests.

Even though previous behaviour indicating the offender was of good character would appear to be given minimal weight at sentencing, it is important to acknowledge the role that apparent good character may have played in facilitating offending. New South Wales and South Australia have legislated to exclude evidence of good character in mitigation of sentence in relation to child sexual abuse, if the court is satisfied that it was a factor of assistance to the offender in committing the offence. The Commission supports consideration of the approach taken in England and Wales in allowing prior good character to be raised as an aggravating factor in cases where this has facilitated offending.

### ***Sentencing standards in historical cases***

The issue of imposition of historical sentencing standards is especially critical in relation to institutional child sexual abuse given that prosecutions often occur decades after the offence was committed. In practical terms, it may be difficult to ascertain what the sentencing standards of the particular time may have been if relevant sentencing remarks or statistics were unavailable. Some survivors are likely to feel aggrieved that the offender might receive a lighter sentence through use of historical sentencing compared with current sentencing standards, as a function of the delay in reporting which is characteristic of offences involving an alleged perpetrator who was in a position of authority.



The approach taken by England and Wales of sentencing in accordance with the sentencing regime applicable at the time of sentencing, with a focus on the culpability of the offender and the harm caused or intended, would appear appropriate. Fairness to the offender is secured by the continued application of the maximum penalty that applied at the time of the offending, or of any lesser penalty adopted subsequently.

**RECOMMENDATION – That the Royal Commission supports the inclusion of good character as an aggravating factor in sentencing for child sexual abuse offences where that character was used in the commission of the offence/s.**

**RECOMMENDATION – That the Royal Commission supports the application of sentencing standards at the time of sentencing rather than at the time of the offending for child sexual abuse offences, with evaluation research to assess for unintended consequences.**

## **Juvenile Offenders**

Youth Justice operates as a distinct criminal justice system; in recognition of childhood and adolescence as stages of development with evolving physical, mental, emotional and moral capacities and capabilities. They are recognised as stages with particular vulnerabilities but also with greater opportunities for rehabilitation. The most significant proportion of youth offending behaviour is transitional and transitory. Young offenders do not ordinarily become adult criminals.

This is also the case for criminal sexual offences committed by young people, although there are significantly different types of behaviour that can constitute offences; not only those that can be categorised as sexually abusive. As an example, due to the nature of the legal formula used to establish the age of consent for sexual activity for the purposes of the criminal law, it is possible for young people who have engaged in non-abusive consensual sexual activity with other young people to have committed sexual offences at law. This is particularly the case in Australian states where there is no consideration given to the age difference between two young people.

This has been an important consideration that has not necessarily been given appropriate attention in various developments in the criminal law in Australia. It has already been identified as an issue of concern in the development and operation of sex offender registers across the country. For example, the Law Reform Commission of Western Australia has found that sex offender legislation has failed to differentiate appropriately between juvenile and adult offenders.

There would appear to be merit in striving for reform and greater national consistency in the responses of the criminal justice system to young people who have engaged in sexual behaviours. This requires particular attention to ensure responses that distinguish between abusive and non-abusive behaviours, and that maximise the prospect of rehabilitation and effective treatment. This also raises the issue of the definition of criminal offences, the responses by police and prosecutors and where appropriate diversion and/or treatment applied to each relevant behaviour.

### ***Sex offender register***

The concern that the stigma of being registered as a sex offender may undermine the rehabilitation of a young offender has been given some consideration in Victoria for young people engaging in sexually abusive behaviours. In order for a young offender to be placed on the sex offender register in Victoria, the court must be satisfied beyond reasonable doubt that the person poses a risk to the sexual safety of one or more persons in the community. This offers judicial discretion in the

consideration of risk rather than a blunt punitive response. Furthermore, the language used to describe the behaviour, which is age specific, includes problem sexual behaviour for children under ten years of age and those engaging in sexually abusive behaviours aged from ten to fourteen years.

### ***Therapeutic treatment orders***

In Victoria, a Therapeutic Treatment Order (TTO) system has been built into the *Children, Youth and Families Act 2005* to provide a mechanism for dealing with those children who have been engaging in sexually abusive behaviours. Ideally such children and their families will voluntarily engage with treatment services. In practice the availability of a compulsory order can support the operation of a diversionary approach with relatively few treatment orders made.

The Sexual Assault Support Service (Tasmania) has conducted a review of the Victorian system, with a view to consider implementation in Tasmania. The review concluded that the system was invaluable and should apply to all children up to and including those 17 years of age (Sexual Assault Support Service (2015) *Responding to Problem Sexual Behaviour and Sexually Abusive Behaviour in Tasmania* Position Paper).

It should be noted that the Victorian system currently only applies to those children aged from ten to 14 years of age, but is being expanded to include those aged up to 17 years. Young people are not automatically diverted away from the criminal justice system, but subjected to a criminal justice response to the degree necessary to support attendance for treatment appropriate to their needs. The paper recommends that family members can be required to attend treatment, whilst acknowledging that voluntary participation of children and family members is preferred.

### ***Working with children checks***

The introduction of the TTO scheme in Victoria has also highlighted the concerns about placement of a young person on the sex offender register. This creates the potential for stigmatisation and risk of an inappropriate punitive approach that can outlast and undermine the operation of the youth justice system with its focus on rehabilitation. These issues take on even greater practical relevance when intersecting with the operation of a Working with Children Check, an area that is continuing to be explored in Victoria by service providers and should be considered nationally.

The Commission has previously made relevant comment in response to the Royal Commission's *Working with Children's Checks* Consultation Paper in February 2015.

### ***Out of home care***

In the Commission's report "...as a good parent would..." *Inquiry into the adequacy of the provision of residential care services to Victorian children and young people who have been subject to sexual abuse or sexual exploitation whilst residing in residential care*, a substantial number of recommendations relevant to systemic concerns were made. These were relevant to a large proportion of critical incident reports relevant to child-to-child sexual abuse. These issues were referenced in the Commission's submission to the Royal Commission's consultation on Advocacy and Support Services in November 2015.

**RECOMMENDATION – That the Royal Commission considers a review of the youth justice system nationally to allow for more careful differentiation of the sexual behaviours of young people to reduce the risks of criminalisation and increase the prospects of rehabilitation and treatment options. This review should consider restricting the placement of young offenders on the sex offender register to where the young person poses a risk to the sexual safety of others; and the impact on young offenders of the operation of WWCC schemes.**

**RECOMMENDATION – That the Royal Commission considers the protection of those children and young people who are the victims of sexually abusive behaviours by other young people and the treatment of young people engaging in those behaviours particularly in out-of-home care and other institutional settings.**

## **References**

Sexual Assault Support Services (SASS) (2015). *Responding to Problem Sexual behaviour and Sexually Abusive Behaviour in Tasmania* Position Paper.

