

# CRIMINAL JUSTICE REPORT



**Royal Commission**  
into Institutional Responses  
to Child Sexual Abuse

PARTS VII - X  
AND APPENDICES

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Parts VII - X  
and Appendices



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# PART VII OTHER TRIAL PROCESSES



## 29 Introduction

As we stated in Chapter 22, we are satisfied that how the criminal justice system deals with allegations against an individual of sexual offending against more than one child is one of the most significant issues affecting criminal justice in child sexual abuse cases, including those involving abuse in an institutional context. Given the amount of material we have gathered in relation to tendency and coincidence evidence and joint trials, and the attention this issue received during our public hearings and consultation processes, we addressed it separately in Part VI.

There are a number of other issues that are particularly important for the conduct of trials for child sexual abuse offences, which we discuss in this part.

In Chapter 30, we discuss issues in relation to how victims and survivors give evidence in child sexual abuse trials. We invited submissions on these issues in Chapter 9 of the Consultation Paper.

As discussed in Chapter 2, child sexual abuse offences are generally committed in private, and typically the complainant's evidence is the only direct evidence of the abuse. The complainant's ability to give clear and credible evidence is therefore critically important to any criminal investigation and prosecution. Many survivors have told us how daunting they found the criminal justice system, and how the process of giving evidence was particularly difficult.

Our focus in Chapter 30 is on identifying reforms that will ensure the complainant is given a good opportunity to give their 'best evidence', meaning the most complete and accurate evidence the complainant is able to give. We particularly consider the needs of young victims and victims with disability, but we also recognise that many complainants of child sexual abuse, including adult survivors without disability, are likely to be vulnerable witnesses.

In Chapter 31, we discuss issues in relation to judicial directions and informing juries. We invited submissions on these issues in Chapter 11 of the Consultation Paper.

The trial judge is obliged to ensure that a trial of the accused is fair. To that end, the judge must direct the jury as to the appropriate law and remind the jury of the relevant facts. When giving directions in a trial, the judge may in some circumstances be required to give the jury an appropriate warning or caution. It is common in trials of child sexual offences for some directions and warnings to be given over and above the directions commonly given in trials for other offences.

We trace the development of the law with respect to judicial directions and warnings in sexual offence trials, including child sexual abuse trials. It has been complex and controversial, and the subject of considerable review and research in Australia over the last decade.

Our focus in Chapter 31 is on identifying how juries – and judges and legal practitioners – can be assisted by the provision of accurate information and education to address myths and misconceptions relevant to child sexual abuse offences. We consider and make recommendations in relation to judicial directions, expert evidence and training and education.

In Chapter 32, we discuss issues in relation to delays and case management. We invited submissions on these issues in Chapter 8 of the Consultation Paper.

Many survivors who have participated in criminal trials have raised concerns with us about delays. Delays can cause great distress for the complainant and those close to them, with prosecutions sometimes continuing for years. In some cases, delays cause survivors to withdraw from the prosecution process.

The causes of delays in the prosecution process are complex and interrelated. As we observed in the Consultation Paper, it is unrealistic to think that we could recommend particular structures or processes that would be effective in eight states and territories, each with its own different system.

Our focus in Chapter 32 is on identifying some common themes and elements that might contribute to reducing delay and creating more efficient court processes and case management. We discuss a number of examples of approaches that particular states or territories have recently adopted to address delays, and a number of measures that may help to reduce delays.

## 30 Evidence of victims and survivors

### 30.1 Introduction

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As we outlined in the Consultation Paper, many survivors have told us how daunting they found the criminal justice system. Those survivors whose allegations proceeded to a prosecution told us that the process of giving evidence was particularly difficult. Many survivors told us that they felt that they were the ones on trial. Some survivors told us that the cross-examination process was as bad as the child sexual abuse they suffered. Many survivors told us that they found the process re-traumatising and offensive.

In private sessions and in public hearings, we have also heard from the families of young victims and victims with disability about the particular difficulties these victims face in giving evidence. Police and prosecutors have given us examples of complainants, especially children, breaking down during cross-examination, in some cases with the result that the prosecution has failed.

As discussed in Chapter 2, child sexual abuse offences are generally committed in private, with no eyewitnesses and no medical or scientific evidence capable of confirming the abuse. Unless the perpetrator has retained recorded images of the abuse, or unless the perpetrator admits the abuse, typically the only direct evidence of the abuse is the evidence the complainant gives about what occurred.

The complainant's ability to give clear and credible evidence is therefore critically important to any criminal investigation and prosecution.

The accused's ability to question witnesses – including the complainant – is a key part of the accused's right to a fair trial. However, our consultations and research have indicated that, at least in some cases, the way in which complainants are questioned by police, prosecutors and defence counsel has itself compromised their evidence.

Questioning that prevents the complainant from giving their evidence effectively may lead to significant injustices. As discussed in Chapter 2, the criminal justice system is an adversarial system, and we have not recommended any major structural changes to that system. However, the system should be concerned to ensure that the guilty are convicted and punished and not just that the innocent are acquitted. This requires that the complainant be given a good opportunity to give their 'best evidence'.

By 'best evidence', we mean the most complete and accurate evidence a witness is able to give.

The term 'best evidence' has been used in England and Wales and Australia to describe the goal of ensuring children and vulnerable witnesses are able to give a complete and accurate account as a witness in criminal proceedings. In the seminal England and Wales Court of Appeal case regarding the need to adjust cross-examination techniques when questioning children, *R v Barker*,<sup>1</sup> the then Lord Chief Justice of England and Wales said:

In short, the competency test is not failed because the forensic techniques of the advocate (in particular in relation to cross-examination) or the processes of the court (for example, in relation to the patient expenditure of time) have to be adapted to enable the child to give the *best evidence* of which he or she is capable.<sup>2</sup> [Emphasis added.]

The guidance on interviewing victims and witnesses and on using special measures, published by the Ministry of Justice in England and Wales, is titled *Achieving best evidence in criminal proceedings*.<sup>3</sup>

The term ‘best evidence’ has also been used:

- in the legislation establishing the New South Wales child sex offence evidence pilot: the witness intermediary is ‘an officer of the Court and has a duty to impartially facilitate the communication of, and with, the witness so the witness can provide the witness’s best evidence’<sup>4</sup>
- by the Attorney-General’s Department of South Australia: it has published guidance as part of its Disability Justice Plan titled *Supporting vulnerable witnesses in the giving of evidence – Guidelines for securing best evidence*<sup>5</sup>
- in a submission the relevant quotation from which was endorsed by the Australian Law Reform Commission, the New South Wales Law Reform Commission and the Victorian Law Reform Commission in their *Uniform Evidence Law report 2005*<sup>6</sup>
- by the Victorian Law Reform Commission in its 2016 report, *The role of victims of crime in the criminal trial process*.<sup>7</sup>

For some time, complainants in sexual assault cases, children and people with disability have all been recognised as vulnerable witnesses. Various aids have been implemented through legislation to assist them in giving their evidence at trial.

As Ms Terese Henning, Director of the Tasmanian Law Reform Institute, observed in her evidence in Case Study 38:

At the most fundamental level, in order to participate in the criminal justice process, children and witnesses with cognitive impairments who allege sexual abuse must be able to give a comprehensible account of what has happened. This also means that they must be able to comprehend questions they are asked and communicate comprehensible answers to questions. These matters will determine whether they can be heard at all, both in the investigative stages of the criminal justice process and at trial.<sup>8</sup>

This can present challenges for vulnerable witnesses, who may not recognise the abuse or have the language to describe what happened. Even if they are able to articulate that something happened, disclosing this to strangers in unfamiliar settings may not be possible. It may also be very difficult for them to disclose the abuse with a sufficient level of particularity to allow further investigation and charging.

The Royal Commission has heard that children and people with disability may face significant challenges as complainants of child sexual abuse. The barriers for people with disability when engaging with the criminal justice system have been confirmed in recent reports and inquiries. Barriers include a lack of support programs and negative assumptions about the reliability of their evidence.<sup>9</sup>

Children with disability are a particular concern for the Royal Commission. High levels of contact with institutions and dependency on professionals for medical treatment and other support often place children with disability in institutional contexts, where they may be at higher risk of sexual abuse. The Australian Institute of Health and Welfare reported that in 2012 – the most recent year for which data has been reported – an estimated 171,000 children under 15 years of age in Australia lived with severe or profound disability.<sup>10</sup>

Research suggests that children with disability – especially those with intellectual disability, cognitive disability or additional communication needs – are at significantly increased risk of abuse, which includes sexual abuse.<sup>11</sup> The Royal Commission has also heard that, because of specialised care and support needs, children with disability are often segregated from mainstream society. This segregation can create isolation and additional vulnerability.

The Royal Commission’s consultations in relation to people with disability suggest that children with disability face particular difficulties in disclosing sexual abuse. Children with disability are often not included in mainstream education on protective behaviours and sexuality, so they may not be equipped with the necessary understanding and language to speak out about abuse. Where children with disability show physical and behavioural indicators of abuse, these may be misinterpreted as bad behaviour or as part of the child’s disability, so they may be overlooked or dismissed. Children or their carers may also be inhibited in reporting abuse for fear that they may lose critical support services if they complain.

As noted in Chapter 38, under the New South Wales reportable conduct scheme, the NSW Ombudsman receives notifications from institutions that are required to report allegations of a child protection nature made against employees of government and certain non-government agencies. Data collected indicates that children with disability are involved in a disproportionately high number of allegations of abuse, yet they are significantly under-represented in cases of abuse being investigated in the criminal justice system.<sup>12</sup>

In this chapter, we:

- discuss examples from the second week of our public hearing in Case Study 38 in relation to criminal justice issues
- examine the availability of ‘special measures’ and their use
- examine other issues that arise for complainants at trial, including competency testing and courtroom questioning

- outline the responses we received to the Consultation Paper and evidence we heard in Case Study 46
- make recommendations to help ensure that complainants and other relevant witnesses are given a good opportunity to give their best evidence in child sexual abuse prosecutions.

## 30.2 Examples from our case studies

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In this section, we summarise a number of examples of the difficulties facing children and people with disability, and their families, and adult survivors in participating in the criminal justice system. The first five examples are of cases we examined in the second week of Case Study 38. Four of the examples relate to children and people with disability and the fifth relates to Mr Sascha Chandler, an adult survivor. The sixth example is of a case we examined in Case Study 46 in relation to an adult survivor, FAB.

### 30.2.1 The case of CDE

CDE is the youngest of three boys. One of his brothers, CDD, has autism and is mostly non-verbal. While he used to use a speech device, he now usually communicates by writing things down, using gestures or sending messages with a mobile phone. CDE's other brother, CDC, has Asperger's syndrome and will not talk with people he does not know. Sometimes he uses his mobile phone to send messages to communicate with his parents.

In 2008, CDE's parents began using a local respite care service to help them with respite care for their three children. In early 2011, the service assigned CDA as their respite carer.

On 13 August 2011, CDE, then aged six, disclosed to his mother that CDA had abused him while providing respite care that evening in the family home. His brother CDD had been in the room at the time, but his other brother, CDC, was in another room. CDE's parents immediately reported the abuse to the respite care service and the police. CDE was interviewed by police the next day.

CDC was also interviewed by police. However, police did not attempt a formal interview with CDD after they were unable to communicate with him, either through his mother or directly. CDE's mother, CDB, gave evidence that they did not know that they had the right to offer suggestions to the police about how to communicate with CDD – for example, by using a speech therapist or someone who CDD trusted.<sup>13</sup> Detective Sergeant David Crowe, who did not take part in the investigation of CDA but is now a team leader of a Sexual Assault and Child Abuse Team in ACT Policing, agreed that the police officers who participated in the investigation did not try to communicate with CDD either in writing or with the aid of the speech device that CDD had previously used with his parents. Detective Sergeant Crowe said that they should have done so.<sup>14</sup>



On 23 August 2011, CDA was charged with committing an act of indecency on a person under the age of 10 in relation to CDE.

During 2011, ACT Policing received a number of other allegations that CDA had sexually abused other children with disability for whom he was providing care. ACT Policing took steps to investigate these matters, but the information they obtained from the affected children was insufficient to support any charge.

An initial ruling that CDE was not competent to give evidence was overturned on appeal. In 2013, in the first trial of CDA, both CDE and CDC gave prerecorded evidence. CDD did not give evidence. This trial was aborted when CDE's mother, CDB, gave evidence of a prior occasion of sexual abuse by CDA against CDE which was not the subject of any charge.

A second trial was held in 2014. CDA was acquitted of the charge.

CDB gave evidence of the impact that the experience had on her family. Her children have had a number of mental health issues relating to the incident, and the family does not use any external carer support services. This means that CDB now devotes all of her time to looking after her own children. A couple of months after the trials ended, CDE told her, 'I know why [CDA] got off mum. It was my fault'.<sup>15</sup>

CDE later told her that a teacher getting angry with him was 'like being cross-examined'. CDB also said that, had an intermediary scheme been available, this would have been 'incredibly helpful' for CDE, particularly to avoid his becoming confused during cross-examination.<sup>16</sup> We discuss intermediaries in sections 30.7.3 and 30.8.1.

We also heard evidence from Mr Jonathan White SC, the Director of Public Prosecutions (DPP) for the Australian Capital Territory, who noted that the Australian Capital Territory provides for the recorded investigative interview of child complainants and witnesses to be used as evidence in chief at trial as well as the remote location prerecording of the cross-examination of complainants in a pre-trial hearing, in the absence of the jury.<sup>17</sup>

Mr White expressed the opinion that the cross-examination of CDE used a 'not unusual' practice of repeating a series of propositions until the witness accedes to the proposition. He said this style of cross-examination can 'work' with children, as they tire, lose energy and effectively start agreeing with the propositions put to them.<sup>18</sup> Mr White noted that the cross-examination involved closed questions and language beyond the understanding of CDE.<sup>19</sup> Mr White also expressed the opinion that an intermediary would have been of benefit, including in the cross-examination.<sup>20</sup>

### 30.2.2 The case of CDI

CDI has a generalised intellectual disability characterised by lower than average intellectual functioning. In 2010, aged six, he was attending a special education class at a primary school in Adelaide.

On 20 August 2010, a teacher noted that CDI was crying as he got off the school bus. When the teacher asked him why, CDI indicated that the school bus driver, CDF, had hurt him in the groin and bottom area. Police were called and CDF was charged with unlawful sexual intercourse with a child under 14 and aggravated indecent assault. Other children who caught the bus also made disclosures against CDF.

Given their young age, investigative interviews with the children were conducted by the child protection service following consultation with police. On 2 September 2010, CDF was charged with indecent assault involving another child who caught the bus with CDI and who also had an intellectual disability. Over the following months, the child protection service and the Office of the Director of Public Prosecutions (ODPP) interviewed five other children, each of whom had intellectual disabilities, who also caught the bus.

On 17 June 2011, the South Australian ODPP advised the parents that there was insufficient evidence to support the existing charges against CDF, given inconsistencies in the children's evidence and the likelihood that the children would struggle to give evidence in court.

On 26 July 2011, the existing charges were dropped, including those relating to CDI. However, two new charges were laid in relation to abuse of CEN, one of the other children who had previously been interviewed.

On 20 December 2011, the charges relating to CEN were dismissed for want of prosecution, as the ODPP had determined that CEN and another child witness, CEH, would not be able to be cross-examined.

We heard evidence from CDG, who is the mother of CDI, about her experiences of dealing with the police and prosecutors and the impact of the criminal proceedings on CDI and other members of her family. CDG felt devastated when the charges against CDF were ultimately dropped. She said that she is 'terrified of the day that [CDI] comes to realise that his account of [CDF]'s abuse was not "good enough" for the South Australian judicial system'.<sup>21</sup>

CDG also gave evidence that the officers who interviewed CDI did not make any adjustments to take into account CDI's disability or use any aids to help him give his evidence.<sup>22</sup>

We heard evidence from Detective Superintendent Mark Wieszyk, who did not take part in the investigation of CDF but is now the Officer in Charge of the Special Crimes Investigation Branch in South Australia Police. Detective Superintendent Wieszyk gave evidence about the police

involvement in the investigation and charging of CDF. He noted the difficulties that can arise for children with disability who require a support person, as their preferred support person may be a potential witness in the case.<sup>23</sup>

Detective Superintendent Wieszyk also noted the then approaching commencement of the *Statutes Amendment (Vulnerable Witnesses) Act 2015 (SA)*, which provides for additional communication assistance for vulnerable witnesses.<sup>24</sup> The Act is discussed further in section 30.7.3.

We also heard evidence from Mr Adam Kimber SC, the South Australian DPP, about the challenges his office faced in obtaining evidence to support the charges against CDF to the required standard of proof.

Mr Kimber's statement for Case Study 38 outlined the challenges in proceeding with the charges against CDF:

The challenges for the ODPP stemmed from the requirement of proving a specific incident, as distinct from some generic wrongdoing, in circumstances where the children's ability to recount detail consistently was seriously compromised.

Throughout the consideration of the matter, the prosecutors involved approached the matter on the basis that the allegations were such that illegal conduct had likely taken place. The difficulties lay in particularising a charge or charges and being able to establish them to the criminal standard.<sup>25</sup>

### 30.2.3 The case of CDL

CDL has autism, Tourette's syndrome and a moderate intellectual disability. He has been under the permanent care of the Victorian Department of Health and Human Services since he was 11 years old.

In 1999, when he was 13 years of age, CDL disclosed to his father that he had been sexually abused by CDJ, who was a disability support worker at a residential facility run by the department in Melbourne. CDL disclosed the abuse to his father during the week following the abuse, when his father was visiting him. CDL's father reported the abuse to the department's Cluster Manager. Police were notified 11 days later.

Before interviewing CDL, police discussed with CDL's parents their proposed approach to the interview. Interviewing CDL presented risks, particularly the risk of CDL harming himself if he became upset. After the first police interview, it was agreed between police, staff at CDL's residential facility and CDL's parents that a videotaped interview would not be possible.

A second interview was held on 9 June 1999, in which police recorded that CDL was not able to give a free narrative or understand the difference between truth and lies. This adversely affected the value of CDL's identification of CDJ as the offender. The investigation was put on hold at this point, with the agreement of CDL's parents.

In 2006, following repeated requests from CDL's family, the department commissioned a private investigation into the department's handling of CDL's allegations and other incidents of abuse. The investigation reported that there was no legal obligation for the department to have investigated the allegations and, although CDL had identified CDJ as the alleged abuser, there was insufficient information to conclude that the abuse had occurred.

In 2008, after CDL made further disclosures about the abuse, police reopened their investigation at the request of the department. Before interviewing CDL, police obtained advice from his psychologist and psychiatrist regarding his ability to disclose and suitable interview techniques. Both advised that CDL would be able to recall certain facts but was limited in his communication ability, was prone to become anxious and would struggle to demonstrate the difference between truth and lies.

Following an initial interview, CDL participated in a videotaped interview. The interview produced reasonable grounds to believe that an offence had been committed, although CDL was unable to provide great detail or dates or times. A brief of evidence was prepared to charge CDJ. However, it was not proceeded with – in particular, because it was considered unlikely that CDL would be able to provide any meaningful answers under cross-examination and, therefore, any proceedings would possibly be unfair to CDJ as the accused.

We heard evidence from CDK, CDL's mother. CDK stated that, despite the police interview in 2009 being a positive experience due to the professionalism of the police officers involved, in her view further advances could be made with additional training for police regarding communication difficulties and disabilities; and opportunities for expert evidence regarding specific disabilities, such as autism, to be given in court.<sup>26</sup>

We also heard evidence from Assistant Commissioner Stephen Fontana of Crime Command, Victoria Police. Assistant Commissioner Fontana gave evidence regarding the investigation of CDL's allegations, the efforts police made to obtain a statement from CDL, the decision not to charge CDJ, and the protocols Victoria Police have regarding communicating with people with a disability.<sup>27</sup>

#### 30.2.4 The cases of CDO and CDQ

In late 2010, CDQ and CDO were attending a childcare centre in southern Sydney. Both were three years of age.

In November 2010, another child at the centre, CEW, disclosed that she had been sexually abused by CDM. CDM worked at the centre, apparently as a volunteer. He was the father of the centre's director and a part-owner of the centre. CDM was charged with indecent assault and aggravated indecent assault in relation to CEW.

After CDM was charged, the parents of CDQ and CDO had concerns about whether their girls might have been abused by CDM. They requested the girls be interviewed by the local Joint Investigation Response Team (JIRT) at Kogarah in Sydney.

During this period, the licensing of childcare centres was regulated by the Children's Services Directorate within the Department of Community Services (as it was then named). On 15 November 2010, the Director General of the Department of Community Services issued a notice of exclusion to CDM which directed him to refrain from entering the premises of the childcare centre; informed him that his continued presence at the centre would constitute an unacceptable risk to the safety, welfare or wellbeing of a child or children enrolled with the centre; and informed him that it was a criminal offence for him to enter the centre.

In December 2010, CDM was charged with indecent assault in relation to another child at the centre, CEY. On 24 December 2010, the Children's Services Directorate placed licence conditions on the childcare centre which required the childcare centre itself to prevent CDM from entering or remaining on the premises.

In February 2011, CDQ was interviewed by JIRT but did not make any disclosures in this interview. CDO was also interviewed by JIRT and she made disclosures. In May 2011, CDM was charged with aggravated indecent assault in relation to CDO.

In June 2011, CDM was committed to stand trial on four counts of aggravated indecent assault against three children.

In November 2011, the Crown prosecutor with carriage of the prosecution formed the view that the evidence that CEW and CEY had given could not support sufficient particularisation of the charged offences; that is, the girls could not describe a particular occasion, as opposed to stating that certain behaviour had occurred at some undetermined time. With respect to CDO, the Crown prosecutor was concerned that, although CDO could identify a specific incident, the detail of that incident was not clear, and she had given inconsistent evidence about whether the incident had occurred. The Crown prosecutor recommended that the three girls be reinterviewed.

In January 2012, JIRT officers conducted further interviews of the three girls, including CDO. The interviews did not produce any additional evidence on the issues identified by the Crown prosecutor.

In April 2012, the Crown prosecutor met with the girls' parents to explain the results of the further interviews, discuss the prospects of success of the prosecution and seek the parents' views on whether they wished the prosecution to proceed or not.

In May 2012, on the recommendation of the Crown prosecutor, the Deputy DPP directed that there be no further proceedings. This was on the basis that the prosecutions were likely to fail given the inability of the children to give sufficient detail about the charged incidents.

In December 2010, after the initial allegations against CDM were made, the owner of the childcare centre reported the allegations to the NSW Ombudsman as required under the reportable conduct scheme operating in New South Wales. The Ombudsman advised her to defer any investigation until after the criminal proceedings were concluded.

Following the discontinuance of the criminal proceedings in May 2012, the owner of the childcare centre commissioned a review of CDM's conduct. The review recommended findings of 'Not sustained' in relation to the allegations of sexual offences. In December 2012, the Ombudsman received a copy of the review.

In February 2013, the Ombudsman wrote to the owner of the centre advising her to make a notification to the New South Wales Commission for Children and Young People, which was then responsible for operating the Working with Children Check scheme in New South Wales. In July 2013, the owner of the centre advised the Ombudsman that she had sold the centre and that CDM had retired.

Later in 2013, the parents of the four girls who had disclosed abuse by CDM made a complaint to the Ombudsman about how the owner of the centre had responded to the allegations and other matters. The Ombudsman released information about the police and reportable conduct investigations of CDM to the New South Wales Office of the Children's Guardian. As a result of concerns that the parents raised about limitations on the information the Ombudsman could give them about the reportable conduct investigation, the Ombudsman sought legislative reform. In 2015, the legislation was amended to allow disclosure of information about reportable conduct investigations to victims, their parents and carers.

We heard evidence from CDN, who is the mother of CDO; and CDP, who is the mother of CDQ. CDN and CDP gave evidence about their own experiences and the experiences of their daughters in the investigation, the impact that this experience had on their families, and their contact with the NSW Ombudsman in making complaints about the conduct of the childcare centre in responding to the allegations.

CDN gave evidence that 'The biggest issue for me is that the criminal justice system wasn't set up to allow my daughter to share her story. She was so little that she was denied a voice'.<sup>28</sup>

CDP gave evidence that:

The present criminal justice system forces parents of child abuse victims to decide between two options. Parents can either expose their children to the trauma of participating in the criminal justice system in order to achieve justice by putting paedophiles in gaol to prevent harm to further children. Alternatively, parents can allow paedophiles to remain free in order to prevent the criminal justice system from causing further harm to their own child. In my mind, that will never be a fair and just system.<sup>29</sup>

We heard evidence from Detective Sergeant Kelly Donaghy, who was a detective in the JIRT unit at Kogarah and who was the original officer in charge of the investigation of CDM. Detective Sergeant Donaghy gave evidence about the police involvement in the investigation and charging of CDM and the protocols that the NSW Police Force has on interviewing children and supporting children and their families in an investigation. Detective Sergeant Donaghy also gave evidence about the limited information that can be given during an investigation, including to parents, because of the risk of compromising the investigation or prosecution.

We also heard evidence from Detective Chief Inspector Peter Yeomans of the Child Abuse Squad in State Crime Command, NSW Police Force. Detective Chief Inspector Yeomans gave evidence on the role, structure and functions of JIRT; NSW Police Force policies and procedures for interviewing young children; training in communicating with young children; and support services and assistance provided to young children and their families.

Mr Huw Baker, the Crown prosecutor briefed to appear in the prosecution of CDM, gave evidence about the conduct of the prosecution, including the steps taken to try to obtain evidence to support the charges against CDM to the required standard of proof and the requirements for particularising charges. Mr Baker outlined that the evidence of the young girls was such that it was difficult to say precisely when or how often the abuse had occurred. He said this would be a problem if the girls were cross-examined, as they would not be able to provide any details about a particular incident of offending.<sup>30</sup>

Ms Rhonda Dodd, a witness assistance officer in the Witness Assistance Service in the ODPP who had carriage of assisting the complainants in the prosecution of CDM, gave evidence about how the young girls, including CDO, were prepared for the prosecution and what information and assistance was provided to the children and their families during the prosecution.

### 30.2.5 The case of Mr Sascha Chandler

Mr Chandler's experiences in reporting the abuse he suffered to police illustrate the difficulties that all victims and survivors of child sexual abuse – even adults – face in reporting and in pursuing a prosecution. Mr Chandler's subsequent participation in police training illustrates the importance of police understanding the difficulties survivors face in coming forward.

Mr Chandler was abused as a teenager by Andrew McIntosh while Mr Chandler was a student at Barker College in the early 1990s. McIntosh was a cadet leader at Barker College.

McIntosh had been convicted of five counts of indecent assault in 1988, and he was on parole when he commenced working at Barker College.

Mr Chandler reported the offences McIntosh committed against him to police in 2006. He gave evidence that it was not until then that he felt able to report to police. He found the experience of reporting to police particularly difficult, and he felt like he had little support at a time of extreme vulnerability. Over the next few years, his case was handled by a number of different detectives, and Mr Chandler felt frustrated at having to retell his story to each detective.

In October 2007, McIntosh was arrested in Cairns in Queensland and extradited to New South Wales. He was charged with a number of offences relating to Mr Chandler and other child sexual abuse offences relating to other complainants.

In January 2009, McIntosh failed to report to police as required by his bail conditions. In February 2009, he was again arrested in Queensland and extradited to New South Wales.

In July 2009, McIntosh was convicted on 24 counts relating to Mr Chandler. Sentencing was delayed for McIntosh's trial on the child sexual abuse offences in relation to other complainants. In May 2011, he was convicted of 18 counts in addition to the 24 counts relating to Mr Chandler. He was sentenced to 32 years imprisonment with a non-parole period of 20 years.

McIntosh appealed against his sentence. In 2015, his sentence was reduced on appeal to 24 years imprisonment with a non-parole period of 18 years.

Mr Chandler gave evidence that he now participates in police training by giving presentations to detectives to provide a victim's perspective of child sexual abuse. He also provides support to survivors of sexual abuse who are preparing for trials. Mr Chandler's experiences were featured on an episode of the ABC Television program *Australian Story*.

We heard evidence from Mr Chandler on the abuse that McIntosh inflicted on him and his experiences in reporting the abuse to police and participating in the prosecution of McIntosh. He gave evidence that his experiences of providing evidence, both initially to police and subsequently in court, were isolating and difficult. He made recommendations about providing victims with support and preparation to cope with the challenges of the criminal justice process.<sup>31</sup>

Mr Chandler's evidence demonstrated that the challenges in reporting child sexual abuse and participating in a subsequent prosecution are significant, even for adults.

We also heard from Detective Sergeant Matt Davey of the Detectives Training Unit in the NSW Police Force, who gave evidence about relevant police training and Mr Chandler's role in presenting during the Investigation and Management of Adult Sexual Assault course.



### 30.2.6 The case of FAB

In Chapter 11, we outlined the prosecution of Brother Christopher Rafferty and the evidence given at his trial by the complainant FAB.

In section 11.2, we set out the background to the matter, noting that, in August 2016, Rafferty was tried and acquitted in relation to six counts of child sexual abuse alleged to have been committed between 1984 and 1987 against FAB.

FAB alleged that Rafferty, a teacher at St Patrick's College in Goulburn, sexually abused him while he was a student at that school in connection with music lessons. FAB gave evidence in Case Study 46 about the gruelling experience of giving evidence during Rafferty's trial, including his surprise at the detail he was required to go into in recounting the abuse and the intense nature of the questioning that was put to him. He told the public hearing:

I gave evidence over two days at the trial. It was a pretty gruelling experience. Everything about being in the courtroom was new to me. I think it is fair to say that even though I had been told what to expect by Goulburn police and the DPP, no-one told me the level of detail that I was required to go into with each of the incidents of the abuse. I was asked questions about the nitty-gritty of each particular incident, such as, for example, whether it happened in the morning or the afternoon or the colour of Rafferty's pubic hair. Given that the abuse had happened about thirty years ago, I was not always able to remember these sorts of details.

Rafferty's lawyers absolutely tore me to shreds when they cross-examined me. I remember that at times I became very upset. They asked me questions about inconsistencies between my statement to the Professional Standards Office [of the Catholic Church] in 2012 and the statements taken by police for the trial. They said that the inconsistencies showed that I was able to make up the abuse in order to get compensation from the Catholic Church. They made me feel like a real piece of crap. I don't make things up like this just to get compensation. You don't go through what I've been through just to make a little bit of money.

Looking back, I know that my evidence probably didn't come across as well as it could have. I know that this would have created some doubt in the judge's mind. But I had spent my whole life up until that point trying to forget what had happened to me at the school so that I could get on with the rest of my life. When I was giving my evidence at the trial, it was very difficult for me to recall and describe the minute details of each particular incident of the abuse.<sup>32</sup>

In his judgment, the judge noted that ultimately FAB had only given evidence in support of three of the six counts against Rafferty.<sup>33</sup> Notwithstanding the confusion apparent from FAB's evidence, and although the judge acquitted the accused on all counts, he said, 'I am well satisfied that the accused did sexually abuse the complainant at school and I reject his blanket denial as a reasonable possibility'.<sup>34</sup>

In section 30.7.2 we note the views of the Crown prosecutor in Rafferty's trial regarding the choice for adult victims of child sexual abuse to give evidence either via audiovisual (AV) link or live in court. We also discuss the benefits of prerecording the evidence of child sex offence complainants, including adults, in section 30.8.1.

### 30.3 Complainants' Evidence Research

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As discussed in section 8.5, in 2014, the Royal Commission engaged Professor Martine Powell, Dr Nina Westera, Professor Jane Goodman-Delahunty and Ms Anne Sophie Pichler to conduct a research project on how complainants give evidence and the impact that different means of taking evidence from a complainant have on the outcome of the trial. The research report, *An evaluation of how evidence is elicited from complainants of child sexual abuse* (Complainants' Evidence Research), is published on the Royal Commission's website.

The need for the research arose from a concern that special measures may not be being used as often as they could or should be and that there may be opposition to their use from some lawyers and judges, who might be either discouraging complainants from making use of permitted special measures or, in the case of judges, not permitting the use of some special measures.

The research project involved 17 studies, which are reported in the Complainants' Evidence Research. They enabled a mixed-method approach to be taken to analysing the use of special measures. Study techniques included:

- a survey of criminal justice professionals (judges, prosecutors, defence lawyers and witness assistance officers) regarding their experience with and views of the utility of special measures
- a review of prosecution case files to identify the scale of use of special measures
- a review of courtroom transcripts to identify how often special measures are used and the issues that arise when they are; and to analyse the suitability of instructions and questioning put to child witnesses
- a review of the minutes of the New South Wales Sexual Assault Review Committee to identify issues raised associated with special measures
- an analysis of audio and video clarity of recorded interviews, camera perspective and other technical aspects of prerecorded interviews
- an analysis of police interview transcripts to measure against academic findings on effective questioning techniques.

The Complainants' Evidence Research identifies that criminal justice professionals regard special measures as having improved the evidence-giving processes for child sexual abuse complainants and that they are routinely used, although more for children than for adults.<sup>35</sup>

Criminal justice professionals perceived that the special measures were generally an effective way of reducing the complainant's stress when giving evidence without compromising the fairness of the proceedings to the accused.<sup>36</sup>

The criminal justice professionals considered that reduction in stress improved the reliability and completeness of the complainant's evidence. The most effective and frequently used special measures were identified as prerecorded investigative interviews, closed circuit television (CCTV) and the presence of a support person.<sup>37</sup>

However, the Complainants' Evidence Research also identified areas where there is room for improvement in the use and effectiveness of special measures, particularly in:

- the conduct of police interviews, which is discussed in Chapter 8
- overcoming technological problems, which is discussed in Chapter 8 in relation to police investigative interviews and below in relation to courtroom issues
- improving questioning in the courtroom
- reducing delays in the prosecution process.<sup>38</sup>

The research also suggested that adult complainants would benefit from special measures being made more available for them to use.<sup>39</sup>

Specific findings from the research are discussed in the relevant sections below.

## 30.4 Special measures in Australian jurisdictions

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### 30.4.1 The range of special measures

The difficulties faced by complainants of sexual abuse, including child sexual abuse, have been recognised for many years. New South Wales began to introduce measures to assist complainants to give evidence in the early 1990s. Since that time, all Australian jurisdictions have introduced a range of measures – often termed 'special measures' – to assist complainants through modifying usual procedures for giving evidence.

A number of special measures are now commonly available, although their use varies across jurisdictions. They include:

- the use of a prerecorded investigative interview, often conducted by police, as some or all of the complainant's evidence in chief
- prerecording all of the complainant's evidence, including cross-examination and re-examination, so that the evidence is taken in the absence of the jury and the complainant need not participate in the trial itself. This measure can also reduce uncertainty in timing and delay

- CCTV may be used so that the complainant is able to give evidence from a room away from the courtroom
- the complainant may be allowed to have a support person with them when giving evidence, whether in the courtroom or remotely by CCTV
- if the complainant is giving evidence in court, screens, partitions or one-way glass may be used so that the complainant cannot see the accused while giving evidence
- the public gallery of a courtroom may be cleared during the complainant's evidence
- in some cases, particularly while young children are giving evidence, the judge and counsel may remove their wigs and gowns.

There have also been a number of reforms to procedural rules and rules of evidence. These include provisions:

- restricting the scope of questions that can be asked in cross-examination
- requiring the court to disallow improper questions in cross-examination
- allowing third parties to give evidence of the disclosure of abuse as evidence that the abuse occurred
- allowing expert evidence to be given about child development and child behaviour, including about the impact of sexual abuse on children.

### 30.4.2 Eligibility for special measures

While each jurisdiction has special measures for vulnerable witnesses, eligibility for these measures varies and is defined differently. For example, entitlement to a particular measure may depend on a witness's age, whether they have a particular disability or whether a particular offence is alleged to have been committed against them. Eligibility for different special measures in each jurisdiction is set out below.

#### New South Wales

In New South Wales, complainants in sexual offence proceedings may have a support person in court, use screens in the courtroom to avoid seeing the accused or give evidence from another room through CCTV.<sup>40</sup> Where the complainant or witness is a child, the court may also be closed to the public.<sup>41</sup>

A 'vulnerable person' (defined as a child under 16 years or a 'cognitively impaired person') is a separate category of witness with access to special measures under the *Criminal Procedure Act 1986* (NSW).<sup>42</sup> These include being able to give evidence in chief through use of their recorded police interview.<sup>43</sup>

Under the child sexual offence evidence pilot scheme in Sydney and Newcastle District Courts, children under the age of 18 years who are complainants of child sexual abuse may have all of their evidence prerecorded in the absence of a jury.<sup>44</sup> Following an amendment in October 2016, any child prosecution witness involved in a child sexual offence matter may have their evidence prerecorded.<sup>45</sup> The amendment also extended the use of intermediaries to any child prosecution witness involved in a child sexual offence.

The extension of the pilot to other child prosecution witnesses is particularly important for witnesses who are closely connected to the complainant, such as the complainant's siblings or classmates. By allowing them to give prerecorded evidence, the pilot allows the family or group to finish their direct involvement with the trial, except where the child's parents are required to give evidence. Without this measure, the complainant might not benefit as fully from prerecording their evidence because their siblings or friends are still caught up in the trial.

Intermediaries may be appointed to assist the parties and the court to communicate and explain questions and answers of child complainants and witnesses in the pilot.<sup>46</sup> In all other courts, the vulnerable person must be available for cross-examination and re-examination orally in the courtroom or by means of alternative arrangements such as giving evidence remotely using CCTV. This evidence currently cannot be prerecorded outside of the pilot scheme.

In its submission in response to the Consultation Paper, the New South Wales Government noted that preliminary analysis of administrative data collected by Victims Services indicated that prerecorded hearings were being held, on average, six months prior to the trial listing date.<sup>47</sup>

A process evaluation of the pilot was due to take place in April 2017, with a further evaluation in 2019 after the pilot has been operating for three years.<sup>48</sup>

## Victoria

In Victoria, under the *Criminal Procedure Act 2009*, complainants and other witnesses in sexual offence proceedings can access alternative arrangements for giving evidence.<sup>49</sup> These witnesses may give evidence through CCTV, with a screen, with a support person or in a closed court. Legal representatives may also be required not to wear robes while the witness gives evidence and to be seated when examining or cross-examining the witness.<sup>50</sup>

Witnesses in sexual offence proceedings who are under 18 years or have a cognitive impairment may give prerecorded evidence as their evidence in chief at trial.<sup>51</sup> Usually, this will be their recorded police investigative interview. Complainants in sexual offence proceedings under the age of 18 years or who have a cognitive impairment can have their cross-examination and re-examination recorded at a special hearing.<sup>52</sup> This enables the entire evidence to be prerecorded before the trial.

After we published the Consultation Paper, the Victorian Law Reform Commission published its report, *The role of victims of crime in the criminal trial process*. It made a number of recommendations for additional protections for witnesses in court, including:

- expanding special measures to victims who are likely to suffer severe emotional trauma or be so intimidated or distressed that they are unable to give evidence fairly<sup>53</sup>
- tightening the rules governing when a victim can be cross-examined at the committal stage<sup>54</sup>
- making the use of special measures the default position unless the victim does not wish to use them<sup>55</sup>
- introducing a guiding principle in the *Criminal Procedure Act 2009* (Vic) that special measures are to be used to limit, to the fullest practical extent, the trauma, intimidation and distress suffered by victims when giving evidence<sup>56</sup>
- amending the *Victims' Charter Act 2006* (Vic) to require prosecuting agencies to inform victims about special measures and to state the victim's preferences about the use of such measures to the court<sup>57</sup>
- that Court Services Victoria, in consultation with investigatory, prosecuting and victims' services agencies, should implement measures to protect victims attending court proceedings on indictable criminal matters, including by:
  - ensuring that victims can enter and leave courthouses safely, including, where possible, allowing them to use a separate entrance and exit
  - making available separate rooms for victims to wait in at court and ensuring victims know where they are
  - establishing remote witness facilities that are off-site or accessed via a separate entry to that used by other court users
  - using more appropriate means to screen victims from the accused when giving evidence in the courtroom.<sup>58</sup>

As discussed in section 3.3.1, on 7 May 2017 the Victorian Government announced a number of initiatives in response to the Victorian Law Reform Commission's report, including the introduction of a state-wide intermediary scheme and consultation on proposed reforms to committal hearings.<sup>59</sup> We understand that the intermediary scheme will be a two year pilot of a specialist service, available at key stages in the criminal justice system. The details of the scheme have not yet been announced.

## Queensland

In Queensland, a 'special witness' relevantly includes:

- a child under 16 years

- a person with mental, intellectual or physical impairment likely to be disadvantaged as a witness
- a person likely to suffer severe emotional trauma or intimidation.<sup>60</sup>

The special measures available for special witnesses include:

- screens
- closed court during evidence
- giving evidence from a separate room
- having a support person
- video recording the special witness's evidence for viewing in court instead of the special witness giving direct evidence
- court directions about rest breaks for the special witness, keeping questions simple for the witness, limiting time for questions or the number of questions asked on a given issue, or any other appropriate orders.<sup>61</sup>

Further special measures are also available for an 'affected child'. This refers to a witness in a sexual offence proceeding who was under 16 years at the commencement of a criminal proceeding or a witness who was under 18 years at the commencement of a criminal proceeding and who is a 'special witness'.<sup>62</sup>

The further special measures include prerecording the entirety of the child's evidence before the trial, or the child giving evidence by AV link or with a screen.<sup>63</sup>

Mr Michael Byrne QC, the Queensland DPP, gave evidence in Case Study 46 on the experience of prerecording in Queensland:

It happens almost inevitably for a child witness and has done since 2003. With children, their evidence-in-chief is taken by a recorded statement that occurs very close to the time of the reporting.

There is no provision for that for adults. But in terms of cross-examination, there is under our section 21A of the Evidence Act. It has recently been expanded from late last year to include any complainant in a matter of domestic violence as is defined under our domestic violence legislation. That wouldn't necessarily encompass, therefore, the institutional-type settings that this Royal Commission is dealing with, but it is an expansion to adults automatically if it's a domestic violence type of offence.

Further, there has been since I think about 1997, thereabouts, in section 21A provision for any witness, adult or child, who would be likely to suffer severe emotional trauma or would be likely to be so intimidated as to be disadvantaged as a witness, for their evidence

to be taken by special means. Now, that may mean that the witness is sitting in a remote room and, in effect, videoconferenced into the courtroom or it may mean a prerecording. It depends on the circumstances.

Again, as with Western Australia, there doesn't need to be a recognised psychiatric illness. It simply needs to meet those criteria. That provision is being increasingly used in Queensland in more recent years. I'd have to accept that it largely sat dormant for quite a while, but it is more readily being used now.<sup>64</sup>

Mr Byrne also noted that, now that the provisions have been in place for some time, there is not a great amount of objection from the defence Bar to prerecorded evidence.<sup>65</sup>

## Western Australia

In Western Australia, a 'child' is defined as being a person under 18 years.<sup>66</sup> A child is entitled to a support person while giving evidence.<sup>67</sup> The court may also appoint a person to act as a communicator for the child. The communicator's function is to communicate and explain questions to the child and the child's answers to the court.<sup>68</sup> The whole of a child's evidence (including cross-examination and re-examination) in a sexual offence proceeding may be recorded at a special hearing and presented at trial.<sup>69</sup>

Recorded police interviews may be admitted as the whole or part of a witness's evidence in chief for a child or person with mental impairment if police had reason to believe the witness may have been physically or sexually abused.<sup>70</sup>

In addition, under section 106R(1) of the *Evidence Act 1906* (WA), a judge may declare a witness to be a special witness. A 'special witness' is a person with physical disability or mental impairment; or a person who is likely to suffer severe emotional trauma or be so intimidated or distressed that they cannot give evidence satisfactorily.<sup>71</sup> Available measures include having a support person, a communicator or the ability to give evidence by AV link or with screens.<sup>72</sup> As with children, the court may order the whole of the evidence to be recorded at a special hearing.<sup>73</sup>

## South Australia

In South Australia, special arrangements are available for protecting witnesses generally from embarrassment, distress or intimidation when giving evidence.<sup>74</sup> The court 'should' order special arrangements. Special arrangements may include:

- giving evidence through CCTV
- prerecording evidence to be used at trial
- use of a screen, partition or one-way glass



- use of a support person
- that the evidence be taken a particular way to minimise embarrassment or distress if a witness has a physical disability or cognitive impairment.

There are additional measures for protecting ‘vulnerable witnesses’ in criminal proceedings. A vulnerable witness includes:

- a person under 16 years of age
- a person with a cognitive impairment
- a victim of a sexual offence
- any witness who, because of the circumstances of the case, in the court’s view would be specially disadvantaged if not treated as a vulnerable witness.<sup>75</sup>

The court ‘must’, on application, order special arrangements for vulnerable witness, which may include the special arrangements listed above. They may also include additional measures of an extra allowance for breaks and that lawyers and the judge not wear robes or wigs.<sup>76</sup> The court may also appoint a communication assistant for a witness, which is discussed further in section 30.7.3.<sup>77</sup>

Also, for a child under 14 years, or a person with disability that adversely affects their capacity to give a coherent account of their experiences or respond rationally to questions, the court may order a pre-trial special hearing to record their full evidence.<sup>78</sup>

## Tasmania

In Tasmania, under the *Evidence (Children and Special Witnesses) Act 2001*, special measures are available for a child under 18 years.<sup>79</sup> Measures include:

- a child may have a support person<sup>80</sup>
- a child’s evidence in sexual offence proceedings may be recorded in full at a special hearing so that it can be presented at trial, where the child need not be present<sup>81</sup>
- a child’s evidence in sexual offence proceedings can be given by AV link, and prior statements of the child may be admitted.<sup>82</sup>

A ‘special witness’ is a person with an intellectual, mental or physical disability that would prevent them from giving evidence in the ordinary manner; or some other vulnerability, such as a relationship to any party to the proceeding that is likely to cause severe emotional trauma, intimidation or distress so as to prevent them giving evidence satisfactorily.<sup>83</sup> Special witnesses may be permitted to have a support person, give evidence via AV link, have a prior statement admitted, record their evidence in full in a special hearing, or give their evidence in a closed court.<sup>84</sup>

## Australian Capital Territory

In the Australian Capital Territory, in a sexual offence trial, complainants and other witnesses may access special measures, including the use of screens and support persons and closing the court.<sup>85</sup>

Witnesses in sexual offence proceedings who are under 18 or intellectually impaired may have their police investigative interview admitted as their evidence in chief by means of a video recording.<sup>86</sup> In his submission in response to the Consultation Paper, the DPP for the Australian Capital Territory noted that these provisions would be extended to all sexual offence complainants in May 2017.<sup>87</sup>

Prosecution witnesses in sexual offence proceedings who are under 18, are intellectually impaired or are likely to suffer severe emotional trauma or be intimidated or distressed may give the whole of their evidence, including cross-examination and re-examination, via AV link at a pre-trial hearing.<sup>88</sup>

## Northern Territory

The Northern Territory has special measures for ‘vulnerable witnesses’ and additional protections for vulnerable witnesses in sexual offence proceedings. The following are vulnerable witnesses:

- children under 18 years
- persons who have a cognitive impairment or intellectual disability
- victims of a sexual offence
- persons who the court considers vulnerable.<sup>89</sup>

A vulnerable witness may give evidence by CCTV, using a screen, with a support person or in a closed court.<sup>90</sup>

For vulnerable witnesses in sexual offence proceedings, the court may admit a recorded statement as their evidence in chief and hold a special pre-trial hearing to record the cross-examination and re-examination of the witness.<sup>91</sup>

## Commonwealth

In her submission in response to the Consultation Paper, the Commonwealth DPP noted that there are specific measures in Part IAD of the *Crimes Act 1914* (Cth) for the protection of vulnerable witnesses.<sup>92</sup> These measures include restrictions on cross-examination, giving evidence via CCTV, use of video recordings as evidence in chief and in retrials, support people, and clearing the court.

### 30.4.3 Use of special measures

#### Frequency of use of special measures

One of the studies in the Complainants' Evidence Research assessed the use of special measures by examining trial transcripts across three jurisdictions – New South Wales, Victoria and Western Australia.

The Complainants' Evidence Research found that child and adolescent complainants had ready access to special measures when giving their evidence in chief, with almost all using the police investigative interview. Although most adults used special measures, there was more variability, and more adults gave their evidence in person.<sup>93</sup>

Almost all children and adolescents used CCTV or AV link during cross-examination – some of the cross-examinations by CCTV or AV link were prerecorded. While most adults were cross-examined via CCTV, a substantial number gave evidence live in court. A small number of complainants gave their evidence live in court with the use of a screen.

Most child complainants and at least half of adult complainants used support persons, and the public gallery was cleared for most complainants in New South Wales and Victoria. There were few occasions where judges and lawyers removed their wigs or gowns.

As noted in section 30.3, the Complainants' Evidence Research identified that criminal justice professionals regard special measures as having improved the evidence-giving processes for child sexual abuse complainants. They are generally an effective way of reducing the complainant's stress when giving evidence, which improves the reliability of the complainant's evidence without compromising the fairness of the proceedings to the accused.

#### Problems with use of special measures

In the Complainants' Evidence Research, criminal justice professionals identified the use of the police investigative interview as evidence in chief as one of the most effective and frequently used special measures. However, if the interview is not well conducted, the researchers identified that it may adversely affect the jury's view of the complainant's reliability and credibility. This is particularly a problem if the interview includes many peripheral details which lead to extensive cross-examination on inconsistencies that are not central to the offences charged.

Improving police investigative interviewing, including through improved skills and training, is discussed in Chapter 8.

The Complainants' Evidence Research also found that approximately 50 per cent of cases in New South Wales and Victoria, and 40 per cent in Western Australia, experienced some kind of problem when playing prerecorded interviews – the most common being inadequate volume, a problem viewing the complainant on the screen and the operation of devices playing recordings.<sup>94</sup> Similar problems arose when using CCTV or AV links.<sup>95</sup>

The researchers conclude that best-practice standards are needed to address the image and audio quality of prerecorded and CCTV videos.<sup>96</sup> They state:

Videotaped evidence varied depending on the camera angle used. Many recordings failed to capture images of the complainant that allowed for an adequate assessment of demeanour, by omitting an image of more than just the complainant's face, or by placing the camera at such a great distance from the complainant that the complainant's facial expressions were not adequately displayed.<sup>97</sup>

Technical problems with prerecorded interviews or CCTV or AV links are also disruptive for complainants and other participants in the trial, and they cause delays. They may also increase the stress of the complainant, potentially causing them to give less reliable evidence.

The Complainants' Evidence Research also identified that some stakeholders felt that evidence given via a prerecorded interview or via CCTV had less impact than evidence given in person, and it made it harder for the jury to assess the credibility of the witness. Such problems can be exacerbated where there are technical problems with viewing the evidence.<sup>98</sup>

Views on the impact of special measures on the credibility of the complainant varied according to the age of the complainant. A prerecorded interview was considered the most credible special measure for children, while giving evidence live, without any special measures, was perceived as the most credible form of evidence for adult complainants.<sup>99</sup>

The Complainants' Evidence Research also surveyed different criminal justice professionals on their attitudes to different special measures and their impact on credibility. The researchers found that opinions on which special measures produced the most reliable evidence differed depending on the professional background of the person surveyed. Defence lawyers were significantly more likely to rate evidence given live in person as more reliable, whereas judges, prosecutors, police and support persons were more likely to rate evidence given via CCTV or a prerecorded interview as more reliable.<sup>100</sup>

## 30.5 Other courtroom issues

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### 30.5.1 Competency testing

In the Uniform Evidence Act jurisdictions, everyone is presumed to be competent to give evidence.<sup>101</sup> A person will not be competent where it can be shown that they do not have the capacity to understand a question about a fact or give an understandable answer.<sup>102</sup>

To give sworn evidence, a person must have the capacity to understand that they are under an obligation to give truthful evidence.<sup>103</sup> If a person does not have this capacity, they may give unsworn evidence after the court has informed them that it is important to tell the truth, that they can say if they do not know the answer to a question and that they should not feel any pressure to agree with statements that are not true.<sup>104</sup>

Although they differ in some respects, the competency tests in Queensland, Western Australia and South Australia are similar to that used in the Uniform Evidence Act jurisdictions.<sup>105</sup>

The issue of competency testing typically arises in cases involving younger children or people with disability. Older children and adults are unlikely to face competency testing unless they may have disability that affects their cognitive abilities.

The Complainants' Evidence Research examined competency questions asked in 51 trials involving 56 child complainants. The researchers coded the questions into different types:

- Definition – for example, 'What does the truth mean?'
- Identification – for example, 'If I were to say my hair was green, would that be the truth?'
- Example – for example, 'Give me an example of a lie.'
- Difference – for example, 'What's the difference between truth and lie?'
- Evaluation – for example, 'Is it good or bad to tell a lie?'
- Consequence – for example, 'What do you think will happen if you tell a lie?'
- Prior occurrence – for example, 'Have you ever told a lie?'
- Obligation/promise – for example 'Will you tell the truth today?'<sup>106</sup>

The most common question types were the identification, evaluation and obligation/promise types.

Children who ultimately gave unsworn evidence tended to be younger. Although the research found that judges tended to ask more questions of younger children,<sup>107</sup> this may simply reflect the fact that competency is more likely to be in issue with younger children, and judges are giving younger children every chance to give sworn evidence by testing their competency.

The Complainants' Evidence Research cites academic literature suggesting that testing whether a child knows the difference between a truth and a lie (the difference type of question) is not a good indicator of whether a child will tell the truth in their evidence. The researchers suggest that, based on academic literature, a better approach would be simply to ask a child whether he or she will promise to tell the truth (the obligation/promise type of question). They refer to this being the approach now adopted in Canada and Scotland.<sup>108</sup>

In her evidence in Case Study 38, Professor Penny Cooper gave her opinion that an intermediary can make the difference between a child being assessed as competent or not, as they can play a role in helping a witness to understand and answer questions, which is the basic test of competency.<sup>109</sup> Professor Cooper also noted that at least one non-government organisation that trains intermediaries has developed a mobile device application – an app – to assist children with telling the difference between a truth and a lie.<sup>110</sup>

In *GO v The State of Western Australia*,<sup>111</sup> the Western Australian Court of Appeal considered the issue of the competency of a seven-year-old child, M, to give unsworn evidence and the fairness of trial proceedings about her sexual assault by two co-accused adults (her mother and a man her mother formed a relationship with). M gave evidence before the jury but became distressed while she was being cross-examined by the second accused's barrister. The judge, who was concerned about the slow pace and repetitiveness of the questioning, suggested a brief adjournment. Following this, M remained distressed and refused to return to the remote witness room. After an overnight adjournment, the situation remained the same. Ultimately the trial judge excused M from having to be involved any longer. Both adults were convicted of sexual offences against M as well as sexual offences against M's brother W, who also gave evidence at the trial.

One of the issues raised on appeal was whether M was competent to give unsworn evidence. The Court of Appeal held:

The critical question concerns the intelligibility, rather than the accuracy or reliability, of the account which the child is able to give. The circumstance that the child gives answers which may be regarded as incorrect does not preclude a judge from being satisfied that the child is able to give an intelligible account of events. The reliability of the account of events which the child gives is a matter for assessment by the jury after the evidence is received. The trial judge was not required to satisfy himself of the reliability of M's account before her evidence could be admitted. It was sufficient that the judge was satisfied that M was able to give an intelligible account of events.<sup>112</sup>

### 30.5.2 Courtroom questioning

The Complainants' Evidence Research identifies that the types of questions that lawyers and judges ask of complainants can have a strong influence on the accuracy and detail of the responses that complainants provide. Complainants are more likely to make errors when answering questions that are leading, complex and repeated. This is likely to be the case for children in particular, due to developmental factors and the risk that children will tire more quickly than adults.

In her evidence in Case Study 38, Ms Henning stated that the nature of courtroom questioning can, itself, render vulnerable witnesses unreliable. This is because these witnesses will rarely seek clarification even where they do not fully understand the question. They will try to give answers that do not necessarily make sense, rendering them unreliable in the eyes of the jury.<sup>113</sup>

After police investigative interviews, the aspect of current practice most criticised by the criminal justice professionals interviewed for the Complainants' Evidence Research was courtroom questioning that was unfair to the complainant. However, the criminal justice professionals also identified that the adversarial nature of criminal trials meant that giving evidence was always going to be taxing for complainants.<sup>114</sup>

It is probably to be expected that, as the complainant's evidence is the main – and in some cases, the only – direct evidence of the abuse in child sexual abuse trials, if the accused does not plead guilty, the complainant's evidence is likely to be subjected to extensive testing and criticism through cross-examination.

As discussed in Chapter 4, we have recently published Professor Goodman-Delahunty, Associate Professor Nolan and Dr van Gijn-Grosvenor's report, *Empirical guidance on the effects of child sexual abuse on memory and complainants' evidence* (Memory Research).<sup>115</sup> We also convened a public roundtable on complainants' memory of child sexual abuse and the law, in conjunction with finalising the Memory Research.

Below we outline the findings from specific studies undertaken as part of the Complainants' Evidence Research and aspects of the Memory Research and relevant discussion at the roundtable, highlighting particular issues in courtroom questioning.

#### Cross-examination and normative assumptions

The Complainants' Evidence Research identified three common themes in cross-examination:

- questioning the capacity of children to give reliable evidence
- questioning minor details as an indirect criticism of the validity of the central allegation
- questioning the way in which the victim responded to the abuse.

Noting separate research that children can be accurate witnesses if questioned correctly, the researchers identified that defence counsel sometimes implied that children may not be accurate witnesses by reference to their creativity or imagination.<sup>116</sup>

We discussed the findings of the Memory Research in relation to children's memory and their ability to give accurate accounts of events in section 4.3.3. We also discussed the myth or misconception that children are easily manipulated into making up stories of sexual abuse and reported the Memory Research's conclusion that 'the view that children are more suggestible than adults is regarded by many contemporary memory researchers as "outdated"' (reference omitted).<sup>117</sup>

The Complainants' Evidence Research cites empirical research that errors or inconsistencies in minor details do not reliably predict overall accuracy or deception. The transcript analysis identified that defence counsel routinely suggested that poor memory or inconsistency in relation to minor details indicated that the central allegation was wrong. 'Minor details' included the colour of clothing or the weather.<sup>118</sup>

Reporting child sexual abuse involves recalling one or a series of personal life events, based on both autobiographical and event memory.<sup>119</sup> In relation to autobiographical memories, the Memory Research stated:

Autobiographical memories are recollections of one's personal history, comprised of personally experienced episodes from our past. These memories are fundamental to our sense of self, goals and motivations, and interpersonal relationships, and also allow us to make sense of the present and anticipate the future.<sup>120</sup> [References omitted.]

The Memory Research stated:

A person's knowledge of their personal life is more stable, and less error-prone than memory for one-off episodic events. In other words, according to the British Psychological Society Research Board: 'memories of the knowledge of a person's life are more likely to be accurate than memories for specific events'<sup>121</sup> and stronger than episodic recall for event locations, times and dates.<sup>122</sup>

Gaps in memory are normal, but central, distinctive and personally significant aspects of events are likely to be encoded and retained. Distinctiveness may involve novelty, stress, trauma or pain.<sup>123</sup> The Memory Research suggests that the subjective significance of events can make them more distinctive and enduring.<sup>124</sup>

While there are likely to be inconsistencies in a complainant's account of abuse, the inconsistencies do not necessarily indicate that the account is inaccurate or unreliable. At our public roundtable, Professor Neil Brewer of the School of Psychology at Flinders University discussed eyewitness memory research and the relationship between contradictions in the witness's different accounts of the event they observed and the overall accuracy – or global accuracy – of their evidence. He said:



I don't think there actually is any children's research ... on the relationship between contradictions and the accuracy at the global level of testimony, but the work we've done and other people have done on the relationship in adults shows what, to most people, seems like a counter-intuitive finding, certainly one that's at odds with what judges think, namely, the relationship between the two is rather weak. It also shows that if you interview a person a day after the event and three months later, in fact everyone produces contradictions in their testimony.

So while the relationship is weak, of course, we are not able to say a pile of things – is there some kind of ceiling, is there a certain number of contradictions in testimony that indicates that this person has suddenly crossed the line and you shouldn't believe them?

I guess with our work on adults, we'd be saying, 'Well, you expect contradictions', and they can actually be about really major things. They don't have to be about some little dinky subset of material. That's the first thing. The second thing is they indicate one of those two bits of information is obviously wrong. The third thing is that it doesn't necessarily indicate that the whole testimony is flawed. The fourth thing probably is that you can't identify a magical number of contradictions that now lead you to transition from, 'This witness is okay' to, 'This witness is a major problem.' All of these things are just murky.<sup>125</sup>

Professor Brewer also identified that this research has focused on contradictions in details rather than in gist, and the implications of a contradiction in gist have not been studied.<sup>126</sup>

In relation to delay, after noting research indicating that, for a variety of reasons, victims of child sexual abuse may delay reporting and even show loyalty to the offender, the Complainants' Evidence Research identifies examples of defence counsel questioning the complainant about their lack of resistance or delayed reporting.

## Cross-examination strategies and tactics

Using a breakdown of identified cross-examination strategies from previous research, the Complainants' Evidence Research used the transcripts to record how often these strategies were used and whether this varied by the age of the complainant.

The main strategies identified were:

- attacking the complainant's reliability – for example, by:
  - questioning the accuracy of their recall
  - raising environmental factors at the time of the offence, such as the complainant having been asleep
- attacking the complainant's credibility – for example, by:

- suggesting that the complainant is lying
- suggesting a motive for making a false allegation
- raising previous 'bad character' or dishonesty by the complainant
- attacking the plausibility of the complainant's story – for example, by:
  - raising the absence of resistance by the complainant at the time of the offence
  - raising the delay in reporting
  - raising the lack of emotionality by the complainant at the time of the offence
  - raising the continued relationship between the complainant and the accused after the offence
  - suggesting that the abuse simply could not have taken place in the manner alleged, whether because of the presence of other adults in close proximity or physical limitations
- attacking the complainant's consistency – for example, by raising inconsistencies between the complainant's evidence in court and:
  - the complainant's police interview
  - other evidence the complainant has given in court
  - evidence of other witnesses
  - the accused's account
- indiscriminate strategies that target reliability or credibility – for example, by:
  - suggesting the complainant is wrong
  - suggesting collusion and contamination with another complainant
  - raising custody disputes in relation to familial abuse
  - raising the complainant's mental health
  - raising the complainant's drug and alcohol use
  - raising any history of sexual abuse, including abuse of close relatives of the complainant.<sup>127</sup>

The Complainants' Evidence Research found that eight out of 10 complainants had every strategy used against them and that this occurred regardless of the age of the complainant.<sup>128</sup>

The researchers analysed the tactics used and the number of lines of questioning in each tactic. They provide examples of tactics targeting memory loss on minor details (as opposed to the central elements of the offence) and their frequent use with tactics targeting inconsistencies, again particularly on minor details.

The researchers suggest that some tactics – for example, asking about motivations to make a false allegation; or contradictions between the complainant's accounts of events that were directly relevant to establishing the elements or particulars of the offence – are legitimate lines of questioning. They are more critical of tactics that rely on unfounded stereotypes about memory and complainant behaviour, such as memory errors over minor details or lack of resistance.<sup>129</sup>

The researchers also suggest that defence lawyers used tactics in some cases without any clear aim and that, as a consequence, complainants endured prolonged questioning regardless of age. They suggest that the indiscriminate use of tactics and prolonged cross-examination are likely to be making the evidence-giving process more difficult for complainants.<sup>130</sup>

## Cross-examination on inconsistencies

The Complainants' Evidence Research looked at the inconsistencies identified in the study on cross-examination strategies and tactics discussed above and coded them according to the nature, significance, content, type and source of the inconsistency.

The results indicated that:

- inconsistencies within the complainant's own evidence or with the evidence of another witness were raised far more frequently (raised with over 90 per cent and over 80 per cent of complainants respectively) than inconsistencies with the accused's evidence (raised with more than 40 per cent of complainants) or other evidence (raised with more than 30 per cent of complainants)
- defence lawyers raised inconsistencies with matters the researchers identified as 'central' to proving the offence with 72.4 per cent of complainants, but they raised inconsistencies with 'peripheral' matters with 98.4 per cent of complainants
- inconsistencies regarding the offence, its timing and the evidence of other witnesses were raised with the majority of complainants
- inconsistencies that were contradictions were raised far more frequently (raised with 98.4 per cent of complainants) than those that were additions (raised with 50.4 per cent of complainants) or omissions (raised with 29.3 per cent of complainants)
- the most common sources for inconsistency arguments from the defence against children and adolescents were between the police interview and the cross-examination, and these were raised with 74.7 per cent of complainants.<sup>131</sup>

In the 83 cases where the complainant was under 18 years of age and had a prerecorded police interview, the Complainants' Evidence Research found that, as the number of questions asked by police in the prerecorded interview increased, so did the lines of questioning on inconsistencies in cross-examination.<sup>132</sup>

The researchers also assessed the quality of the police interviews on a scale of 1 to 5 and found that better-quality interviews were associated with the raising of fewer inconsistencies at trial.<sup>133</sup>

However, the researchers also found no significant associations between the case outcome and the inconsistencies raised for those cases where the outcome was available.

## Labelling

The Complainants' Evidence Research examined the 'labels' that were used to describe specific incidents of sexual abuse (for example 'the time at the holiday house' or 'the first time'). It identified the person who introduced these labels (for example, the complainant, the police interviewer or defence counsel), and whether the incident was given a different label at different stages of the criminal justice process.

As discussed in Chapter 8, the Complainants' Evidence Research cites research to the effect that, ideally, labels should be created at the police interview and used consistently thereafter. Also, particularly for children, if a child can generate the label in their own words and from their own perspective or recollection of events, it is more likely that unique and meaningful labels will be created. It is important that labels are used consistently to avoid errors and also because labels can have an important memory function: they allow a more accurate and detailed recall.

The study only examined labels used in Western Australia, as the trial transcripts from New South Wales and Victoria did not contain all aspects of the trial.<sup>134</sup> For the 59 incidents given labels, 177 labels were used, meaning that 118 labels were replacing a previous label.<sup>135</sup>

Table 30.1 shows who created the labels and whether they were the first or replacement labels.<sup>136</sup>

**Table 30.1: Creation of labels**

Creator	Total labels		First labels for an occurrence		Replacement labels	
	Frequency	%	Frequency	%	Frequency	%
Child	23	12.99	11	18.64	12	10.17
Interviewer	36	20.34	27	45.76	9	7.63
Prosecutor	46	25.99	17	28.81	29	24.58
Defence lawyer	54	30.51	4	6.78	50	42.37
Judge	18	10.17	0	0.00	18	15.25
Total	177	100.00	59	100.00	118	100.00

Table 30.2 shows at which stage of the criminal justice process each label was created.<sup>137</sup>

**Table 30.2: Stage at which label was created**

Stage	Total labels		First labels for an occurrence		Replacement labels	
	Frequency	%	Frequency	%	Frequency	%
<b>Police interview</b>	46	25.99	37	62.71	9	7.63
<b>Prosecutor's opening</b>	27	15.25	12	20.34	15	12.71
<b>Defence's opening</b>	5	2.82	0	0.00	5	4.24
<b>Evidence in chief</b>	15	8.47	4	6.78	11	9.32
<b>Cross-examination</b>	58	32.77	5	8.47	53	44.92
<b>Re-examination</b>	8	4.52	1	1.69	7	5.93
<b>Judge's summing up</b>	18	10.17	0	0.00	18	15.25
<b>Total</b>	<b>177</b>	<b>100.00</b>	<b>59</b>	<b>100.00</b>	<b>118</b>	<b>100.00</b>

These results show that children created very few labels, while defence lawyers created the most, including nearly half of the replacement labels. Nearly 63 per cent of 'first' labels were created at police investigative interview stage, although more were created by the interviewer than by the child.

## Types of questions

The Complainants' Evidence Research analysed the trial transcripts of 63 complainants to examine the number and types of questions being asked and the responses generated.

Questions were coded into categories such as:

- **open:** what happened?
- **closed:** did anything happen?
- **leading:** you had been separated from your father, hadn't you?
- **complex:** a multi-part question or using complex language.

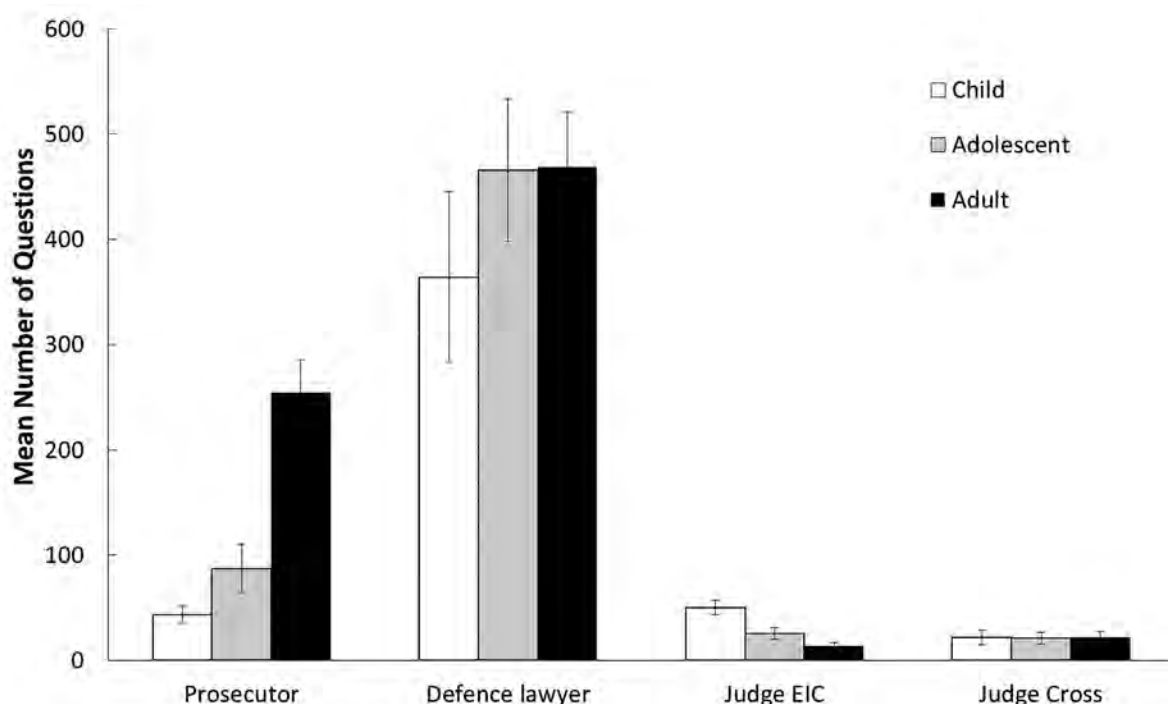
Responses were coded into categories such as ‘complies’, ‘resists’ and ‘misunderstands’.<sup>138</sup>

The researchers noted literature that suggested that leading, complex and repeated questions increased the chance that complainants would produce unreliable evidence.<sup>139</sup>

The analysis showed that defence lawyers asked the most questions.

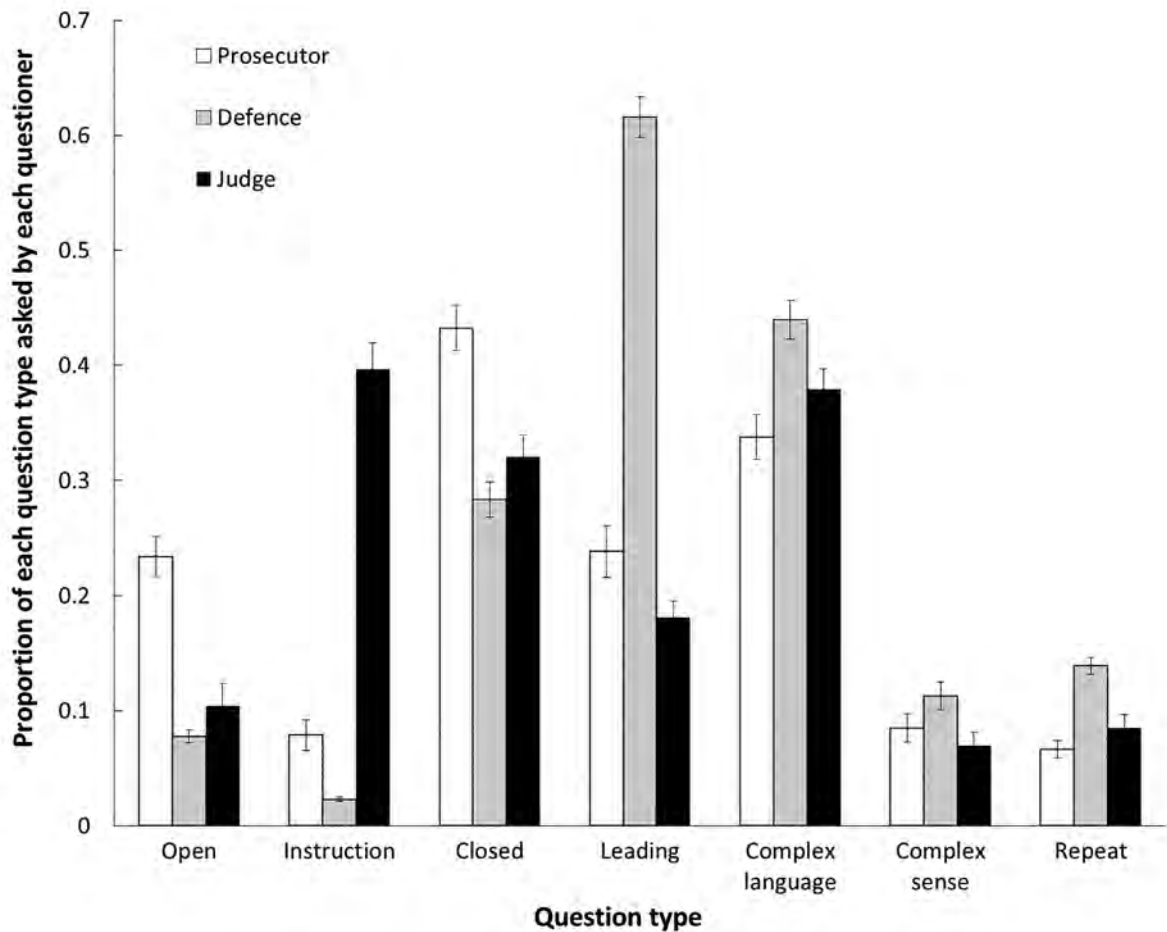
Figure 30.1 shows the mean number of questions asked by prosecutors, defence lawyers and judges, with the judges’ questions separated between evidence in chief and cross-examination. Figure 30.1 also breaks down the questions by age group (‘children’ are six to 11 years old, ‘adolescents’ are 12 to 17 years old and ‘adults’ are 18 years or older).<sup>140</sup>

**Figure 30.1: Mean number of questions**



The study also broke down the types of questions, as shown in Figure 30.2, and identified whether the prosecutor, defence counsel or judge asked the question. Prosecutors used closed questions most often, and they used leading questions as much as open questions; more than 60 per cent of defence counsel’s questions were leading questions, and less than 10 per cent were open.<sup>141</sup>

**Figure 30.2: Types of questions**



When breaking down the questions asked by age of the complainant, the Complainants' Evidence Research found that prosecutors asked children and adolescents fewer open questions and gave more instructions. The types of questions asked by defence counsel varied little across age groups. In terms of responses, children and adolescents complied more often with leading questions than adults and sought fewer clarifications.

In Case Study 38, Ms Henning agreed with the literature cited in the Complainants' Evidence Research to the effect that leading questions are unlikely to elicit the best evidence from vulnerable witnesses, because the witness will simply agree with the suggestion in the question as it is put by someone older and who is in a position of authority.<sup>142</sup>

## Judicial interventions

The Complainants' Evidence Research examined 120 transcripts of complainants' evidence at trial and coded the interventions by judges, whether on their own motion or at the request of counsel.

The types of interventions were broken down into the following categories:

- **Question form:** This can include vague or misleading questions, complex language and sentence structure.
- **Question manner:** This can include repetitive questions, going too quickly, interrupting the complainant or changing topics abruptly in a manner that might be confusing.
- **Question substance:** This can include oppressive or harassing questions.
- **Matter of law:** This can include issues of relevance and introduction of sexual history evidence.
- **Complainant care:** This can include suggesting a break.
- **Complainant directions or questions:** This can include asking the complainant to wait until the question is put, clarifying the complainant's answers or asking questions of the complainant (to clarify the evidence).<sup>143</sup>

The analysis showed that the most common intervention was by the judge during cross-examination, and this occurred nearly four times more often than interventions by prosecutors.<sup>144</sup>

Table 30.3 shows the number of interventions by judges and lawyers.<sup>145</sup>

**Table 30.3: Interventions by judges and lawyers**

Intervention by	Total interventions	Mean (standard deviation)	Range
Judge evidence in chief	262	2.18 (4.81)	0–45
Defence lawyer	110	0.9 (1.48)	0–26
Judge cross-examination	1,293	10.78 (4.41)	0–162
Prosecutor	344	2.87 (4.40)	0–26
<b>Total</b>	<b>2,009</b>	<b>16.74 (22.24)</b>	<b>0–169</b>

Defence lawyers intervened more often with adults than with children (which would be expected given that children's evidence in chief, or at least most of it, would generally have been settled in advance through editing the prerecorded investigative interview). The interventions of judges and prosecutors did not significantly differ based on the age of the complainant.<sup>146</sup>

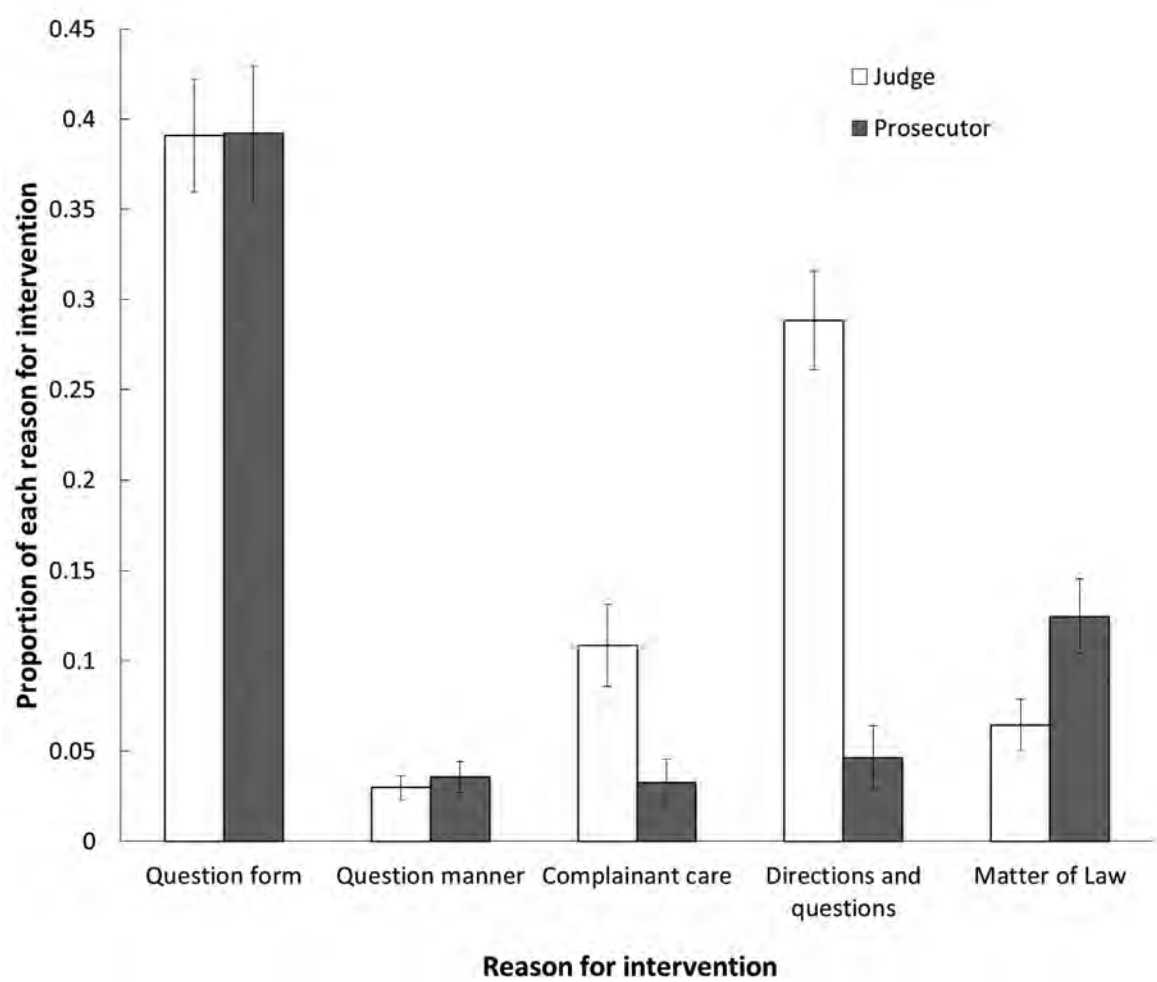


The most common judicial intervention was regarding the form of a question (for example, asking counsel to rephrase a complex or vague question) or to give a direction or ask their own question. There were very few interventions for question substance.<sup>147</sup>

The types of intervention did not vary according to the age of the complainant.

Figure 30.3 shows the reasons for intervention by judges and prosecutors (excluding question substance, because it occurred so infrequently).<sup>148</sup>

**Figure 30.3: Reasons for intervention**



In Case Study 38, Ms Henning gave evidence that, despite the introduction of provisions placing a duty on judges to disallow improper questions, judges rarely intervene. She said that this is for a variety of reasons, including:

- they do not wish to be seen as intervening too much in a cross-examination because it may result in a jury drawing adverse inferences about the witness

- as a matter of principle, some judges allow counsel significant autonomy in conducting their case, as that is consistent with the principles of adversarial trials
- the factors they may take into account in deciding whether a question is improper include the subjective characteristics of the witness, which is difficult to do on the limited information that the judge might have about the witness.<sup>149</sup>

## The rule in *Browne v Dunn*

The rule in *Browne v Dunn* is a rule of fairness. It requires a party who intends to lead evidence that will contradict or challenge the evidence of a witness to put that evidence to the witness.<sup>150</sup> The rule prevents a witness being discredited without the chance to respond.

We have heard that observance of the rule can have unintended consequences for children and other vulnerable witnesses. Instead of seeing it as an opportunity to correct an inaccurate statement, vulnerable witnesses may become confused and feel like they are simply being accused of lying.<sup>151</sup> Where the rule requires the defence counsel to seek a response from the complainant about any claims by the accused – typically in the form of questions such as ‘I put it to you that’ or ‘I suggest to you that’ – this may be confusing and distressing for complainants.<sup>152</sup>

The Complainants’ Evidence Research reports that some defence counsel participating in the survey of professionals questioned the utility of the rule and recognised that it could cause harm and confusion for complainants. They identified it as a possible area for reform.<sup>153</sup>

Ms Henning gave evidence that, in England and Wales, courts have provided that the rule need not be complied with in certain situations to avoid such problems.<sup>154</sup> In her statement for Case Study 38, Professor Cooper stated that the Criminal Procedure Rules in England and Wales were amended in April 2015 to explicitly provide for ground rules hearings and that one of these ground rules can be a direction relieving a party of any duty to put that party’s case to a witness or a defendant in its entirety.<sup>155</sup>

### 30.5.3 Evidence of disclosure to third parties

We heard evidence in Case Study 38 of circumstances where a child may make a disclosure to a third party – for example, a teacher or a parent – but is then unable to make disclosures to police that are capable of being led as evidence in a trial.

Evidence of earlier disclosures by the victim is generally not admissible to prove the truth of what the victim said. These disclosures may be admitted as evidence of ‘early complaint’ – to prove that the victim made an earlier disclosure of the abuse – but not to prove the abuse itself.

Evidence from a third party that the victim said they were abused is generally inadmissible as ‘hearsay’ evidence if it is sought to be used as evidence that the victim was abused. In the Uniform Evidence Act jurisdictions, such evidence is not admissible under the hearsay rule: Uniform Evidence Act, section 59.

There are exceptions where hearsay evidence may be allowed to prove the abuse, although these are limited:

- If the victim is available and has been or is called to give evidence, their disclosure of abuse to a third party is admissible to prove the abuse if the abuse was ‘fresh in the memory’ of the victim at the time they disclosed to the third party: Uniform Evidence Act, section 66. This exception may be of little assistance. The victim will give evidence themselves, and it may be unlikely that a conviction would be secured by relying on the third party’s hearsay evidence of the victim’s earlier disclosure if the victim did not provide direct evidence of the abuse.
- If the victim is ‘unavailable to give evidence’ by reason of being ‘mentally or physically unable to give the evidence and it is not reasonably practical to overcome that inability’, their disclosure of abuse to a third party is admissible to prove the abuse if they made the disclosure either:
  - when or shortly after the abuse occurred and in circumstances that make it unlikely the disclosure is a fabrication
  - in circumstances that make it highly probable that the disclosure is reliable: Uniform Evidence Act, section 65.

This exception may be of some assistance if the victim’s mental or physical inability to give evidence has arisen since they disclosed to the third party. However, if they had a disability that did not prevent disclosure to the third party, it may be difficult to establish that they are unavailable to give evidence because of that disability – that is, if they can tell the third party, they should also be able to tell the court in evidence.

In 2015, South Australia enacted the *Statutes Amendment (Vulnerable Witnesses) Act 2015 (SA)*, which inserted section 34LA into the *Evidence Act 1929 (SA)*. Section 34LA provides for an out-of-court statement by certain alleged victims of sexual offences to be admissible as evidence of what was stated in some circumstances.

The out-of-court statement may be admissible to prove the truth of what was said in the statement (that is, that the victim was abused) if:

- it was made by the alleged victim of a sexual offence
- the alleged victim will not be called as a witness because, at the time they made the out-of-court statement, they were a young child or a person with a disability that adversely affects their capacity to give evidence

- it was not made to police or another authority in a formal interview in investigating the alleged offence
- the judge is satisfied that it has sufficient probative value to justify its admission.

In his evidence in Case Study 38, Mr David Plater, Senior Legal Officer with the South Australian Attorney-General's Department, outlined the intended effect of section 34LA of the *Evidence Act 1929* (SA). Mr Plater said:

The contemplation is that the Act, the communication partner model and the improved specialist training will make life a lot better for vulnerable parties. However, it is still contemplated that there will be some witnesses, or there may be some witnesses or victims, who are so young or whose intellectual disability is so severe that even with the increased support contemplated under both the Act and the Disability Justice Plan, they would be unable to give evidence, unable perhaps to satisfy the test in South Australia, which, unlike the UEA [Uniform Evidence Act], still requires the witness to be able to know the difference between truth or a lie.

That section [section 34LA] is designed to deal with that rare situation. The example that was raised during consultation might be I think based on a couple of very unfortunate cases in Victoria: say a person with a severe intellectual disability has been sexually abused. That person is sadly unable, even with the support, the assistance, to be able to give evidence in court. However, there is something said by that witness which is damning or probative evidence of guilt. There may be other evidence, such as forensic evidence, some other evidence. So the intention is to somehow ensure that if you are so young or so severely intellectually disabled that you are sadly unable to give evidence, there may be means that a case can still be brought using the initial or the first statement made by that witness as evidence of truth of its contents, but ideally, and I think in practice, it would require other cogent evidence to enable a case to be brought by the prosecution. That's what is meant by section 34LA.<sup>156</sup>

In his evidence, the South Australian DPP, Mr Kimber, noted that the previous provision, section 34CA, could be used in similar circumstances.<sup>157</sup> However, the drafting of the previous provision was subject to some criticism.<sup>158</sup>

The South Australian provision goes further than the exceptions to the hearsay rule in the Uniform Evidence Act. However, as Mr Plater's evidence might suggest, it seems unlikely that abuse could be proved beyond reasonable doubt on the evidence of a third party about a disclosure made by an alleged victim unless there is also other evidence to prove the abuse.

## 30.6 Other jurisdictions

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### 30.6.1 England and Wales

#### Registered intermediaries and ground rules hearings

In its review of the use of special measures, the Complainants' Evidence Research considered the use of these measures in overseas jurisdictions. The researchers noted that in the United Kingdom the most frequently used special measures for vulnerable witnesses, particularly for younger witnesses, were prerecorded evidence in chief and CCTV. They also identified that many vulnerable witnesses would have liked to use special measures but did not do so.<sup>159</sup>

In the second week of Case Study 38, we heard evidence from a number of experts familiar with the operation of the Registered Intermediary Scheme, which has been in operation across England and Wales since 2008. The Registered Intermediary Scheme had its origins in a number of government reports and academic studies in England and Wales in the late 1980s and 1990s on the way children were treated by the criminal justice system. The scheme was initially conducted as a pilot from 2004 before being rolled out across England and Wales in 2008.<sup>160</sup>

Intermediaries can be used to assist vulnerable witnesses at both the investigative stage by police and in preparation for a trial, although involvement at the police stage is through an administrative arrangement rather than as a statutory right.<sup>161</sup>

The intermediary is generally a professional with expertise in the type of communication difficulty that has been identified with respect to the witness.<sup>162</sup> Intermediaries can be requested by police, and they are matched to the witness according to the skills and location of the intermediary and the needs of the witness through a matching process operated by the Ministry of Justice.<sup>163</sup>

Within 24 hours of accepting a request, the intermediary will contact the requesting police officer, arrange to meet to gather more information about the communication needs of the witness, and arrange a time to conduct an assessment of the witness's communication needs.<sup>164</sup> The intermediary will also gather other information about the witness, such as from parents, teachers, speech and language reports and psychologist reports.<sup>165</sup>

Then, in the presence of the police officer, the intermediary will conduct an assessment of the communication skills of the witness. Having the police officer attend allows the officer to build rapport with the witness and start to learn more about how the witness communicates.<sup>166</sup> Ideally, the assessment will take place in the interview suite where the investigative interview will take place, which assists in making the witness comfortable in that environment.<sup>167</sup> Intermediaries are trained not to assess the witness on the evidence that is relevant to the proceedings but on neutral topics.<sup>168</sup>

The intermediary then provides an assessment to police regarding the techniques that might be used to draw information from the witness, including question types, and the need for breaks.<sup>169</sup> Following discussion with the relevant police officer about the role the intermediary will play, the intermediary will then participate in the investigative interview.<sup>170</sup> Dr Michelle Mattison, who is a Registered Intermediary in England and Wales, outlined her role in the investigative interview:

My role is passive in the sense that I'm not there as a second interviewer. I'm there to listen and to monitor the questions put to the child carefully to ensure that they are appropriate for that person's communication needs. I also monitor and carefully watch the child or the vulnerable adult's anxiety and concentration and, where appropriate, I may suggest that the person needs a break or we need to think about strategies to help that person remain calm and focused.<sup>171</sup>

In terms of intervening, Dr Mattison said that:

I try to pre-empt, as much as possible, whether or not that child – that person will understand that question before they answer the question. So, for example, if a police officer uses a very big word that I believe a five-year-old may not understand, I'll intervene and I might say, 'Mr Policeman, what does that word mean?' That's my way of alerting the police officer to think perhaps about reframing that question, or rewording that question, rather than me interjecting and doing that myself.<sup>172</sup>

It was made clear during the hearing that the intermediary's role is not to rephrase or summarise the witness's evidence, because this brings with it the risk of misunderstanding or reinterpreting the evidence.<sup>173</sup>

If the matter proceeds to prosecution, a more substantial report is prepared to assist the court in the questioning of the witness. The report includes the findings of both the assessment and the interview process, along with recommendations for the court in terms of communicating with the witness.<sup>174</sup>

Ideally, the intermediary will also participate in a 'ground rules' hearing before the witness's evidence is taken. In the hearing, the intermediary can report to the court on the witness's requirements and the judge can give guidance to counsel as to which recommendations of the intermediary are to be adopted.<sup>175</sup>

The intermediary will also sit with the witness during their evidence and may intervene where they believe a communication breakdown is likely to occur.<sup>176</sup> In terms of intervening during a trial, Dr Mattison gave the following example:

I alert the judge to the terribly worded question usually by saying ‘your Honour’ and then I explain what the problem is with the question, such as saying, ‘That’s a tagged question.’ It’s then up to the judge to decide what to do with that information. If the judge agrees with what I’ve highlighted, they may say something like, ‘Counsel, please rephrase the question.’ If counsel tries to rephrase the question and then unfortunately there is still a tag or there is still an issue with the question, on some occasions the judge may seek my assistance with rephrasing. My assistance with rephrasing questions is extended only to me giving suggestions to the judge and then counsel taking them upon him or herself to then put the question to the witness, but at no point do I actually communicate the question to the witness myself.<sup>177</sup>

Intermediaries are formally trained in their role in the justice system and are bound by a code of practice and a requirement to maintain their professional development and registration.<sup>178</sup> Their duty is to assist the court to communicate with the witness and to be impartial, not to support a child witness or assist police in catching a criminal.<sup>179</sup> Intermediaries are paid an hourly rate for their work.<sup>180</sup>

The scheme in England and Wales is available to all witnesses under the age of 18 and to adults with a disorder affecting their communication.<sup>181</sup> We heard that the scheme in England and Wales provides assistance to roughly equal numbers of children and adults with disability.<sup>182</sup> The scheme is not formally available to defendants, but we heard that some courts have appointed and funded the provision of intermediaries out of their own inherent jurisdiction.<sup>183</sup>

Appellate courts in England and Wales have ‘supported and endorsed’ resources and toolkits which have been developed by relevant professional bodies to enhance forensic practice, such as those that appear on The Advocate’s Gateway website.<sup>184</sup> The Advocate’s Gateway is chaired by Professor Cooper, who gave evidence in Case Study 38 regarding the operation of the Registered Intermediary Scheme in England and Wales and coordinated the training for professionals prior to the commencement of the child sex offence evidence pilot in New South Wales. Ground rules hearings are now a mandated part of judicial case management and are expected to cover a broad terrain of issues going to treatment of vulnerable witnesses.<sup>185</sup>

## Recent cases in relation to special measures

A landmark case in the acceptance of special measures in England and Wales was the decision in 2010 in *R v Barker*,<sup>186</sup> in which a four-and-a-half-year-old girl with speech delay gave evidence regarding anal rape which had been committed against her when she was three years old. The court found that she was competent to give evidence provided ‘due allowance’ was given to her tender age and appropriate adjustments were made to ordinary procedure. These included playing a video recording of her original police interview as her evidence in chief, taking breaks when she tired and limiting questions to those in simple form. There was no intermediary to assist counsel in the framing of questions.

An issue arose because the child complainant was essentially unresponsive to some questions put to her in cross-examination. Rather than prompting the abandonment of the prosecution, the interpretation of the child's silences when she was asked about various confronting aspects of the offence was left to the jury. While defence counsel subsequently complained that he was unable to cross-examine her effectively because of her age, this argument was rejected because, even re-examining the question of competency at the close of her evidence, the court found the child had given intelligible answers to questions put to her. Relevantly, the court stated:

the competency test is not failed because the forensic techniques of the advocate (in particular in relation to cross-examination) or the processes of the court (for example, in relation to the patient expenditure of time) have to be adapted to enable the child to give the best evidence of which she is capable.<sup>187</sup>

The case of *R v Edwards*<sup>188</sup> in 2011 did not involve sexual offending but the serious assault of a 5-year-old child who was in the care of her stepfather. Having been advised the child witness was susceptible to confusion by particular forms of question (in particular, leading 'tag questions' in which the interlocutor suggests an answer and invites agreement) the court placed limits on the questioning in cross-examination. In particular, the defence was proscribed from 'putting its case' in the 'traditional' way, because this risked unfairly confusing the child. Instead, the trial judge invited counsel to pose open questions. The appeal court stated that it 'struggle[d] to understand how the defendant's right to a fair trial was in any way compromised simply because [his counsel] was not allowed to ask: "Simon did not punch you in the tummy did he?"'.<sup>189</sup>

In *R v Wills*<sup>190</sup> in 2011, the trial court's limitations on cross-examination of the complainants (of whom there were eight) were challenged. The court's preliminary ruling, with which trial counsel properly complied, was that defence counsel must not challenge witnesses, should pose open questions and avoid questions 'tagged' with a comment to prompt an answer. On appeal, it was argued for one offender that this limitation had deprived defence counsel of the opportunity to properly test the evidence against him. Proof of this was said to lie in the acquittal of his co-accused, whose counsel had (improperly) cross-examined in a more 'traditional' way. The Court of Appeal rejected the proposition and line of reasoning, noting that there was 'overwhelming evidence from a number of young complainants' against him. In relation to judicial constraint of questioning, the appellate court stated:

First, we consider that in cases where it is necessary and appropriate to have limitations on the way in which the advocate conducts cross-examination, there is a duty on the judge to ensure that those limitations are complied with. This is important to ensure that vulnerable witnesses are able to give the best evidence of which they are capable. Where appropriate the judge, in fairness to defendants, should explain the limitations to the jury and the reasons for them. It is also important that defendants do not perceive, whatever the true position, that the cross-examination by their advocate was less effective than that of another advocate in eliciting evidence to defend them on allegations such as those raised in the present case.

...



Secondly, we observe that if there is some lapse by counsel in failing to comply with the limitations on cross-examination, it is important that the judge gives a relevant direction to the jury when that occurs, both for the benefit of the jury and any other defendant. To leave that direction until the summing up will in many cases mean that it is much less effective than a direction given at the time.

Thirdly, this case highlights that, for vulnerable witnesses, the traditional style of cross-examination where comment is made on inconsistencies during cross-examination must be replaced by a system where those inconsistencies can be drawn to the jury at or about the time when the evidence is being given and not, in long or complex cases, for that comment to have to await the closing speeches at the end of the trial. One solution would be for important inconsistencies to be pointed out, after the vulnerable witness has finished giving evidence, either by the advocate or by the judge, after the necessary discussion with the advocates.<sup>191</sup>

In *R v Lubemba*<sup>192</sup> in 2014, the Court of Appeal was concerned with convictions for rape of a 10-year-old girl. The special measures adopted at trial included limiting cross-examination to 45 minutes and precluding the defence from 'putting the case' to the complainant. The trial judge also intervened in the course of cross-examination to ensure that the pre-existing limits that had been imposed were not exceeded. The accused's counsel subsequently complained that these limits had combined to unfairly confine Lubemba's defence and had potentially garnered sympathy for the witness and alienated the jury from the defendant, in turn giving rise to an unsound conviction. The Court of Appeal disagreed, finding that, far from acting inappropriately, the trial judge was *required* to intervene as he did in the circumstances of the case:

A trial judge is not only entitled, he is duty bound to control the questioning of a witness. He is not obliged to allow a defence advocate to put their case. He is entitled to and should set reasonable time limits and to interrupt where he considers questioning is inappropriate.

...

The interruptions were not excessive, they were justified, and they did not prevent counsel from testing the evidence.<sup>193</sup>

Most recently, the Court of Appeal for England and Wales has explicitly sanctioned the use of ground rules hearings and the 'vetting' of questions in advance of cross-examination. *R v RL*<sup>194</sup> in 2015 involved a mother's assaultive cruelty to her children. The defence case was that the father had coached the children to lie about their mother to advantage him in ensuing family law proceedings. A witness intermediary helped the court to determine whether the two younger of the couple's three sons (aged four, six and 13 at the time of the hearing) would be capable of understanding and responding to questions posed in particular terms. The trial court had regard to a list of questions defence counsel proposed to ask. Some questions were not

permitted on the basis that they were not necessary or were repetitious, while other tagged questions were only allowed to be asked in an amended form. The Court of Appeal rejected the complaint that the combined effect of the limitations rendered the trial unfair. On the contrary, it found that the trial court was correct to impose limitations on the cross-examination and that it had done so in a way that was fair.<sup>195</sup>

In *R v FA*,<sup>196</sup> the Court of Appeal endorsed the practice of a witness intermediary reviewing proposed cross-examination questions and providing suggestions. FA had been convicted of causing a person to engage in sexual activity without consent. The complainant, KK, had an IQ of between 55 and 69. FA appealed against his conviction on the basis of fresh evidence that KK had retracted her allegation after the conviction. KK was cross-examined by counsel for FA (the applicant) before the Court of Appeal, but the Court of Appeal noted that:

[The registered intermediary, counsel for FA and the prosecutor] have worked as a team, the better to promote the interests of justice in the conduct of this case. It is clear they have had in mind not only the course of the hearing and the welfare of KK, but also the interests of the applicant himself. Questions to be put by [counsel for FA] to KK in cross-examination were reviewed by the registered intermediary, whose sensible expert suggestions were unhesitatingly adopted.<sup>197</sup>

## Prerecording of complainants' evidence

We also heard that the prerecording of the cross-examination of complainants was still subject to a pilot scheme in England and Wales.<sup>198</sup> A process evaluation of the scheme was published on 16 September 2016. The scheme allows vulnerable or intimidated witnesses who have had their evidence in chief recorded to have their cross-examination also prerecorded before the trial.

While the provisions that provided for prerecording cross-examination were included in the 1999 legislation that introduced a range of special measures, such as the Registered Intermediary Scheme described above, they were not implemented until 2013 due to concerns about the procedural changes required and the cost and quality of the information technology infrastructure required.<sup>199</sup>

The pilot covered cases sent to three Crown courts from 30 December 2013 to 31 October 2014. The evaluation included interviews with practitioners, witnesses and witnesses' parents and an analysis of the outcomes of the matters within the pilot.<sup>200</sup>

The key findings of the evaluation included:

- practitioners acknowledged that some eligible witnesses were not identified sufficiently early by police or the Crown Prosecution Service (CPS)<sup>201</sup>

- the expedited time frames at the outset of cases raised workload concerns for the police, CPS and defence, including the deprioritisation of matters that were not subject to the pilot. Many judges noted the positive effect on the amount of work required at the end of matters, particularly the cross-examination and trial stage<sup>202</sup>
- practitioners – in particular, judges – found the technology and facilities used to be inadequate, with poor sound quality, difficulties in adequately assessing the witness on-screen, and cramped and non-child-friendly rooms<sup>203</sup>
- while witnesses found their cross-examination stressful and difficult, whether it was prerecorded or not, practitioners felt that prerecorded cross-examinations reduced the level of trauma for witnesses and involved more focused questioning as a result of greater scrutiny through the ground rules hearings. Although based on a small and self-reported sample, cross-examinations were generally shorter when prerecorded<sup>204</sup>
- in cases where the cross-examination was prerecorded, the time between the matter being sent to the court and the cross-examination taking place was much shorter than in cases where the cross-examination took place during the trial (94 days as against 182 days)<sup>205</sup>
- fewer cases did not proceed to trial where the cross-examination had been prerecorded than where it had not (8 per cent as against 27 per cent). However, there were also more guilty pleas before trial in matters that had had the cross-examination prerecorded (48 per cent as against 9 per cent). The conviction rate was similar for prerecorded and non-prerecorded matters (54 per cent and 46 per cent).<sup>206</sup>

The evaluation made clear that, given the small sample size, both of cases and interviews, the results of the evaluation should be treated with caution and could not be expected to be replicated everywhere if the trial was expanded. The evaluation also noted that the comparison group was similar but not identical to the test group.<sup>207</sup> Three-quarters of the matters subject to the trial were sexual offence cases, with theft and violence cases the next most prevalent.<sup>208</sup>

On 19 March 2017, the Justice Secretary for the United Kingdom announced that, following the positive evaluation, eligibility to have cross-examination prerecorded would be rolled out across England and Wales in September 2017 for all victims of sex crimes.<sup>209</sup>

### 30.6.2 Northern Ireland

A pilot registered intermediary scheme in Northern Ireland extends to both complainants and vulnerable defendants.<sup>210</sup> The scheme was recently reviewed by the Northern Ireland Department of Justice. The review reported positive feedback from participants at both the investigative and court stages. It concluded that the registered intermediary role ‘continues to be essential in assisting vulnerable persons with significant communication problems during their engagement with the criminal justice process and is very well-regarded by all those who come into contact with it’.<sup>211</sup>

### 30.6.3 New Zealand

The Complainants' Evidence Research noted similar trends for the use of special measures in New Zealand as those identified for the United Kingdom. That is, the research notes that there was high demand for and use of prerecorded investigative interviews and CCTV, especially for younger witnesses.<sup>212</sup>

In her evidence in Case Study 38, Ms Henning noted concerns about the adoption of the prerecording of cross-examination in New Zealand, particularly about the potential benefits and timing of the prerecording.

Ms Henning noted that the New Zealand Court of Appeal, in the case of *M v R & E v R*,<sup>213</sup> had suggested that, as the 'only' benefit of prerecording the entire testimony of the witness was to reduce the stress caused by long court delays, this would rarely outweigh the disadvantages to the accused, the court and the witness.<sup>214</sup> Therefore, the court held that prerecording would only be appropriate in extreme situations, such as where the witness is dying or leaving the jurisdiction, and only where it can be completed significantly in advance of the trial.

However, Ms Henning's evidence, discussed in section 30.7.2, made clear that the benefits of prerecording are broader than simply reducing the stress of long court delays.<sup>215</sup>

## 30.7 Possible reforms

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### 30.7.1 Possible reforms discussed in the Consultation Paper

In the Consultation Paper, we set out a number of possible reforms that we suggested might make a significant difference to the way that vulnerable witnesses give their evidence and might help vulnerable witnesses to give their best evidence. The possible reforms were:

- prerecording all of a witness's evidence
- use of intermediaries
- use of ground rules hearings
- improving special measures
- improving courtroom issues
- use of expert evidence
- use of interpreters.

We discuss each of these possible reforms and the submissions and evidence we received in relation to them below.

More generally, many submissions agreed that the criminal justice system can be traumatising and that measures to assist survivors to give their evidence are justified on this basis.<sup>216</sup>

The Victorian Victims of Crime Commissioner noted the unfamiliar and often distressing trial process as justification for his support for the full suite of protective measures identified in the Consultation Paper.<sup>217</sup> He submitted:

In view of the high attrition rates relating to cases of child sexual abuse, the improvement of these measures is critical. The required funding, training and commitment to improve the standard of their delivery should be viewed as a priority by government and courts.<sup>218</sup>

The Centre Against Sexual Violence Queensland expressed support for any measures that can minimise further harm to survivors, stating that survivors should be empowered to make the decision about how they would be most comfortable giving their evidence.<sup>219</sup>

The Jannawi Family Centre submitted that any measures that reduce the continued contact between the victim and the abuser will reduce the harassment felt by the victim, thus leading to better engagement with the system and better outcomes.<sup>220</sup>

A number of submissions expressed general support for the measures outlined in the Consultation Paper.<sup>221</sup>

The Victorian Commission for Children and Young People felt that further research was necessary. It recommended a research program that includes the development of a 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.<sup>222</sup>

### 30.7.2 Prerecording of all of a witness's evidence

In submissions and in Case Study 46, interested parties addressed the use and potential benefits of the prerecording of all of a witness's evidence. In this section we first outline the long-term use of prerecording in Western Australia and the more recent introduction of prerecording in New South Wales and South Australia. We then outline what we were told about prerecording more generally in submissions and in Case Study 46.

#### Western Australia

In Case Study 38, Ms Henning gave evidence that prerecorded testimony has been in operation in Western Australia since 1992, and research has shown that the procedure was working well, is well accepted and has been taken up well.<sup>223</sup>

In Case Study 46, the Acting DPP for Western Australia, Ms Amanda Forrester SC, gave evidence about the experience of prerecording in Western Australia. She told the public hearing:

It's primarily used in relation to young children. It can be used for anyone, and I've done it personally in relation to adults who are particularly vulnerable or there are certain circumstances that necessitate the early taking of their evidence. And in fact the prerecording procedure is available to people in other categories, for example, those who might not be available at trial and things of that nature. So it's a fairly wide range.

That said, we tend to use it primarily for young children, and it's almost automatic, I think, if the child is under 12 or 13. We get very little resistance from the court in listing prerecordings or granting applications for prerecordings for children that young.

Once they start getting a bit older or they are adults, then we tend to need expert evidence or a psychiatric or social worker's report to justify the use of that procedure. But most of the time, we don't meet a significant amount of resistance if there's a good reason for that procedure to be used.<sup>224</sup>

As noted in section 30.4.2, prerecording is also available in Western Australia for a 'special witness', who is a person with physical disability or mental impairment; or a person who is likely to suffer severe emotional trauma or be so intimidated or distressed that they cannot give evidence satisfactorily.

In Case Study 46, Ms Forrester outlined that an adult witness may not necessarily need to have a psychiatric condition to be declared a special witness and give their evidence in a prerecorded hearing:

Yes, they don't need a diagnosable psychiatric condition. Enormous distress, the sorts of distress that are felt routinely by complainants in these sorts of cases – and we have a witness assistance service called the Victim Support Service in Western Australia that do write letters to us and provide evidence on behalf of those complainants that have indicated that for whatever reason – and there are many – they feel that it would be better for them to give evidence in a prerecorded setting. All of our complainants of sexual abuse, no matter how old they are, are entitled as of right to give their evidence by remote CCTV. So it's about whether they need to give their evidence early and in full that is the issue in those circumstances.<sup>225</sup>

Ms Forrester outlined the advantages of the procedure:

The advantages of it are, to some extent, self-evident. For young children, you get their evidence down at an early stage. There are lots of practical reasons for it as well. In a typical trial where you start – although we don't have the same sorts of delays that some other jurisdictions have on the first day of trial, the very acts of empanelment, initial judicial directions, opening, mean that quite often your child isn't giving evidence until 11 o'clock or 11.30.

Then with children nowadays, we already have their evidence-in-chief down by way of a video recording. They don't have to watch that while it's being played, but it has to be played before they're cross-examined, so quite often they're not even giving evidence until after lunch. Now, that's unbearable for a 10-year-old, to be sitting around for at least some of the morning. You can tell them to come late, but they're still sitting around for a bit, and by 2 o'clock they've practically had it, even before they start to be cross-examined.

Sometimes we can call the child on the second day so we've got all that out of the way, but it's a much more effective procedure for the child to give their evidence at a prerecording.

The other advantages are set out in the consultation paper. You know what they're going to say. You can more properly weed out trials that shouldn't be proceeding. They can promote pleas of guilty or better negotiations. And of course there's the benefit to the child in no longer having to think about what they've got to talk about from a criminal proceeding context.<sup>226</sup>

In terms of whether prerecording facilitates greater judicial intervention in cross-examination, Ms Forrester said:

Can I also say that one of the things in the consultation paper suggests that an advantage of prerecordings is that it permits editing of judicial intervention or questions by counsel or objectionable material. That's true, but certainly in Western Australia it's important that, from the judiciary's point of view, they reinforce the rule that you should be very careful not to ask objectionable material. It's not an opportunity for you to ask objectionable questions just because it can be edited out at a later time.<sup>227</sup>

When asked about the disadvantages of prerecording, Ms Forrester said:

I struggle to think of many. There is one, and that is if there is late disclosure, and sometimes that comes from parents or relatives who aren't in the same situation. They might disclose something later about complaint or something of that nature, which might necessitate the child being brought back. It's an awful shock to a child to have been told it's all over and then to be brought back for more cross-examination, which is the most distressing part of the experience for them.<sup>228</sup>

Ms Forrester indicated that recalling a child to give further evidence was very rare, and 'a great deal of persuasion' is needed for it to occur.<sup>229</sup>

## New South Wales

A pilot scheme providing for the prerecording of evidence and witness intermediaries for child complainants commenced in New South Wales on 31 March 2016.

In Case Study 46, we heard evidence regarding the initial operation of the pilot scheme. Ms Gina O'Rourke, a Deputy Senior Crown Prosecutor for the New South Wales ODPP, told the public hearing that there had been eight trials under the scheme up to 29 November 2016, with a further 40 listed. There had been 31 preliminary hearings, with another 15 expected shortly after the public hearing.<sup>230</sup>

The New South Wales Commissioner for Victims' Rights, Ms Mahashini Krishna, told the public hearing in Case Study 46 that the total funding for the pilot scheme, including both prerecording evidence and the use of intermediaries, was \$28 million over three years to 2019.<sup>231</sup> A process evaluation of the scheme will take place after 12 months, and an outcome evaluation will take place after three years.<sup>232</sup>

Ms Sharyn Hall, from the New South Wales Bar, discussed the impact of the pilot scheme on Legal Aid NSW and the difficulty in estimating the total cost of the pilot:

At the moment, because the pilot hasn't been going for very long, it is difficult to assess what the cost is going to be, but the concern is really in the, in effect, duplication of processes that by necessity must occur. For example, whereas in the old system where there was no prerecording, counsel would not be engaged until much later in the process, now the position is – and this is obviously also for the DPP – that counsel needs to be engaged really at the committal, before the committal process, so that issues are appropriately identified and raised at an early opportunity.

There are issues into sexual assault communications privilege which obviously need to be raised very early.

So those are all issues that need to be raised or parties need to be cognisant of by the first mention in the District Court. That's the first stage at which counsel is engaged.

The next stage is the prerecording, which obviously involves a great deal of preparation, because the cross-examination needs to cover all of the issues. Then there is obviously the preparation for the trial itself.

In one of my cases, for example, the prerecording was done in September and the trial is not listed until July of next year.

In the meantime, there have also been legal issues which have been raised, which were properly raised before the prerecording, but by virtue of time pressure on the court,



weren't able to be dealt with before the prerecording, so issues that are then dealt with in the interim. There are a lot of issues in terms of how that is going to exponentially increase the funding that's going to be required for counsel's involvement.<sup>233</sup>

Ms Hall agreed that the process of prerecording evidence may make for a more efficient trial.<sup>234</sup>

Ms O'Rourke outlined how the pre-trial hearings incorporate the police interview and the prerecording of the witness's cross-examination:

Basically the interview itself is played – or not played anymore. Initially it started off to be played, but in light of other studies in the other jurisdictions that have incorporated this prior to New South Wales, it is basically just tendered, so to speak, the interview itself, and then any further evidence-in-chief, questions by the Crown and then cross-examination and then re-examination, and all of that process is recorded.<sup>235</sup>

Ms O'Rourke said that this recording is then later shown to the jury in the trial. In relation to editing the prerecorded evidence, she said:

There are some edits that take place, just things that a jury would not normally see. We do that at the DPP, with consultation with defence counsel, and then that is played, itself, at the remainder of the trial, which has a later date.<sup>236</sup>

Speaking of the benefits of the pilot scheme from a police perspective, Detective Chief Inspector Yeomans of the Child Abuse Squad in the NSW Police Force, told the public hearing in Case Study 46:

There has only been a very minimal amount of matters at this stage. But in saying that, what has happened in years gone by is that children have waited years before their evidence is heard at the District Court, and I've seen it, that those children and their families go through great trauma, and a lot of their childhood is lost because of the fact that they have waited so long to give their evidence.

In these sorts of matters, the prerecorded evidence is given shortly after the arraignment of the alleged offender, which is timely in the fact that that child is given a specific time and a specific day to give their evidence, and then they don't have to attend court [for the trial].

The feedback I'm getting from both families and victims is nothing short of positive in relation to that aspect of it, which is a real milestone in relation to the whole aspect of this pilot scheme, in that it's timely; it's also done closer to the offence, which hopefully will then have the victim remembering more about the events themselves; it's not years later. So obviously the process in relation to both the defence and the Crown is fairer, I believe.<sup>237</sup>

He also gave a specific example of where prerecording had had a positive impact on a case:

Another matter, just in relation to the prerecorded evidence, I know because Ms O'Rourke here actually prosecuted the matter, but we had a matter where the child gave their prerecorded evidence and then, some time later, they decided to proceed with the matter. They were a bit hesitant in going forward, the family and the child. The matter proceeded. The evidence was given at trial by way of prerecording, by way of disk. Then the trial proceeded until basically summations on the last day, when there was a legal issue unrelated to the pilot scheme. The matter has been put over – the jury got discharged and the matter has been put over until next year.

Now, speaking to the family, they said that they would not have proceeded, looking at the time that this matter has taken at court and the trauma that their daughter would have had to go through in relation to this. It involved a stranger in their own house. It's a terrible case. They all are terrible cases. But they didn't want to add to this trauma in relation to having this matter continue and continue on. But when this child actually gave their evidence, that was it. The family were happy. The child even remarked that they could now go to their swimming carnival tomorrow, and all of those sorts of things. So we have then moved on and the matter will then proceed at trial next year.<sup>238</sup>

Detective Chief Inspector Yeomans also expressed the view that the improvements in the way the criminal justice system treats victims, which the pilot introduced, will have a positive impact on families coming forward to report child sexual abuse.<sup>239</sup>

Ms O'Rourke also told of the possible positive impact of prerecording on the trial process, including in relation to early guilty pleas:

What we have found is that by doing this, by having counsel intervene at an early stage, as your Honour said, the issues are identified; we can look at whether there is going to be a plea or not be a plea. It focuses the mind of counsel on to what it actually is that they want from the complainant and what they want from the trial, and actually the trial runs – so the prerecorded hearing is listed; it is going to run. The trial gets listed; it is going to run. That's compared to rocking up to court on a date, where we have a stack of sexual assault communication issues, we have delays, we have adjournment applications and matters just blow out. So in this way, we have seen that the matters resolve and get completed.<sup>240</sup>

Ms Hall noted that there had been one matter in the pilot that had required a child complainant to be recalled to give further evidence.<sup>241</sup> When asked whether the circumstances that led to the recall would commonly arise, Ms Hall noted that, while she was of the view that such circumstances would arise from time to time, she would not say that they would commonly arise.<sup>242</sup>

In the public hearing in Case Study 46, the New South Wales DPP, Mr Lloyd Babb SC, outlined his views on prerecorded evidence:

Yes, I have strong views on prerecording. I favour it and think that it does bring forward in time important decision-making. The indication from the pilot is that it brings forward also determinations about pleas of guilty. I think it is an extremely positive advance in New South

Wales, one that is long overdue. We are catching up with other jurisdictions in this regard. It has a number of advantages, not least of which is that if someone says something that would abort a trial in front of a jury, you can simply edit the tape, and so you don't have the possible stress of restarting a trial.

It is a form of case management in that it's bringing forward decision-making and getting judicial involvement early.

To be honest, I don't see any downsides. I think it's an important development and one that I would like to see expanded to cover all – certainly all child sexual offending and, in my view, adult sexual offending and maybe all vulnerable witnesses of all types.<sup>243</sup>

Mr Babb highlighted that prerecording can avoid a particular type of trauma for complainants:

One of the enormous sources of trauma, in my experience, for complainants is uncertainty of when they are going to give their evidence. The stress that that creates in relation to complainants cannot be underestimated, and I am very sad to say that I think some prosecutions don't go ahead because the trauma, through uncertainty, impacts on decisions about willingness to proceed, and I think that this sort of certainty will assist in encouraging people to go ahead with prosecutions.<sup>244</sup>

He also expressed the view that it can improve communication between complainants and DPP staff:

I think it helps in terms of communication. The focus has to be on earlier briefing, earlier consultation and relationship development with the complainant, and continuity of officers from my department with complainants. If we can maintain the relationship that is established earlier, I think we can assist complainants through the prosecutorial process.<sup>245</sup>

## South Australia

The *Statutes Amendment (Vulnerable Witnesses) Act 2015* made provision for the prerecording of a vulnerable witness's evidence in South Australia from 1 July 2016. However, at the time of Case Study 46, no pre-trial special hearings to prerecord evidence had taken place.<sup>246</sup>

Facilities for prerecording are available at all the Courts Administration Authority courts where the higher courts sit – namely, Adelaide, Mount Gambier and Port Augusta. It is also available in the Magistrates Courts in Adelaide, Mount Gambier, Port Augusta, Christies Beach, Elizabeth, Port Adelaide, Murray Bridge, Port Pirie, Whyalla and the Youth Court.<sup>247</sup>

In his statement tendered during Case Study 46, Mr Greg Weir, Executive Director, Rights Protection and Policy, of the South Australian Attorney-General's Department, outlined the preparatory work that had been undertaken to prepare for the commencement of the *Statutes Amendment (Vulnerable Witnesses) Act 2015*. This included:

- inserting new rules in the Criminal Rules for the Supreme Court and District Courts providing for prerecording of evidence for vulnerable witnesses<sup>248</sup>
- training for the judiciary, prosecution and defence practitioners, police and communication partners.<sup>249</sup>

Mr Kimber, the South Australian DPP, told the public hearing in Case Study 46 about the state of prerecording evidence in South Australia:

There is [provision for it], but only very recently, so only in legislation in the middle of this year [2016], and it really has the two formats: it has the interview by the trained police officer, which can be the evidence-in-chief of the relevant witness, child or cognitively impaired, and it also allows for, separately or as part of that, the prerecording of the evidence after committal. So those provisions are there and they're now available to be used but need to be used.

The other interesting thing is ... what might be the benefits in expanding this, at least in some areas, to adults because, at the very least, there are trials that don't get reached.

Sometimes trials don't get reached because the court doesn't have five days available for that trial. It can't start the trial on the Monday and it won't finish it by the following Monday. But it might be that that court does have availability on the Thursday or the Friday, and we have counsel there; we have everyone ready to go. There must be opportunities to use that Thursday or Friday to call that evidence, first of all, to take away the waiting around for the complainant for another six or nine months, but also for all those other benefits that we've heard about.

Sometimes the catalyst for a plea or an agreement is: this person is going to give evidence; this is really going to happen. Also, some complainants, for very good reasons, when a trial is adjourned, step away because of the delay. 'I was ready, I was ready to go. I'm sorry, I just can't come back in nine months' time.'

So I think there are benefits outside of just children and the cognitively impaired, quite frankly.<sup>250</sup>

## What we were told in submissions and Case Study 46

Many submissions expressed support for the prerecording of a witness's evidence.<sup>251</sup>

A number of submissions in response to the Consultation Paper noted the importance of reducing the number of times a complainant, particularly a child, should have to recount their abuse, and supported measures to achieve this.<sup>252</sup> The DPP for the Australian Capital Territory stated that the introduction of use of the police interview as evidence in chief has been very

successful, despite the need to edit the interviews pre-trial. He noted that, prior to their use, counts would regularly be withdrawn from an indictment in the case of child complainants, as the child would not be able to recall at court what they had told police at interview.<sup>253</sup>

The Victorian Government submitted that Victoria Police considers that there are benefits in adult victims of child sexual abuse being eligible for prerecorded evidence in the form of a video recorded investigative interview, because it provides a vastly superior interview experience for the victim and reduces errors in taking the evidence.<sup>254</sup>

The DPP for the Australian Capital Territory stated that, in the Australian Capital Territory, all child sex offence complainants and witnesses who are children prerecord their evidence and he submitted that this has worked very well.<sup>255</sup>

In Case Study 38, Ms Henning gave evidence outlining a number of advantages in providing for the full evidence of complainants – that is, evidence in chief, cross-examination and re-examination – to be recorded pre-trial, in the absence of a jury. These included the following:

- As the recording will take place in advance of any trial, the events in question will be fresher in the memory of the complainant, and the completion of the prerecording will provide an earlier release for the complainant from the stress of testifying.
- Preparing for the recording, and the evidence that ultimately comes out, may make clearer the key issues in the trial for both the prosecution and the defence, possibly leading to the earlier resolution of cases, whether through guilty pleas entered before trial, charge negotiations or withdrawal.
- As objections, judicial interventions and inappropriate questions can be edited out of the final recording to be shown to the jury, the prerecording process may be better controlled by the judge.<sup>256</sup>

Several submissions in response to the Consultation Paper endorsed these benefits.<sup>257</sup>

Full recording of the complainant's evidence may also complement some of the case management and related reforms we discuss in Chapter 32, such as requiring earlier allocation of the Crown prosecutor and defence counsel.

Other potential benefits of prerecording evidence identified in submissions include:

- reducing the trauma of giving evidence, particularly for children and young people<sup>258</sup>
- allowing a child complainant to obtain counselling sooner<sup>259</sup>
- reducing the stress for the complainant through giving them a concrete time when their evidence will be taken rather than having them wait at court for other issues in the trial to be determined<sup>260</sup>

- providing additional flexibility in the timing of any subsequent trial, as the inconvenience to the complainant will be reduced if the trial date is moved<sup>261</sup>
- having the same evidence available in the event of a retrial.<sup>262</sup>

In her evidence in the public hearing in Case Study 46, Ms Shireen Gunn, representing the Ballarat CASA Men's Support Group, was asked about the benefits of prerecording evidence. She said:

The criminal system, the court system, it's very intimidating, it's very overwhelming. We're already dealing with people who are very traumatised, so it increases their level of anxiety and stress. It is a very stressful experience, so anything that would relieve that stress or reduce that level of anxiety would be really useful. If you are wanting people to come forward and report, they would have to know that the system that they are going to enter is going to be a system that is not going to further traumatise them.<sup>263</sup>

The South Eastern Centre Against Sexual Assault & Family Violence (SECASA) and Relationships Australia NSW noted that, while having the option of prerecording evidence would be of value to many people, the option of giving evidence in court should still be available to complainants if they wish to.<sup>264</sup> In Case Study 46, we heard evidence that the decision for a complainant to give evidence remotely, whether via prerecording or simply via AVL link, was a difficult one and that views differed about the appropriate course of action.

As discussed in section 30.2.6, in Case Study 46 we heard evidence from a survivor, FAB, who had given evidence in a trial of his alleged abuser in 2016. Reflecting on FAB's decision to give evidence live in court rather than via AV link, Crown prosecutor Mr Lou Lungo said:

Yes, well, in conference he indicated he wanted to give evidence in court and he was told that he could give evidence via AVL. However, I mean, I certainly wouldn't discourage anyone – a complainant from giving evidence in court. He seemed to be confident. However, I think that might have been adverse to him, in hindsight. I think he may well have coped better being in the remote room without seeing the accused in court.<sup>265</sup>

Ms Caroline Carroll, representing the Alliance for Forgotten Australians, said of the option to prerecord a survivor's evidence:

Well, I think if the client or the survivor is – if that's what they want to do, I think, you know, every effort should be made to make it easy and better for the client. Many of our people wouldn't want to do that. They would want their day in court. But many of us wouldn't want that. We would much rather have a taping of what we had to say, because we could do that in a place where we were more comfortable, where we had some support around us and wouldn't have to face a court like this. So I think it's a really individual thing, but I think we should try to discover many different ways of taking people's stories and hearing what happened.<sup>266</sup>

FAA, a survivor, gave evidence regarding his experience of participating in a trial of his alleged abuser, FAD. FAA spoke of giving evidence remotely during a committal hearing:

I gave evidence at the committal hearing from a remote witness room. I believe [FAD] was present in the courtroom. It helped that I was able to give evidence without seeing [FAD].<sup>267</sup>

In Case Study 46, the Victorian DPP, Mr John Champion SC, endorsed the support expressed by the New South Wales DPP for the prerecording of cross-examination and gave his views on prerecording of evidence in Victoria:

We have actually come quite some distance in Victoria. Obviously the [Royal] Commission would know that we have police doing VARE [Video and Audio Recorded Evidence] recordings with children and cognitively impaired witnesses. They get very good training. The quality of that product is getting better and better.

We have, in Victoria, special hearings that are conducted – well, let me go back a step. Although we still have committals we don't impose an oral committal process on children and vulnerable witnesses but move straight to the special hearing regime for them. So the evidence is, if you like, given once by children and cognitively impaired people. It is packaged and, as has already been remarked, it can be edited as needed and then presented to the jury as a packaged piece of prerecorded evidence. We find it works very well indeed.

Can I add, though, I'm firmly of the view that we should be making strong efforts to get evidence from children and cognitively impaired people very, very early. And I'm aware of the approach they take in England, or at least certainly strongly piloted in England, that if we could get to a position where we were getting the evidence of children, particularly, and cognitively impaired, within a very, very short period of time from the commission of the offence that they were either subject to or witnessed, that's an ideal. In England I know they try to work towards doing that within weeks.

It is especially important for child witnesses who we find often, through the trial process, the committal process, adjournments and so on, that it might be a year or two before the child is giving [his or her] evidence in [a] special hearing. That's a lot in a young child's life. If you have a seven-year-old or eight-year-old child, it could be that nearly a quarter or a third or a half of that child's life has passed before they are asked to give evidence. We have to get the evidence earlier.<sup>268</sup>

Mr Champion went on to say that he agreed that prerecording of evidence should be available for adult survivors of child sexual abuse.<sup>269</sup>

Mr Michael Byrne QC, the Queensland DPP, suggested that the main disadvantage of prerecording evidence is the possibility of having to call back a witness, particularly a child witness:

That can almost be doubly devastating for the child, or the adult, as the case may be – the witness – because the witness has got that aspect behind them so that they can deal with whatever else they’re dealing with. To have someone come along and knock on the door, figuratively speaking, to say, ‘You need to come back to court’, in my experience, can be very devastating.<sup>270</sup>

Mr Byrne was of the view that prerecording evidence may well be desirable for the complainant in terms of testifying early, in addition to other benefits, but it does not necessarily save resources, as the prerecording takes time to make, in addition to then playing the evidence in the trial.<sup>271</sup>

Speaking of the experience in Tasmania, Mr Daryl Coates SC, the Tasmanian DPP, said:

We’ve been having it [prerecording] for about 18 months now. I think I would endorse what the others say. It means that people look at the issues much earlier, so you can get earlier pleas of guilty.

I think the judges are more robust in controlling cross-examination in the special hearings, because it can be all edited out, so they can control cross-examination without the jury thinking they are getting into the defence counsel.

I think it does get earlier pleas and, in fact, in a family violence matter recently, the children didn’t even have to give evidence. Once the accused knew that the children were there to give evidence, he pleaded. Where if it had gone off for a normal trial, by then the children may not have given evidence.

In my submissions, however, I do raise that it’s not available to adults unless the prosecution prove that they will suffer severe emotional trauma or are unable to give evidence satisfactorily. So to prove that, you have to put the adult in the witness box, and they suffer the severe emotional trauma.

It would seem to me a much better situation where the adult can elect to have evidence by video-link or in an earlier special hearing, or if they wish to give it in court, they can do so. But it would be their election.<sup>272</sup>

The DPP for the Australian Capital Territory, Mr White, was also in favour of prerecording:

We have had in the ACT for some time evidence-in-chief interviews of children and pre-trial evidence of children, and it’s also possible to make an application for vulnerable witnesses to give their evidence in pre-trial setting. It has worked very well.



The advantages are primarily that the child can put the matter behind them. We find that children in particular focus on the giving of evidence; they don't focus on the result of the case, in which respect they differ from adults. So that's an advantage.

It's also an advantage to, in effect, define the issues in the case, because the cross-examination of the complainant will almost inevitably define the issues in the ultimate trial.

I would have to say that very occasionally – I think a couple of times in my time as DPP – we have discontinued matters as a result of pre-trial evidence. Which is a positive outcome for the criminal justice system.

We are introducing evidence-in-chief interviews for adult sexual offence complainants next year, but there's no provision at this stage to have pre-trial evidence in relation to adults. For the reasons I've mentioned earlier I don't see it as quite as important, but in some instances, it certainly is important. If they qualified as vulnerable witnesses we would be able to do it.<sup>273</sup>

The main criticism we have heard of full recording of the complainant's evidence is that it takes up too much time and too many other resources of the court in that court time has to be taken both to record the complainant's evidence and then again to replay it to the jury.<sup>274</sup> Another potential criticism, that a child may be called to give evidence in a trial even though they had already prerecorded their cross-examination, would appear to be a rare occurrence, as noted in the Acting DPP of Western Australia's evidence quoted above.<sup>275</sup>

Discussing the advantages and disadvantages of prerecording evidence, Mr Peter Morrissey SC, a senior member of the Victorian Bar, told the public hearing in Case Study 46:

Clearly, it spares the complainant the need for multiple revisitings of the issues that they have to talk about.

The disadvantages are that they often do not canvass a wide range of relevant matters, requiring recall, and that can be to the advantage of each side. It's hard to generalise about that. You need to be case specific and fact specific.

In some cases, it's radically unfair to the complainant and creates difficulties for them. In other cases, you have a sanitised case put forward through the – in Victoria it's called a VARE, but the same issues attend, whether it's recorded by police at an early stage or whether it's done in a special hearing.<sup>276</sup>

Mr Morrissey agreed that the need for the complainant to be recalled can arise because of late disclosure of information or because barristers may not be as fully aware of the factual context at the time of prerecording as they are on the day the trial starts.<sup>277</sup>

While noting that he has not participated in a prerecorded hearing, Mr Tim Game SC, a senior member of the New South Wales Bar, also raised the risks of having to recall a witness after the prerecording as well as the impact of the witness's evidence being seen on a screen:

What I've seen is cases where there's an early interview that comes in as part of the evidence-in-chief; there may be a supplementary interview when something further comes out; and then there may be an examination-in-chief when the prosecutor works out that some of the critical questions haven't been asked. So it's quite common to see it in dribs and drabs like that, and then you have the cross-examination.

And that last bit might be a relatively short passage of evidence, it might be just five pages of short but crucial questions, so then – I don't see any alternative to this, but it has an aspect to it that's not great, which is that the whole thing that one sees in the courtroom is kind of the cross-examination, and you're seeing it all on a screen.

I myself, if I'm given a choice between having a witness in court and having them on a screen, would tell them to go halfway across the country to come to be in the witness box. I understand it's different with children.

The other thing is there can be quite substantial delays. Sometimes you'll see a child giving an interview and then you'll see a teenager being cross-examined, and that's a very strange thing. I understand the necessity of it, but curially it is an odd thing.

For myself, as I said, as a party calling a witness, I really prefer to have the witness in the witness box in the courtroom, if possible, I have to say.<sup>278</sup>

Mr Game agreed that evidence given in person in the courtroom is more persuasive, saying:

Because they're [the witness] live and present and they're relating to the people and so people are interested in what they've got to say, whereas on the other hand they're somebody on a screen and they don't form a relationship.

I mean, I'm talking to you now and there's some kind of a relationship. Well, that's what happens with a witness in the courtroom. So everybody – the jury, everybody – forms some kind of relationship with the witness and that's what's lost.<sup>279</sup>

The Law Council of Australia noted that prerecording was a beneficial special measure but submitted that:

any scheme for pre-recording must include safeguards in relation to the provision of a full brief of evidence to the defence so that any trial is conducted as much like a normal trial as possible. The accused should know the full case against him or her at the time of the pre-recording, just as would be the case if the child gave evidence at trial. It is not appropriate for the prosecution to be permitted, except in exceptional circumstances, to obtain further or different evidence between the pre-recording and the time of the actual trial.<sup>280</sup>

In its submission in response to the Consultation Paper, Legal Aid Victoria raised concerns regarding the timing of the prerecording of evidence in Victoria. Its experience is that the current special hearing approach to children and cognitively impaired victims of sexual offences can sometimes lead to late resolution and discontinuances given that special hearings do not occur until just prior to empanelment of a jury. Late decisions as to resolution and discontinuance of matters can also have an adverse impact on both victims and the accused.<sup>281</sup>

In its submission in response to the Consultation Paper, the Victorian Government outlined that the initial implementation of prerecorded hearings involved a pre-trial process. However, an initial evaluation found that:

the conduct of special hearings as a separate pre-trial process contributed to increased delays in the prosecution of other sexual offence cases and placed an onerous burden on court resources. Special hearings also contributed to court delay by effectively doubling the time that would be required if the complainant were to give evidence during the trial. This is because the special hearing must be recorded, which will often take one to two days, and then the recording is played to the jury once the trial has commenced.<sup>282</sup>

Amendments were therefore made in 2012 to allow for special hearings to be conducted during the course of the trial.<sup>283</sup>

In her evidence in the public hearing in Case Study 46, Ms Joanne Bryant, representing Protect All Children Today (PACT), also noted the problems of delay even where prerecording is available:

the legislation that came in at the beginning of 2004 to the Evidence Act [in Queensland] – one of the premises was to reduce a child’s exposure to the court process, and that was the reason for prerecording of evidence, so it could be done much quicker, before the trial.

Sadly, it is still taking generally between 18 months and two years. We had a case recently where it was six years ago that the child gave their police statement. So it’s a very long time and a long proportion in a child’s life where they are in limbo, essentially, waiting for the court process to happen.<sup>284</sup>

### 30.7.3 Intermediaries

In Case Study 38, in addition to hearing the evidence of expert witnesses regarding the Registered Intermediary Scheme in England and Wales, described in section 30.6.1, we also heard evidence of the recent introduction of similar schemes in New South Wales and South Australia. In Case Study 46, we heard evidence from panels from New South Wales and South Australia about how their schemes were operating as at late November 2016.

## New South Wales

The intermediary aspect of the current child sexual offence evidence pilot scheme in New South Wales is based on the Registered Intermediary Scheme in England and Wales, but it is only available for child complainants and prosecution witnesses. It is being piloted in two District Courts.<sup>285</sup> Intermediaries (who are also called ‘children’s champions’ in the New South Wales legislation) receive formal training for their role, are expected to provide comprehensive assessment of witness capabilities and are paid.<sup>286</sup>

Although neither the legislation establishing the scheme nor the relevant District Court practice note provide for ground rules hearings, they can and do occur at the discretion of the court.<sup>287</sup>

In her evidence in Case Study 46, Ms Krishna stated that, as at the time of the hearing, Victims Services had received 389 requests for a children’s champion from the Child Abuse Squad pilot sites and matched 89 per cent of those requests with a suitably qualified intermediary who had assessed the child’s communication needs and assisted at the police interview. She indicated that, in some of the matters where an intermediary had not been matched, this was due to the need for the investigation to proceed in a timely manner.<sup>288</sup>

Ms Krishna also confirmed that Victims Services had received court orders requesting an intermediary for 36 matters and had matched all of these requests with a suitably qualified intermediary.<sup>289</sup>

Detective Chief Inspector Yeomans outlined how the intermediary aspect of the pilot was operating with respect to police:

police within the Child Abuse Squad, when they get a report of a young child being sexually assaulted – and they are one of the four areas in the pilot scheme, that is, Kogarah, Chatswood, Bankstown and Newcastle child abuse offices – they do an assessment themselves or with assistance of other areas, such as NSW Health, of the issues, communication issues with that child. It could be just the fact that the child is of tender years or it could be that they suffer from a disability. There could be a number of areas.

As a result of that, then we contact [J]ustice, and [J]ustice will match what we put forward and they will match an intermediary to that person. The intermediary then attends the office. What they do is that they will speak to the police involved and then they will make an assessment of the child, with the police officer conducting the interview. That assessment is not electronically recorded. The assessment is not about the offence. The assessment is solely to gauge the communication issues with that child.

What will happen then is that the intermediary and the police officer leave the room and a verbal – usually, if there is immediate risk and the child is going to be interviewed at that time, a verbal assessment is done. At a later time, a written assessment is done in relation

to that child. Then the interview proceeds, and at any time the intermediary can interrupt, for a better word, in relation to assisting police in relation to that interview. But most of that is done outside the interview precinct, outside the room. Then assistance, as I said, is given to the police in relation to how to conduct that interview and gain the best evidence in relation to that child.<sup>290</sup>

Ms O'Rourke said that the pilot had been so successful that efforts had been made to offer the use of intermediaries outside the pilot area:

Indeed, basically because it has been working so well, the office has been – the hardest part is that we cannot offer that to all our complainants, and so there are some that do not fall within the catchment zone of the jurisdiction of the pilot scheme. But if they are exceptional, for example, under 10 or under 18 with a cognitive impairment, we are seeking, with resources available, the use of a witness intermediary and then the utilisation of sections 26 and 41 of the Evidence Act to at least put it before the judge conducting the trial so that some consideration can be given to those children giving evidence.<sup>291</sup>

Detective Chief Inspector Yeomans gave an example of where the use of an intermediary had assisted in a matter outside the operation of the pilot sites:

We recently did an intermediary matter at Ballina, and although it was outside of the pilot scheme, [J]ustice assisted us in interviewing a little girl there who was suffering from cerebral palsy.

It was a matter that, more than likely, police wouldn't have been able to gain a disclosure from the child. Because of the input from the intermediary, the police were enhanced in relation to the way that they interviewed that child and they got a full disclosure from that child, and, as a result of that disclosure, the person pleaded guilty and got a custodial sentence. That more than likely wouldn't have happened unless for that intermediary."<sup>292</sup>

In its submission in response to the Consultation Paper, the New South Wales ODPP stated that feedback from the pilot of intermediaries in New South Wales had been very positive albeit based on relatively small numbers at the time of writing.<sup>293</sup>

In Case Study 46, Ms O'Rourke suggested that defence counsel had been accepting of the role of the intermediary in the pilot thus far:

the defence counsel have really come on board. They are very open to suggestions. The ones that may have been a little bit hesitant at the beginning – at the beginning, when they saw the use of a witness intermediary and how they can actually assist defence as well in getting a clear question and answer back from the child, they have really embraced, in my experience, the whole pilot scheme itself, including the use of the witness intermediaries, once it has been made clear to them that they are impartial and they are not a tool for the prosecution.<sup>294</sup>

Giving evidence as a defence barrister who had participated in the pilot, Ms Hall agreed:

Certainly my experience has been that both parties, both defence and Crown, have been very open to the assistance of the witness intermediary. I think the use of the terminology 'witness intermediary' rather than 'children's champion' is one that is encouraging defence counsel to see the witness intermediary as what they are intended to be – that tool of communication to enable the witness to give the evidence in a succinct fashion and in a way that enables that communication. So the use of the term 'witness intermediary', which, in my experience, is what has been happening at court, is one that is very positive. Once people understand the role of the witness intermediary, they have really embraced it.

In terms of the ground rules hearing, there have been arrangements for the complainant to attend court a little bit later, so they are not waiting around, to enable parties to have the ground rules hearing and then to facilitate any communication between counsel and the witness intermediaries to, if you like, perfect the questions that are going to be asked.

Some counsel who have no experience with witness intermediaries might find themselves a bit challenged by some of the rulings, so they then have a short opportunity to discuss with the witness intermediary a way that they could redraft their questions to make them more appropriate in the circumstances. That's very positive as well.<sup>295</sup>

In its submission in response to the Consultation Paper, Legal Aid NSW expressed concerns about the use of the term 'children's champions' given 'the neutrality and independence of the role of intermediaries and their status as officers of the court'.<sup>296</sup>

In Case Study 46, while noting that it was too early to assess the long-term impact of the reforms of the pilot, Ms O'Rourke expressed the view that the ODPP had had a very positive experience in the pilot thus far.<sup>297</sup> Ms Krishna and Ms Hall also agreed that the experience of the pilot thus far had been very positive.<sup>298</sup>

## South Australia

The South Australian scheme of 'communication partners' commenced on 1 July 2016. The scheme has been in development since 2010 as part of the state's Disability Justice Plan.<sup>299</sup>

While the scheme is largely based on the Registered Intermediary Scheme in England and Wales, it has some differences, noted in the evidence of Mr Plater, Senior Legal Officer with the South Australian Attorney-General's Department, in Case Study 38.<sup>300</sup> The differences are that communication partners are volunteers and the scheme extends to defendants.<sup>301</sup>

While no matters have yet proceeded to the trial stage, we understand that a communication partner support has been provided at the pre-trial stage in a matter that is listed for trial in 2018.

We understand that communication partners are provided with a ‘recommendation template’ to complete which sets out the basic details of the referral as well as the process the partner has undertaken in assessing the witness, observations regarding the witness’s communication needs and any recommendations regarding reasonable adjustments.

The South Australian scheme involves both communication partners and communication assistants. Partners are those formally registered under the communication partner scheme, who can bring their professional skills and training to assess and assist a witness to communicate. Assistants can be parents, carers, teachers or another person who has known the vulnerable witness and can assist the witness to communicate in the best way possible.<sup>302</sup> Both can speak during either a police interview or courtroom examination to assist the witness to understand the questions and to clarify their answers.<sup>303</sup>

The service provider for communication partners under the scheme is a non-government organisation, Uniting Communities.<sup>304</sup> In terms of training, communication partners must complete the Uniting Communities three-day training program. Communication partners go through a selection process, and volunteers must demonstrate relevant knowledge, skills and experience of working with people with disability and/or working in the legal sector. All communication partners must pass a screening process that includes telephone screening and an interview before proceeding to the competency-based training. Upon completion of the training, volunteers undergo criminal screening checks and Working with Children Checks before they can commence in the role.<sup>305</sup>

In terms of assessment, South Australia Police, Child Protection Services, the ODP, the Legal Services Commission, the courts and private legal practitioners can request a communication partner, and the assessment as to whether a partner is required will be made by the requesting party, in consultation with Uniting Communities.<sup>306</sup>

At the time of the public hearing in Case Study 46, communication partners were available in Adelaide, Mount Gambier and Port Augusta (which collectively cover 75 per cent of the state’s population), but it is intended that eventually there will be a state-wide service.<sup>307</sup>

In terms of the availability of communication partners at the time of the public hearing, Mr Weir of the South Australian Attorney-General’s Department told the public hearing:

We want a model that is able to work from Adelaide to south east, to Mount Gambier, all the way to the far west and the Arnhem and Pitjantjatjara Lands, and, with that, we need to be strongly focused on meeting people’s rights, agencies meeting their responsibilities and frontline staff, whether they be police or other agencies, having some skills and capabilities to identify people who are vulnerable because of an intellectual disability but also have the supports, for example from the partnering service, that can be made available wherever they work to try to be proactive and address any risks as early as possible.<sup>308</sup>

As at 17 May 2017, we understand that the service has been expanded to Murray Bridge, Port Pirie, Whyalla, and Victor Harbor.

As at 24 November 2016, since the commencement of the provisions on 1 July 2016, there had been 16 calls to the service provider to request or discuss the support of a communication partner. South Australia Police made 15 of the 16 requests, including one seeking assistance in relation to a suspect. One request was made directly by a parent.<sup>309</sup> Of those 16 requests, 11 had resulted in a communication partner attending, with one request still pending. In the other four cases, a communication partner was not provided because the witness either did not meet the criteria of complex communication needs or a communication assistant was deemed to be more suitable to facilitate communication.<sup>310</sup>

Detective Superintendent Wieszyk of South Australia Police told the public hearing in Case Study 46 that the scheme was working to assist in building rapport between police and victims.<sup>311</sup>

The *Statutes Amendment (Vulnerable Witnesses) Act 2015*, which includes the provisions for communication partners, also includes provisions for:

- specialised training for police interviewers of vulnerable witnesses so that those interviews can be used as the witnesses' evidence in chief<sup>312</sup>
- the prerecording of cross-examination, as discussed in section 30.7.2<sup>313</sup>
- a revised provision allowing evidence to be given by third parties where a complainant has made a disclosure to that party but cannot give evidence in court, as discussed in section 30.5.3.<sup>314</sup>

Mr Weir indicated that funding for the various aspects of the Disability Justice Plan totalled \$3.26 million over four years.<sup>315</sup>

It is anticipated that the scheme and other measures introduced under the Disability Justice Plan will be evaluated at the end of 2017.<sup>316</sup>

## What we were told in submissions and Case Study 46

In submissions in response to the Consultation Paper, there was widespread support for the use of intermediaries, at both the investigative and trial stages, particularly for children and vulnerable witnesses.<sup>317</sup> Some submissions specifically noted the importance of intermediaries being well trained and recognised as competent in their field.<sup>318</sup>

The Victorian Victims of Crime Commissioner suggested that the use of intermediaries would not only enable victims of child sexual abuse to participate in trials but also reinforce an 'accused's right to a fair trial by ensuring the most accurate and complete evidence is given at trials'.<sup>319</sup>



Ballarat CASA Men's Support Group expressed support for the use of intermediaries on the basis that the trauma survivors have suffered may have impacted on their ability to take in information, particularly where stressed or anxious. An intermediary would help reduce the power imbalance and associated anxiety.<sup>320</sup>

Women's Legal Service NSW submitted that:

in child sexual abuse cases, the hearing of effective prosecution evidence, and the consequent likelihood of achieving convictions, should not be hindered by the very fact that the offences are perpetrated against children, who lack the capacity of most adults to effectively communicate in a court room.<sup>321</sup>

People with Disability Australia (PWDA) submitted that an intermediary scheme along the lines of that operated in England and Wales was urgently needed to address the barriers to justice that children and adults with disability experience.<sup>322</sup> In her evidence in the public hearing in Case Study 46, Dr Jess Cadwallader, representing PWDA, outlined her view that providing support through intermediaries at the police and court stage of the criminal justice process 'has the potential to demonstrate that people with disability are actually great witnesses when they are given the adequate support to do that.'<sup>323</sup>

PWDA and Children and Young People with Disability Australia (CYDA) both expressed concerns about the voluntary nature of the communication partners in the South Australian scheme, which may limit participation to retired communication experts. CYDA was concerned that the lack of required qualifications, expertise and training may mean that meaningful support is not provided.<sup>324</sup> While recognising the costs involved, PWDA was of the view that the demands of justice, and Australia's obligations under the *Convention on the Rights of Persons with Disabilities*, meant it was vital that intermediaries have up-to-date expertise.<sup>325</sup>

Ms Stephanie Gotlib, representing CYDA in the public hearing, expanded on CYDA's submission:

I'm sure it [the communication partners scheme] will, and does, provide a very important role for children with disability or people with disability that have communication needs. I think a particular focus that CYDA is very concerned around, that is in many ways a last frontier, I think, is around how do we provide support for that group of children with really significant, high communication and behaviour support needs?

So they're children that communicate primarily through their behaviour, who will never, due to the functional impact of their impairment, be able to make a disclosure, but they will communicate very powerfully, through their behaviour, around their experiences. That group, we know through research, is most vulnerable to abuse and sexual abuse, but it's still very unclear as to how we can progress around their access or ability to access criminal justice.<sup>326</sup>

In response to a question about CYDA's concern that the South Australian scheme will not have the expertise to address the needs of that group, Ms Gotlib said:

I think that particular cohort of children is, through my experience, absolutely dependent on the system for safety but also absolutely dependent on others to have their behaviour recognised, acknowledged, and the opportunity, in fact, to communicate at all.

So it's a very, very vulnerable group, and in a context where behaviour around disability, when it's confronting, when it's different – the typical response is around containing that and stopping it. So we're in a community where behaviour support is hard to access under ideal circumstances, and so around that group of people who are so dependent and reliant on people who have a relationship and specific expertise around their individual circumstances, I don't think the South Australian program and the like of that will be able to provide the communication support and access and opportunities that that group of children require.<sup>327</sup>

When asked how the scheme could be improved, Ms Gotlib said:

I think in terms of how we progress, there's been lots of talk around training and professional development for those involved in the criminal justice system, but I think we need something established that is done by communication experts in this particular area. So in terms of speech pathologists and psychologists with the relevant expertise, I think that should be mandatory.

And I think that we need to look at how evidence is provided which allows that capacity for behaviour to be reported through significant others who can represent accurately what these children's behaviour means and how it's different, what the concerns are.<sup>328</sup>

Some submissions suggested that it would be useful to wait until the New South Wales pilot had been evaluated before forming a view on the use of intermediaries.<sup>329</sup> The Queensland Bar Association was of the view that, given the significance of the change of allowing an intermediary to actively participate in both a recorded interview with police and in court, any reforms should be made with great care and only with the support of very strong evidence.<sup>330</sup> The Queensland Family & Child Commission felt that the provision of intermediaries was worth 'exploring in more detail'.<sup>331</sup>

Both the Tasmanian Government and Tasmanian DPP noted in their submissions that the Tasmanian Law Reform Institute was considering the issue of intermediaries.<sup>332</sup>

PACT queried the need for intermediaries given the risks of requiring the child to develop rapport with too many people, including at the investigative stage.<sup>333</sup> However, in her evidence in the public hearing in Case Study 46, Ms Bryant, representing PACT, noted that the services that PACT provides are more in the nature of support services than the potentially

interventionist role that an intermediary can play; and, further, that PACT would not oppose any measure that would ensure the court proceedings were being conducted in a way that was more appropriate for a child witness.<sup>334</sup>

In its submission in response to the Consultation Paper, the Aboriginal Legal Service (NSW/ACT) expressed support specifically for Aboriginal and Torres Strait Islander intermediaries for Aboriginal and Torres Strait Islander witnesses. It submitted that this would improve the quality and reliability of evidence provided, noting that many Aboriginal and Torres Strait Islander witnesses face communication challenges in court, including a lack of understanding of communication styles and cultural practices.<sup>335</sup>

In her evidence in the public hearing in Case Study 46, Ms Jeannie McIntyre, representing the Victorian Aboriginal Child Care Agency, outlined her support for providing specialist Aboriginal and Torres Strait Islander intermediaries:

it's about providing culturally safe advocates for Aboriginal people, and that obviously is for children but also for Aboriginal adults. I mean, we've had many people come forward to the Royal Commission, have told their story but still don't want to actually make a report to police, because they don't feel safe. Some have, but still there's that fear.

To make the report to the police and then potentially go through any sort of trial is going to be a huge traumatising issue for anyone who has been through this, I think black or white, to be quite honest, but having someone that people feel is safe, that they can identify with, that is there to support them is critical if we really want change in this whole system.<sup>336</sup>

Legal Aid NSW and the Aboriginal Legal Service (NSW/ACT) supported the availability of intermediaries for vulnerable witnesses but, as a matter of fairness, submitted that they should also be available to vulnerable defendants.<sup>337</sup> Legal Aid Victoria suggested that police should be prevented from questioning or undertaking forensic procedures on a person with an acquired brain injury, cognitive impairment or intellectual disability without an independent support person or intermediary present.<sup>338</sup>

We note that the Victorian Law Reform Commission recently recommended the establishment of a professional intermediary scheme modelled on the England and Wales scheme.<sup>339</sup>

### 30.7.4 Ground rules hearings

A number of witnesses in Case Study 38 outlined the potential benefits of pre-trial directions hearings, including laying ground rules for how the questioning of witnesses – in particular, vulnerable witnesses – is to be conducted.<sup>340</sup> These rules can include the way questions may be asked, whether the defence case needs to be put to the witness, and the overall management

of the witness's evidence – for example, whether breaks are required.<sup>341</sup> As noted in section 30.6.1, in England and Wales the ground rules hearings can set rules about questioning, including relieving a party of the obligation to put their case to the complainant.

Many submissions in response to the Consultation Paper expressed general support for ground rules hearings.<sup>342</sup>

Legal Aid Victoria supported the use of ground rules hearings, especially where an intermediary is to be used. It submitted that:

ground rules should assist to provide a less stressful experience for witnesses and complainants by making it easier for them to better understand the questions put to them by the defence and enable a full and honest answer. This may also inadvertently reduce the number of follow up questions asked by the defence, thereby facilitating a more efficient trial.<sup>343</sup>

Legal Aid Victoria stated that such hearings would give practical effect to the Charter of Advocacy for prosecuting or defending sexual offence cases.<sup>344</sup> The charter was developed by the Victorian Department of Justice in 2010, in consultation with various legal stakeholders, including the Supreme, County and Magistrates' Courts of Victoria, the Office of Public Prosecutions, Victoria Police, the Criminal Bar Association, the Law Institute of Victoria, Victoria Legal Aid and the Judicial College of Victoria.<sup>345</sup>

The charter collects existing obligations under the law and legal practice rules which, if observed, can minimise the trauma experienced by victims of sexual assault without jeopardising the accused's right to a fair trial.<sup>346</sup>

Legal Aid Victoria submitted that any ground rules should only relate to how questions are asked rather than whether specific questions could be asked.<sup>347</sup> Ms Helen Fatouros, representing Legal Aid Victoria, expanded on this in her evidence in the public hearing in Case Study 46:

I think it's about enabling the defence to properly construct their defence and their case strategy, if you like, in a non-prescriptive way that could limit the ability of an accused person to fully put their defence.

There's a lot of legislative provisions available now which prescribe notice requirements around questioning on particularly sensitive areas, like prior sexual history; there's a lot of evidentiary provisions that provide protections in relation to how a cross-examination takes place, particularly for vulnerable victims.

So a further prescriptive process which descends to exactly what questions may be asked is too rigid, I would say, in terms of allowing the defence to run their case.

Having said that, I think well-constructed case preparation and case strategies would enable defence barristers to thematically go to the areas that they're likely to cross-examine upon, and there will be a level of detail in that which makes the ground rules hearings serve their purpose.

It's really, again, a question of degree from my perspective.<sup>348</sup>

Legal Aid Victoria also suggested that certain practical issues relating to the operation of ground rules would need to be addressed before they could be adopted, including consideration of how defence could depart from agreed ground rules where the evidence leads to further lines of inquiry relevant to the accused's defence or the facts in issue.<sup>349</sup> They also recommended that ground rules hearings be available in relation to the questioning of a vulnerable accused.<sup>350</sup>

The Bar Association of Queensland submitted that ground rules hearings to clearly delineate allowed lines of questioning are difficult to reconcile with the right of the defence not to disclose their case prior to the commencement of trial. The Bar Association expressed the view that it is the role of the trial judge to ensure that counsel confine themselves to relevant, allowable lines of questioning.<sup>351</sup> The Bar Association cited the High Court case of *Wakeley and Bartling v The Queen*,<sup>352</sup> where the court noted that the limits of cross-examination were hard to define, given that some facts may only become relevant after other evidence has been brought forward. In that case, Mason CJ and Brennan, Deane, Toohey and McHugh JJ stated:

Although it is important in the interests of the administration of justice that cross-examination be contained within reasonable limits, a judge should allow counsel some leeway in cross-examination in order that counsel may perform the duty, where counsel's instructions warrant it, of testing the evidence given by an opposing witness.<sup>353</sup>

In her evidence in Case Study 46, Ms O'Rourke of the New South Wales ODPP discussed the operation of ground rules hearings in the New South Wales pilot:

There is basically a ground rules hearing. After the assessment of the child, there is a quick meeting – it tries to be quick because it is usually incorporated on the first day of the prerecorded hearing. So as not to keep the child waiting for very long, there is an assessment done as to the specific needs and how questioning should or should not be done with the child.

There are also some suggestions that are available by the witness intermediary – for example, one child was quite anxious in giving evidence and one thing that calmed her anxiety was the use of her dog. In one of the prerecorded hearings, we had the use of Nepean therapy dogs that could sit with the child whilst that child was giving her evidence in a prerecorded hearing.<sup>354</sup>

Ms O'Rourke gave another example of a child who had alleged that she was always assaulted from behind, so one of the suggestions from the intermediary was that the child should be able to give her evidence in a corner, have a tent over her and be surrounded by her toys so that she felt safe that no-one was able to come from behind when she gave her evidence.<sup>355</sup>

We note a recent decision regarding the use of a support dog in the Australian Capital Territory Supreme Court: *R v BL*.<sup>356</sup> BL was charged with two counts of acts of indecency on a child under 10 and one count of assault occasioning actual bodily harm. The complainant in relation to all three offences was his daughter, D. D has Asperger's syndrome, a form of autism.

D gave her evidence at a recorded pre-trial hearing. The presiding judge ordered that she be permitted to give her evidence accompanied by her support dog on the basis that the dog would have a positive impact on D's capacity to give evidence. At the time of the prerecording, the judge noted that, before the recording of the pre-trial hearing was played, the trial judge should direct the jury that they must disregard the presence of the dog and not take into account any consideration of sympathy or prejudice that might otherwise be engendered. The dog's presence was not discernible in the recording. An issue in the trial was whether the trial judge should give a direction to the jury in relation to the presence of the dog. No direction was given.

Ms O'Rourke also noted that there had been some initial resistance to ground rules hearings from the defence Bar:

Yes, because it was basically – well, understandably to some extent, because there was some concern that we were repeatedly going to court to obtain the report, to do a prerecorded hearing, and there was some concern that we were – and part of the practice direction, your Honour, is to have the Crown Prosecutor who is conducting the hearing to attend, and the defence counsel. It was basically ensuring that we were repeatedly going over to court for some directions hearings, so that was some of the concern. But it has sort of evolved now that it is seen that it's a more productive way of doing it and it can be done quite quickly, as Ms Hall said, on the morning of the pre[re]corded hearing, and we just adjust so that the complainant arrives a half an hour later.<sup>357</sup>

Speaking as a defence barrister who had participated in the pilot, Ms Hall made the following comments about whether holding ground rules hearings on the morning of the prerecording gave sufficient time to defence counsel to adjust their cross-examination plans:

There certainly has been in the matters that I've been involved in, although I have to say because of the way the orders were made so that the reports were served in the week before the prerecording, I've certainly found that in the matters that I've done, I've had enough time to consider the ground rules that are proposed, or the recommendations that are proposed, and I've had enough time to factor that in to the questioning that I have done.

In part, I certainly consider that a lot of the rules that are proposed are, in many ways, commonsense, so in a lot of ways they don't require a great deal of refashioning of your questions.

On other occasions where a complainant has very specific needs, for example where they have an intellectual disability, then that obviously will require a little bit more attention to detail in terms of what you are doing. But I've always found that time is provided. And the courts – because they are encouraging counsel to embrace the witness intermediary, the court is very flexible if you do need some time. I would be very surprised if the court were to say, 'No, you can't have some time to consult with your witness intermediary.'<sup>358</sup>

A number of submissions in response to the Consultation Paper supported ground rules hearings on the basis that they would reduce confusion for survivors, with an apparent expectation that the ground rules would be shared with survivors before cross-examination and give them some expectation of how they would be questioned.<sup>359</sup> While it may be the case that more widespread use of ground rules hearings does improve the clarity of questioning over time, it is not anticipated that a standard set of ground rules for all cross-examinations be developed. Rather, each ground rules hearing deals with issues that have arisen specifically in the trial at hand and in relation to the relevant witnesses.

The National Association of Services Against Sexual Violence (NASASV) suggested that ground rules for cross-examination should not be necessary, as judicial leadership and observance of existing rules of evidence should facilitate the proper and appropriate questioning of victims, including vulnerable witnesses.<sup>360</sup> Relationships Australia NSW submitted that it is the responsibility of legal practitioners to ensure that when questioning someone who has experienced trauma their questions are not confusing or confrontational.<sup>361</sup>

Relationships Australia NSW and Ballarat CASA Men's Support Group both submitted that the ground rules agreed at any hearing should be trauma informed.<sup>362</sup>

We discussed measures to familiarise the complainant with the trial process in Chapter 20, including recommendation 38 in relation to the development of standard material to inform the complainant about giving evidence.

### 30.7.5 Improving special measures

In the Consultation Paper, we invited submissions in relation to eligibility for special measures. In this section, we discuss these issues as well as issues relating to the technical requirements of using certain special measures and their resource implications.

Many submissions expressed support for extending the availability of special measures beyond children and people with disability to all victims and survivors of child sexual abuse.<sup>363</sup> In her evidence in the public hearing in Case Study 46, Ms Gunn, representing Ballarat CASA Men's Support Group, expressed the view that the use of intermediaries and the prerecording of evidence should be extended to all victims of sexual assault, not just child sexual abuse, and not just for children and people with disability.<sup>364</sup> Ms Janet Loughman, representing Women's Legal Service NSW told the public hearing that special measure should be extended to adults, saying:

If the court system is going to get the best evidence from people, I think it's appropriate that they provide the supports that are required for the best evidence to be given.

It's the case that people don't report child sexual abuse until many years later, until they are adults, so we also think that it's appropriate that any measures that are introduced to make the system more responsive to children be also extended to adults.<sup>365</sup>

In her evidence in the public hearing in Case Study 46, Professor Judy Cashmore, representing Sydney Law School and reporting on a forum held with the Survivors & Mates Support Network, outlined the justification for extending special measures to adult survivors – in particular, recording the evidence:

We've argued that, in fact, a number of the issues that affect child witnesses extend to those who are survivors, and particularly if there are any cognitive impairments or mental health issues that are associated with it.

A number of complainants or survivors of child sexual abuse have suffered the adverse impacts of that abuse, so it has an impact on their education, their mental health and their capacity to want to deal with authorities. So there are a number of aspects. I think there is the power imbalance.

What we know is that adolescents and adults probably suffer the shame and humiliation, embarrassment, more than do younger children who don't understand the full impact of the sexual aspects of it.

The other thing that came through I think very clearly in that workshop was the number of men in particular who talked about how they flip back to their childhood persona. They are being asked, when they give evidence, to take themselves back and to recall exactly what happened and recall the details, and what that can do is flip them back into their thinking at that time, and some of them just find that incredibly difficult to cope with and they do zone out. So I think that we do need to have some of the same protections in place.

The other issues are the difference between males and females. We know that male victims can suffer – a paper that Rita Shackel and I did for the Australian Institute of Family Studies looked at the difference between the impact on male survivors and female survivors. I'm not saying that female survivors don't have, you know, very serious adverse



impacts, and a number of them, but there are a number of aspects that can be very difficult for men to deal with in that image of being a victim, which is not in line with the masculine image that our society expects. So I think there are a number of reasons, and so the capacity to be able to have some audio or video recording of the evidence – one of the other things that the survivors talked about was having to sit there while the police are tapping out and typing in a statement, and also doing it in environments next to a photocopier and having to stop and that it's a very prolonged process.

We know with children that's not the best way to get the most reliable and accurate evidence. Why would it be any different with adults? How do you get an accurate record and a flow of the evidence by having someone typing it in, 'Stop, I've just got to get this bit in.' We know from the research that that is not the best way to do it.<sup>366</sup>

The Law Council of Australia submitted that:

the pre-recording of all of a witness's evidence is a beneficial special measure, and provision for its use should be extended, particularly in relation to cases of child sexual abuse. As noted by the Royal Commission, the most significant gap in terms of eligibility for some special measures is the coverage of adult complainants who do not have disability.<sup>367</sup>

The Tasmanian DPP noted that provisions allowing evidence to be given via AV link as of right were limited in Tasmania to children. The Tasmanian DPP submitted that this should be extended to any complainant in a sexual crime, as the experience has been that use of the measure does not create any real prejudice to the accused.<sup>368</sup> The Tasmanian DPP also submitted that provisions allowing a child complainant to have all of their evidence prerecorded should be extended to all complainants in sexual assault matters.<sup>369</sup>

The Victims of Crime Commissioner for the Australian Capital Territory submitted that special measures should be available for all child victims of crime, not just sexual crime, as well as all victims of sexual abuse.<sup>370</sup>

Legal Aid Victoria and NASASV suggested that the prerecording of a witness's evidence in chief should be extended to all victims of sexual assault. However, they suggested that cross-examination in person should still be available, if required, to ensure fairness for the accused.<sup>371</sup>

In its submission in response to the Consultation Paper, Legal Aid NSW supported the extension of the prerecording and intermediary measures in the current New South Wales pilot to all vulnerable witnesses, including the use of intermediaries for child witnesses in the Children's Court.<sup>372</sup> Legal Aid NSW also noted that any expansion of the New South Wales pilot scheme should be accompanied by sufficient resources to meet the additional pre-trial steps required for ground rules hearings and prerecorded evidence.<sup>373</sup>

In its submission in response to the Consultation Paper, the In Good Faith Foundation supported the extension of video recording of the initial police interview to all survivors of child sexual abuse, including adults, rather than just children and people with disability.<sup>374</sup> The South Australian Commissioner for Victims' Rights submitted that the use of police interviews as evidence in chief should be extended to all vulnerable people, not just children.<sup>375</sup>

The New South Wales ODPP noted several gaps in the availability of special measures in New South Wales that it submitted should be rectified. For example, while the option to have a recorded police interview used as evidence in chief is limited to children under 16, the New South Wales ODPP submitted that this option should be extended to all children. Further:

under section 306ZK of the *Criminal Procedure Act 1986*, the support person for a vulnerable person may assist the vulnerable person with 'any difficulty in giving evidence associated with an impairment or a disability' but this section does not apply to sexual assault victims. Leaving aside the fact that that section does not recognise the inherent difficulties all children face when giving evidence, the alternate sections, section 294C and section 275B, offer less support for sexual assault victims in terms of what role a support person can play in proceedings and what communication assistance can be provided.<sup>376</sup>

Further, the New South Wales ODPP submitted that, when matters are committed for trial from the Children's Court, the victim does not receive the same protection from giving evidence twice as if the matter had commenced in the Local Court.<sup>377</sup>

The New South Wales ODPP also suggested that more resources were needed to increase the provision of, and access to, technology-based special measures in regional and country courts.<sup>378</sup>

We were told that, in Victoria, while child complainants are now able to give their evidence in a prerecorded hearing for matters in the Children's Court,<sup>379</sup> this option is not available for child complainants in summary hearings in the Magistrates' Court. This means that, if there is an appeal from a decision in the Magistrates' Court, the complainant may have to give evidence again, because appeals from the Magistrates' Court proceed as new hearings in the County Court.

In his submission, the Victims of Crime Commissioner for the Australian Capital Territory stressed the importance of having updated and reliable technology to support special measures. While he acknowledged that improving and extending special measures would require an increase in resources, he expressed the view that the benefits outweigh the potential costs.<sup>380</sup> In its submission, and in evidence in the public hearing, the Queensland Family & Child Commission also stressed the importance of consistent technical standards, and the availability of the relevant technology, to ensure the proper use of recorded evidence.<sup>381</sup>

Giving evidence in the public hearing in Case Study 46, the Acting DPP of Western Australia identified the challenges of maintaining recording facilities given that prerecording of evidence for children has been in place in Western Australia for over 20 years:

It's available in all of the District Courts, although the equipment is, to be honest, getting very outdated and on occasion, even in the newer courts, it fails inexplicably and it's enormously frustrating for everyone involved.

It's certainly not available in the Magistrates Court settings. So in the more remote areas of Western Australia, you still have to bring the young children and a guardian to a major regional hub in order to give their evidence. But again that's an advantage of prerecording, that they can come for a day and then go home rather than staying in the major hub, which has its own issues in relation to the sorts of people we're talking about in those areas.

The other thing we can do is that if a trial aborts for some inexplicable reason, both with adults and with children, if the adult or the child gets halfway through their evidence and the trial aborts because someone has said something inappropriate or a jury gets contaminated in some way, the jury is discharged, but we continue to take the evidence of the adult or child and that becomes the prerecording that is able to be used in the later trial, which has very real advantages. No-one wants to come back.<sup>382</sup>

### 30.7.6 Improving courtroom issues

In the Consultation Paper, we invited submissions in relation to a number of possible reforms, including to competency testing, courtroom questioning, the rule in *Browne v Dunn* and evidence of disclosure given by third parties. Some submissions commented on these issues, although we did not receive any submissions in relation to evidence of disclosure given by third parties.

#### Competency testing

In our private roundtable consultations, some practitioners expressed the view that, given the difficulty of applying the current competency tests and the literature suggesting that they do not reflect the most effective approach, changing to a simple request for a promise to tell the truth may be warranted.

Some practitioners expressed the view that children should still be asked to explain the difference between truth and lies, because otherwise a promise to tell the truth would be meaningless. Some gave examples where questioning of younger children had revealed that they were unable to articulate the difference between the truth and a lie. Other stakeholders noted that there was limited use in trying to get children to undertake the difficult task of explaining the difference between the truth and a lie on the basis that, if they could not articulate the difference, there is a good chance that the child will in fact tell the truth, because they do not know what it means to lie. Others also suggested that, if a child intended to lie when giving evidence, they are unlikely to have difficulty in identifying the difference between truth and lies.

Some stakeholders endorsed the view in the literature that it is more effective simply to ask children to promise to tell the truth rather than trying to assess their ability to define truth and lies.

In its submission in response to the Consultation Paper, PWDA stated that:

A person's competence (or capacity) will depend on the quality and appropriateness of the support they are provided. For a person with disability, their competency is inherently linked to the support they are being provided at the time i.e. if the support is inadequate, then the person's competency is affected.<sup>383</sup>

PWDA also noted the observation made by Professor Cooper, cited in section 30.5.1, that an intermediary can make the difference between a witness being assessed as competent or not and submitted that all supports required for a person to exercise capacity should be provided.<sup>384</sup>

The Australian Capital Territory Victims of Crime Commissioner submitted that questioning children on their definition or understanding of the truth is not a satisfactory test of a child's competence to give evidence. While he noted that different question types might be appropriate for different ages, he agreed that a promise to tell the truth would be useful for all children.<sup>385</sup>

Mr James McDougall, representing the Victorian Commission for Children and Young People, told the public hearing that the existing tests for competence had developed out of a system that had not recognised a child's capacity. He said:

I'm quite keen that we look at ways of exploring how children can be involved in legal decision-making processes and not be constrained by a capacity test that looks for an ideal, fully adult equivalent, but to recognise that children can and want to be involved to the extent that they are able and that we need to find those mechanisms that will support their greatest engagement possible with that decision-making process.

That doesn't mean that the children have to bear the whole or the final responsibility, but there is a value in them being involved in the process both for them and for us.<sup>386</sup>

The Tasmanian DPP submitted that no testing by a judge should take place and that competency should be a matter for the jury to assess when seeing the witness's evidence, if necessary assisted by expert evidence about the child's development.<sup>387</sup>

The New South Wales ODPP noted that questioning regarding the difference between truth and lies was already going to the second step of competency testing – that is, whether the witness is capable of giving sworn evidence rather than whether they are competent to give evidence to begin with. They noted that such questioning is frequently directed at child witnesses from the outset, suggesting that the default presumption that a witness is competent is not being applied to children.<sup>388</sup>

The New South Wales ODPP submitted that the increased use of intermediaries should dispel many concerns in relation to the basic competence of many victims, thus removing the need for basic competency testing.<sup>389</sup> The New South Wales ODPP expressed the view that, where required, a promise to tell the truth was the best approach where the witness is unable to give sworn evidence. This should be preceded by:

some questioning by the judge in order to establish rapport and perhaps satisfy themselves, if necessary, that the child understands what is being asked of them. But, again, the judge should be informed by the report from the witness intermediary and these type of questions need not be based on articulating the truth/lie difference. Straightforward, non-confrontational, non-theoretical questions could be asked (age, school, number of siblings, pets) where the answer is known and therefore concepts of truth and so on are also explored if required.<sup>390</sup>

In its submission in response to the Consultation Paper, the Victorian Government noted that the Judicial College of Victoria had published a practical guide to testing the competency of child witnesses. The Victorian Government also acknowledged that the process for testing the competency of children could be simplified.<sup>391</sup>

## Reforming courtroom questioning

In Case Study 46, we heard evidence from a survivor, FAA, who said that he had expected to be more protected from disrespectful questions during cross-examination:

During the cross-examination, I felt that [FAD]’s barrister was hostile and accused me of lying. He made a number of disrespectful comments that I felt belittling. The prosecution objected once or twice, but I thought he would intervene more. The judge stepped in more than the prosecutor did.<sup>392</sup>

FAA said that it took him days to get over the fact that the prosecution had not objected when the defence barrister accused him of lying.<sup>393</sup>

The DPP for the Australian Capital Territory submitted that judges are more likely to intervene to prevent questions in cross-examination that are misleading or confusing than those that are annoying, harassing, intimidating, offensive, oppressive or insulting. He queried whether this was because:

regular users of the court (judges, prosecutors, defence lawyers) have a much higher threshold when assessing if a question is harassing or offensive than witnesses be they children or adults.<sup>394</sup>

The New South Wales ODPP submitted that the use of intermediaries should significantly reduce the difficulty vulnerable witnesses face in cross-examination. However, particularly for those witnesses who do not receive assistance from an intermediary, the New South Wales ODPP submitted that further emphasis should be placed on adhering to the existing requirements under section 41 of the Uniform Evidence Act to reduce improper questions.<sup>395</sup> While improved questioning techniques for police should reduce extraneous material that is exploited in cross-examination, where irrelevant details are brought up in cross-examination, ‘questions of relevancy should be raised’.<sup>396</sup>

A number of submissions suggested that further information should be provided to jurors and legal professionals regarding current literature on memory, and misconceptions about sexual assault, in order to improve courtroom questioning and either eliminate, or at least reduce the effectiveness of, cross-examination tactics based on flawed understandings.<sup>397</sup> We discuss these issues in chapters 4 and 31.

## The rule in *Browne v Dunn*

In the Consultation Paper, we noted that, in England and Wales, one of the possible ground rules identified in the Criminal Rules is a direction relieving a party of any duty to put that party’s case to a witness or a defendant in its entirety, otherwise known as the rule in *Browne v Dunn*. We received a few submissions that commented on this issue.

Ms Lynette Edwards, a support volunteer in the Brisbane Courts, suggested that trials could be made more child friendly by avoiding statements like ‘I put it to you that is not the truth’.<sup>398</sup>

The New South Wales ODPP supported reform of the rule in *Browne v Dunn* in relation to victims who are children or cognitively impaired, preferably through legislative reform.<sup>399</sup>

The DPP for the Australian Capital Territory endorsed the proposition that the rule in *Browne v Dunn* is apt to lead to confusion for child witnesses and stated that the English approach of waiving compliance with the rule in certain situations had considerable merit.<sup>400</sup>

### 30.7.7 Expert evidence

We have heard that many cases of child sexual abuse have not proceeded to prosecution because of misconceptions held about the ‘expected’ behaviour of victims of child sexual abuse during and immediately after the abuse. Defence counsel can exploit these misconceptions to attack the credibility of a complainant in the eyes of a jury.

Evidence and criminal procedure legislation in some jurisdictions provides for the use of expert witnesses to address issues of child behaviour and development. These provisions are discussed in Chapter 31. Our recommendations in Chapter 31 in relation to judicial directions containing educative information about children and the impact of child sexual abuse are also relevant.

### 30.7.8 Use of interpreters

In the Consultation Paper, we sought submissions on the use and availability of interpreters.

PWDA submitted that access to Auslan interpreters for deaf people was an ongoing issue for the justice system, including courtroom facilities, support for a whole trial and variants of the language for some Aboriginal and Torres Strait Islander people. It recommended that adequate provision be made for interpreters for deaf and Aboriginal and Torres Strait Islander people.<sup>401</sup>

The Australian Capital Territory Victims of Crime Commissioner submitted that the lack of appropriate interpreters, including Aboriginal and Torres Strait Islander interpreters, is a concern in the Australian Capital Territory, as many interpreters will know the complainant given the small size of the jurisdiction. He suggested:

- additional efforts to recruit more interpreters
- better screening for conflicts of interest
- the establishment of a national Indigenous Interpreter Service, as recommended by the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs in 2011.<sup>402</sup>

In their submissions, Legal Aid NSW and the Aboriginal Legal Service (NSW/ACT) suggested that, to facilitate the effective participation of Aboriginal and Torres Strait Islander witnesses in child sexual abuse proceedings, the current New South Wales pilot of intermediaries should be expanded to a court in rural New South Wales, or Aboriginal and Torres Strait Islander intermediaries should be recruited more generally.<sup>403</sup>

The Victorian Aboriginal Legal Service submitted that there is a lack of cultural support for Aboriginal and Torres Strait Islander people across the justice system, including translation services, explaining complex legal procedures, and culturally appropriate wellbeing support. It recommended better training around Aboriginal cultural practices, languages and histories to ensure fairer outcomes for Aboriginal and Torres Strait Islander people.<sup>404</sup>

As well as supporting the use of interpreters for Aboriginal and Torres Strait Islander victims, including where English is not the victim's first language, the New South Wales ODPP submitted that consideration should be given to the use of cultural experts who could give evidence in relation to how sexual assault is viewed and responded to in Aboriginal and Torres Strait Islander cultures.<sup>405</sup>

The Royal Commission convened multicultural forums in each state and territory, with representatives from 220 organisations participating in eight events. Many multicultural organisations – particularly at the forums in Adelaide, Hobart and Canberra – identified use of interpreters as a challenge, especially in relation to disclosure, reporting and criminal prosecution.

The key concern raised with us was the minimal or non-existent training in professional conduct or ethical practice for interpreters. It was suggested that there are also often conflicts of interest for interpreters, giving rise to concerns about interpreters' confidentiality and trust.

At the forum held in Canberra, one participant said:

I often observe that interpreters are not capable of articulating the legal terminology, they often confuse different courts – clients have said they felt trapped with one interpreter, their only choice, any other one will feel the same, so they sign an affidavit that they don't truly understand. There's a huge need for specialised interpreters who understand the legal system and the terminology.<sup>406</sup>

In Canberra, a representative from the ACT Legal Aid Office spoke about the benefit of Cultural Liaison Officers who can offer advocacy and cultural interpretation services. This promotes an understanding of cultural issues alongside language interpretation.

In June 2016, the Judicial Council on Cultural Diversity released a Consultation Draft of Australian National Standards for Working with Interpreters in Courts and Tribunals.<sup>407</sup> The national standards set out model standards for courts, judicial officers, interpreters and legal practitioners regarding assessing the need for an interpreter and the engagement and operation of interpreters in legal proceedings. Following consideration of submissions, the council intends to submit the standards to the Council of Chief Justices for endorsement and implementation in all Australian courts and tribunals.

## 30.8 Discussion and conclusions

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### 30.8.1 Prerecording, recording, intermediaries, ground rules hearings and other special measures

It is clear that special measures have assisted complainants to give more reliable evidence. In some cases, victims may not have been willing or able to participate in a prosecution at all if they had not had access to special measures.

#### Prerecording

We are satisfied that prerecording the entirety of a witness's evidence is likely to have clear benefits for both the witness and the parties in a prosecution. Where the witness is a child complainant of child sexual abuse, the benefits are even greater in minimising the trauma associated with participating in the criminal justice process.



As well as the advantage of avoiding the need for a vulnerable witness to recount their abuse in court, the recording of the police investigative interview and the use of it as evidence in chief would appear to have significant advantages in terms of the accuracy of the evidence provided. Research has indicated that investigators' notes of interview with child abuse victims misrepresented both the information elicited and the way it was elicited. Such inaccuracies can have serious consequences for the evaluation of the witnesses and the preparation of statements, and it underscores the importance of electronic recording of such interviews.<sup>408</sup>

In his submission in response to the Consultation Paper, the DPP for the Australian Capital Territory expressed the opinion that using recorded interviews as evidence in chief has contributed to an increase in guilty pleas prior to trial.<sup>409</sup> Once the evidence has been recorded, there is no advantage in waiting to see whether the complainant will be willing to give their evidence in court at the trial stage, as it is already available.

Such benefits would also extend to historical cases of child sexual abuse, where the complainant is an adult. By way of example, in the case of FAB, discussed in section 30.2.6, if FAB's police interview could have been used as his evidence in chief then the problems that occurred in terms of him only giving evidence in the trial in support of three of the six counts against Rafferty would not have occurred.

The benefits of prerecording the cross-examination of witnesses were outlined in section 30.7.2. They include:

- obtaining the evidence earlier – this particularly benefits children, who can move on with their lives, but it can also benefit the parties by narrowing the possible issues at trial or even identifying cases suitable for a guilty plea or withdrawal of charges
- giving the witness a defined time to give their evidence, avoiding the risks of having them waiting around at court for other argument to take place in the trial
- being able to use the evidence again in any retrials without re-traumatising the witness.

The primary objections to the procedure are the resources required to ensure its availability and smooth operation and the risks associated with needing to recall the witness at a later stage of proceedings.

Moving to a system which requires the early disclosure of cases and the early involvement of trial counsel may require additional resources. Additional resources may also be required to provide the appropriate facilities to hold prerecorded hearings and replay them in a subsequent trial. However, the reform has a range of benefits identified above, not only in providing a less traumatic experience for the witness and enabling them to give their best evidence but also in improving the efficient operation of the criminal justice system more broadly. The benefits of the reform must be considered as well as the costs.

The benefits of prerecording may be greater in matters tried on indictment – where there may be a jury trial – than in summary matters, and so prerecording may not need to be made available in matters that are dealt with summarily. However, if the complainant’s police interview has been recorded, it should be admissible as some or all of the complainant’s evidence in chief in summary matters.

In relation to the risk of needing to recall the witness, it would appear that these circumstances, while unfortunate, do not regularly occur. With appropriate early involvement of prosecution and defence counsel at the prerecording stage, they should be avoidable in most cases.

In our private roundtable discussions, some participants noted that providing for certain special measures in legislation is not, of itself, enough to ensure that they are used effectively. Provisions supporting prerecording of evidence require commitment from a range of stakeholders to ensure their effectiveness. They require the support of the judiciary, including through supporting their use and, where necessary, issuing practice notes to manage their integration into case management procedures. They also require the support of governments, including through providing the necessary infrastructure to ensure that facilities and equipment are available to make, and replay, recordings of sufficient quality for use in the trial.

We are satisfied that states and territories should ensure that the relevant legislative provisions and physical resources are in place to allow for the prerecording of the entirety of a witness’s evidence in child sexual abuse matters tried on indictment. This should include both the use of a prerecorded investigative interview as some or all of the witness’s evidence in chief and the availability of pre-trial hearings to record all of a witness’s evidence, including cross-examination and re-examination, so that the evidence is taken in the absence of the jury and the witness need not participate in the trial itself.

We are satisfied that such provisions should be made available for all complainants in child sexual abuse matters tried on indictment, any other witnesses who are children or vulnerable adults, and any other prosecution witness that the prosecution considers necessary.

We consider that eligibility should be extended beyond child complainants to all child witnesses in recognition of the difficulties that may be faced where a number of children in a single family or children in the same school or other social group are required to give evidence. The benefits that a child complainant may gain, for example, from giving their evidence as early as possible in proceedings may be significantly reduced if a sibling who witnessed the abuse was unable to also give their evidence at that earlier stage of proceedings.

While most jurisdictions already make these provisions available for children and adults with a cognitive impairment, the most significant gap in terms of eligibility for some special measures is the coverage of adult complainants who do not have disability.

It is clear to us, including from what we have heard in public hearings and private sessions, that many survivors of institutional child sexual abuse who are now adults and do not have disability are ‘vulnerable’, particularly when they are describing their experiences of abuse and particularly in the very unfamiliar and stressful environment of a court. The evidence FAB gave about the difficulties he faced in giving evidence, discussed in section 30.2.6, provides one illustration of the problem. While the Crown prosecutor, Mr Lungo, suggested that FAB may have benefitted from giving evidence by AV link rather than in person in the court, it may be that FAB would have benefitted even more from being able to prerecord his evidence.

While CCTV and AV links may be available currently, some adult survivors are likely to benefit significantly from being able to use a prerecorded police investigative interview as their evidence in chief and to prerecord their full evidence, including cross-examination and re-examination. Such measures may complement the additional material we recommend be developed and provided to complainants or other witnesses in child sexual abuse trials to better inform them about giving evidence, as discussed in section 20.4.8.

In terms of ‘other prosecution witnesses that the prosecution considers necessary’, we include this category to cater for circumstances where an adult who is not the complainant, and does not have disability, is required to give evidence, and there may be some benefit to the evidence being given pre-trial.

For example, the parents or carers of a child complainant may be required to give evidence in the prosecution. Similar to the example of a complainant’s siblings giving evidence used above, some of the advantages to the child of prerecording their evidence and then being able to move on with their life will be missed if the parent cannot give their evidence until the trial itself takes place. Clearly, not all prosecution witnesses would be in this position. Where there are adult witnesses who are neither vulnerable nor closely connected to any child witnesses, there may be significantly less to be gained by taking their evidence early by way of prerecording.

While we recommend the availability of these special measures, we note that some survivors have told us of the satisfaction and pride they have taken in their ability to confront their abuser in court, face to face. We consider that victims and survivors should always have the option to give evidence live in court if they wish to do so.

We are also of the view that, where cross-examination is to be prerecorded, a ground rules hearing should be able to be held if required to maximise the benefits of the prerecording.

While ground rules are essential to get the full benefit of the use of intermediaries, discussed below, there may be other circumstances where they are of benefit. For example, in circumstances where the issue of compliance with the rule in *Browne v Dunn* arises, or where there are multiple accused who are separately represented, there may be benefit in a ground rules hearing so that all parties can establish a clear understanding, before the cross-examination commences, of the questioning that will take place.

The full benefits of using prerecorded or remote evidence may not be realised if there are technical problems with the recording and playback of such evidence, whether through the failure of the technology or through poor use of the technology. We were told in submissions that there would be benefit in amending protocols and improving staff training to eliminate or minimise these technical problems. Governments should work with courts to improve the technical quality of CCTV and AV links and the equipment and staff training used in taking and replaying prerecorded and remote evidence.

### **Recommendations**

52. State and territory governments should ensure that the necessary legislative provisions and physical resources are in place to allow for the prerecording of the entirety of a witness's evidence in child sexual abuse prosecutions. This should include both:
  - a. in summary and indictable matters, the use of a prerecorded investigative interview as some or all of the witness's evidence in chief
  - b. in matters tried on indictment, the availability of pre-trial hearings to record all of a witness's evidence, including cross-examination and re-examination, so that the evidence is taken in the absence of the jury and the witness need not participate in the trial itself.
53. Full prerecording should be made available for:
  - a. all complainants in child sexual abuse prosecutions
  - b. any other witnesses who are children or vulnerable adults
  - c. any other prosecution witness that the prosecution considers necessary.
54. Where the prerecording of cross-examination is used, it should be accompanied by ground rules hearings to maximise the benefits of such a procedure.
55. State and territory governments should work with courts to improve the technical quality of closed circuit television and audiovisual links and the equipment used and staff training in taking and replaying prerecorded and remote evidence.

## **Recording**

In the Consultation Paper, in relation to our discussion of appeals, we raised the issue of whether reliable audiovisual recordings should be made of evidence given by complainants in child sexual abuse trials so that these recordings could be tendered as the complainant's evidence in any subsequent trial or retrial.

Recording the complainant's evidence would avoid the need for the complainant to give their evidence again if there is a new trial. In the context of appeals, if evidence is not prerecorded or recorded, the complainant may be required to give evidence for a second time if an appeal against conviction is successful and a retrial is ordered.

There are other circumstances where a complainant may have to give evidence for a second time, even without an appeal. For example, where there is a hung jury, a new trial may take place. A jury may be discharged for a variety of reasons after the complainant has given evidence, and a new trial has to begin. Also, as outlined in section 30.7.5, where an appeal is brought from a lower court, the appeal might be heard by way of a new hearing in the higher court.

In all of these cases, if the complainant's evidence was prerecorded or recorded during the first trial, the complainant would not be required to give evidence again.

In circumstances where evidence can be given via a recording or CCTV, there should be no barrier to re-using the recording or to using a recording of the evidence given by CCTV in any retrial. This would avoid the need for the complainant to give evidence again. The relevant provisions in each jurisdiction provide for recordings of evidence to be admitted in subsequent proceedings in this way.<sup>410</sup>

In New South Wales, sections 306B and 306I of the *Criminal Procedure Act 1986* (NSW) provide that the prosecutor may tender as evidence in a new trial a record of the original evidence of a complainant in prescribed sexual offence proceedings, whether the new trial is following an appeal or discharge of a jury. If such a record is available, the complainant may elect to give further evidence but is not compellable to do so.<sup>411</sup>

These provisions apply to prescribed sexual offence proceedings regardless of whether the complainant was eligible for or used special measures to give their evidence.

The record of the complainant's evidence used in a new trial must be the best available evidence. That is, an audiovisual recording of the evidence should be used. If that is not available, an audio recording of the evidence should be used. If neither of those are available, a transcript of the evidence may be used.<sup>412</sup>

We understand that, where possible, evidence given live in court is recorded in audiovisual form in prescribed sexual offence matters in New South Wales, and the evidence of the complainant should therefore be available for use under these provisions.

Victoria has similar provisions, providing that a recording of the direct testimony of a complainant in sexual offence proceedings is admissible in any new trial.<sup>413</sup> In its submission in response to the Consultation Paper, the Victorian Government noted that the court may only admit the recording if it is in the interests of justice to do so, including having regard to the impact on the accused. The accused may also seek leave to cross-examine the complainant.<sup>414</sup>

South Australia has provision for a court in later proceedings to admit an official record of the evidence of a witness in earlier criminal proceedings but only where the witness is vulnerable, has died, has become too ill or infirm to give evidence or cannot be located.<sup>415</sup>

In his submission in response to the Consultation Paper, the Tasmanian DPP noted that, if a child complainant gives evidence at trial and the facilities are available, their evidence is to be audio and visually recorded and may be admitted at a subsequent trial.<sup>416</sup>

In his submission in response to the Consultation Paper, the DPP for the Australian Capital Territory noted that section 43A of the *Evidence (Miscellaneous Provisions) Act 1991* (ACT) provides for the mandatory recording of all of the evidence of sexual offence complainants and tendency and coincidence evidence witnesses, which is then available for retrial. He stated that the provision was introduced in 2013 and, while it had not been used at the time of his submission, he foresaw no problems with the provisions.<sup>417</sup>

In her remarks on sentencing Brian Spillane in the District Court of New South Wales for multiple convictions for child sexual abuse offences, Tupman DCJ referred to the use of a recording of the complainant 'Q's' evidence from a previous trial being used in the subsequent trial as follows:<sup>418</sup>

Q's evidence was before the jury in my trial by way of pre-recorded evidence. There had been a previous trial which had not finished for one reason or another, in which the offender was charged with a number of offences against a different group of complainants, one of whom was Q. The reason it did not finish is not relevant, but the provisions of the Criminal Procedure Act, 1986 now in force, meant Q's previous evidence, which had been video recorded, could be used and relied on as his evidence in this trial.<sup>419</sup>

Judge Tupman went on to describe the process used:

The way in which Q's evidence came before the Court is an indication of the attempts the justice and court systems have made in more recent times, to alleviate the burden on complainants in trials such as these, who often need to come to court more than once, in circumstances where for whatever reason, a trial either does not finish or there is a need for a new trial after appeal. Both the Crown and counsel for the accused in the trial before me, to my observation, worked cooperatively to ensure that much of the unfortunately extensive and often irrelevant cross-examination of Q at the previous trial, was edited out and did not go to the jury. Different counsel appeared for the offender in that earlier trial and his cross-examination extended over two days. Even after editing however, there was some material in Q's evidence that was irrelevant, unnecessary and from time to time, in my view at least, bordering on the offensive. It was impossible however for the parties before me to edit out all of that material, whilst at the same time allowing Q's evidence to maintain some sort of flow.<sup>420</sup>

We are satisfied that reliable audiovisual recordings should be made of evidence given by complainants in child sexual abuse matters and that these recordings should be able to be tendered as the complainant's evidence in any subsequent trial or retrial. Recordings should be made in both indictable and summary matters. This should be done for all complainants in child sexual abuse prosecutions, and not only those who are identified as 'vulnerable' under the relevant jurisdiction's legislation in relation to special measures.

We also consider that these provisions should extend beyond the complainant to other prosecution witnesses that the prosecution considers necessary. For example, siblings, friends or parents of the complainant who give evidence in the trial should also have the benefit of these provisions for the reasons we gave in relation to extending prerecording of evidence to these witnesses. We also consider that the recording of evidence should extend to witnesses giving tendency or coincidence evidence who are not complainants.

Legislation should require that evidence be recorded, regardless of whether the evidence is given live in court, via CCTV or in a prerecorded hearing. Legislation should also allow the evidence to be tendered by the prosecution and relied on as the witness's evidence in any subsequent trial or retrial. State and territory governments should ensure that the courts are adequately resourced to provide this facility, in terms of both the initial recording and its use in any subsequent trial or retrial.

In circumstances where the complainant or another prosecution witness is unable or unwilling to give evidence again, these provisions may facilitate a new trial or a retrial where otherwise the matter would not be able to proceed.

We acknowledge that it may be difficult for high-quality recordings to be made in all child sexual abuse cases where evidence is given live in court. It is important for jurors to be presented with the best evidence available. If the available facilities result in an audiovisual recording that is of poor quality and the complainant does not wish to give evidence again, the prosecution may face a difficult decision in considering whether there are reasonable prospects of a conviction using an audio recording, or even just a transcript, of evidence given in a previous trial. Such evidence may carry less weight with the jury.

If it is not practical to record such evidence in a way that is suitable for use in any subsequent trial, the fact that a witness may be required to give evidence again in the event of a retrial should be a matter discussed with the witness when they initially choose whether to give evidence via prerecording, CCTV or in person.

## Recommendations

56. State and territory governments should introduce legislation to require the audiovisual recording of evidence given by complainants and other witnesses that the prosecution considers necessary in child sexual abuse prosecutions, whether tried on indictment or summarily, and to allow these recordings to be tendered and relied on as the relevant witness's evidence in any subsequent trial or retrial. The legislation should apply regardless of whether the relevant witness gives evidence live in court, via closed circuit television or in a prerecorded hearing.
57. State and territory governments should ensure that the courts are adequately resourced to provide this facility, in terms of both the initial recording and its use in any subsequent trial or retrial.
58. If it is not practical to record evidence given live in court in a way that is suitable for use in any subsequent trial or retrial, prosecution guidelines should require that the fact that a witness may be required to give evidence again in the event of a retrial be discussed with witnesses when they make any choice as to whether to give evidence via prerecording, closed circuit television or in person.

## Intermediaries

In Case Study 38, Professor Cooper gave evidence that the primary justification for the provision of intermediaries is that all people have a right to participate in the justice system. If a person requires an intermediary to provide accurate and reliable evidence then an intermediary should be provided.<sup>421</sup>

We heard that the introduction of the Registered Intermediary Scheme in England and Wales has not only allowed many people to give evidence who otherwise might have been deemed unable to do so but also, over time and with support from senior members of the judiciary, it has encouraged a cultural change at the Bar, recognising that eliciting evidence from vulnerable witnesses requires skill and planning and that traditional approaches have prevented these witnesses from providing evidence at all.<sup>422</sup> Further recognition and support for the scheme came from the then Lord Chief Justice in 2010 and 2011 through judgments and a speech stating that intermediaries had become an integral part of the system without diminishing any rights to a fair trial.<sup>423</sup>

When asked whether an intermediary can completely overcome the suggestibility of vulnerable witnesses, Dr Mattison stated:



I'm not suggesting that it's possible to remove all traces, if you like, of somebody being suggestible. I think even a robust adult witness can be vulnerable to suggestibility, particularly with regard to memory processes. However, if questions are phrased so that the child understands them and if the child understands that if it's something that they are talking about that they know about, then they can say, 'No, that's not right.'<sup>424</sup>

Whereas generalised training for legal practitioners on questioning techniques may well improve the general level of awareness of the particular skills required to obtain the best evidence from vulnerable witnesses, the interaction of police, counsel and judges with intermediaries not only provides assistance to help an individual witness with particular needs but also provides 'on the job' training for those practitioners and access to expert advice about the techniques that can be used to meet different communication needs.<sup>425</sup>

The experience from the New South Wales pilot of witness intermediaries already suggests that they have had a positive impact and that their use is well supported by police, prosecutors and defence counsel. Justice agencies have sought to use intermediaries outside of the pilot areas, both at the police and court stage, because the otherwise unmet need and the benefits of using intermediaries are already clear.

Inevitably, intermediaries cannot fix all communication problems for vulnerable witnesses. There will remain the issue that police or prosecutors must recognise that there is a potential for communication breakdown before an intermediary is engaged.<sup>426</sup> Similarly, there will be some witnesses who, despite assistance from an intermediary, may not be able to give evidence – for example, a witness with advanced dementia<sup>427</sup> or a person with disability who is unable to give evidence at all.

However, there would seem to be potential for comprehensive and professional intermediary schemes to make a significant difference in reducing the problems that children and people with disability face in being heard by the criminal justice system.

As outlined in section 30.1, we have heard that children with disability are disproportionately targeted as victims of child sexual abuse. It is therefore particularly important that effective means of assisting people with disability, as well as children and other vulnerable witnesses, are provided to enable them to participate in the criminal justice system to the fullest extent possible.

Improving the quality of evidence provided – and, in some cases, providing reliable evidence where at present none can be given – is consistent with the aims of making the criminal justice system accessible and increasing its capacity to produce safe convictions for institutional child sexual abuse.

We are satisfied that all states and territories should work towards establishing intermediary schemes similar to the Registered Intermediary Scheme in England and Wales, available to any prosecution witness with a communication difficulty in a child sexual abuse matter. Important features of such a scheme should be as follows:

- Intermediaries should have relevant professional qualifications to assist in communicating with vulnerable witnesses.
- Intermediaries should be provided with training in their role and understand that their duty is to assist the court to communicate with the witness and to be impartial.
- Intermediaries should be available at both the police interview stage and trial stage.
- Intermediaries should be able to provide recommendations to police and the court on how best to communicate with the witness and be able to intervene in an interview or examination where they observe a communication breakdown.

We are satisfied that the long-term benefits of an intermediary scheme are likely to extend beyond assisting in the provision of accurate evidence in individual cases. From what we have heard, particularly with respect to the scheme in England and Wales, the frequent exposure to the assistance that can be provided by an intermediary has assisted in generating cultural change throughout the legal profession regarding the appropriateness of courtroom questioning, particularly in relation to children and people with disability.

It is our view that such broader benefits will be best achieved by a scheme that engages professional intermediaries who are experts in their field and likely to gain the trust of the legal professionals they work with as independent and useful participants in the criminal justice system. However, we do not discourage states and territories from investigating the provision of assistance for vulnerable witnesses even with limited resources. We note the views of CYDA and PWDA that adequate assistance should be provided as a matter of right, and they encourage states and territories to investigate what assistance can be provided to meet these needs immediately even if a full implementation of a comprehensive intermediary scheme is not achievable in the short term.

We note that the full evaluation of the New South Wales scheme will not take place until 2019. We understand the desire to evaluate pilot reforms before they are expanded. However, we are satisfied that the benefits of intermediaries are sufficiently clear that states and territories should move to implement schemes as soon as possible. We have not heard any examples of negative effects where intermediaries have been used; rather, we have heard that vulnerable witnesses are receiving inadequate support where professional intermediary schemes are not in operation.

We recognise the costs of intermediary schemes. There are costs in establishing the scheme and paying intermediaries. There are also likely to be costs for prosecution and defence agencies and the costs of meeting additional demands on court time and court resources. States and territories should work to make intermediary schemes available as quickly as possible but recognising that they may need to be expanded incrementally over time – potentially by area and by eligibility – as resources allow.

We see merit in states and territories recruiting intermediaries with the skills and expertise to assist Aboriginal and Torres Strait Islander witnesses, particularly given the submissions we have received regarding the specific challenges that Aboriginal and Torres Strait Islander people face in participating in the criminal justice system. The role of an intermediary in addressing communication difficulties is quite different from the role of Aboriginal and Torres Strait Islander liaison officers within police forces, and witness assistance officers. Aboriginal and Torres Strait Islander witnesses should be provided with both forms of assistance as required.

With respect to the submissions which suggested that intermediary schemes should extend to defendants as well as prosecution witnesses, we see the inherent fairness in this proposal. Given our Terms of Reference, we do not make a recommendation in relation to defendants but note that intermediary schemes could also be made available to defendants.

As noted above, we see significant benefits arising from the use of ground rules hearings with intermediaries. Professor Cooper expressed the view that ground rules hearings are essential to the smooth running of cross-examination and working collaboratively with intermediaries.<sup>428</sup> In England and Wales, directions have been made for defence counsel to consult directly with an intermediary on how best to frame their questions.<sup>429</sup> Such consultation also appears to be occurring in the New South Wales pilot. Given their duty of impartiality, intermediaries are required not to subsequently disclose these questions to either the prosecution or the witness.<sup>430</sup>

Ground rules not only provide for a more precise and less stressful experience for the witness but may also narrow the issues to be taken by the parties, thus improving the efficiency of the trial.

While inevitably the actual effect of the ground rules will depend on counsel observing them and/or the judge enforcing them in the trial, the experience in England and Wales has been of increasing compliance as the intermediary scheme has become more familiar to judges and practitioners.<sup>431</sup> In England and Wales, ground rules hearings are now formally required for all vulnerable witnesses, whether or not they have an intermediary. They have received judicial endorsement from the England and Wales Court of Appeal and, in the opinion of Professor Cooper, have been a key part of the cultural shift in the approach to vulnerable witnesses.<sup>432</sup>

The experience in New South Wales appears to be that ground rules hearings are a useful addition to the management of child sexual abuse trials, particularly where there is a witness intermediary involved. While it appears that there was some initial resistance from practitioners to what seemed to be another compulsory step in the trial process, the benefits in case preparation and more focused questioning now appear to be recognised.

In the recent Victorian Court of Appeal case of *Ward (a Pseudonym) v The Queen*,<sup>433</sup> Maxwell P and Redlich JA noted that, for some time, the evidence of children has been accepted as not inherently less reliable than adults and set out the range of resources now available to advocates to assist them in avoiding inappropriate questions when cross-examining children.

The court also noted the advent of intermediary schemes in England and Wales and New South Wales.<sup>434</sup> The joint reasons also observed that, even without a formal intermediary scheme operating in Victoria:

Some County Court judges as a matter of practice hold a pre-evidence hearing, at which the parties can discuss the capacity of the child witness. With respect, the introduction of such hearings seems to us to be a most enlightened initiative. There are obvious benefits in a prehearing of this kind, which is similar to the ‘ground rules’ hearing in the UK.

The applicable Practice Note requires the prosecution to inform the court, in the case of a child complainant, about the child’s ‘ability in giving evidence’. It may become apparent at the pre-hearing that an expert (to be engaged by the Crown) will assist the Court in better understanding the capacity of the child. The parties may agree as to what types of questions will be appropriate in cross-examination. Failing agreement, the judge may foreshadow a disposition not to allow certain types of questions. Or, where it is clear from the material available to the judge, including the child’s VARE [Video and Audio Recorded Evidence], the judge may disallow particular questions because of their form or content. Such a pre-trial hearing will in most cases reduce the prospect of the judge having to intervene during the trial. And it will provide defence counsel with guidance as to the form which the cross-examination may take.<sup>435</sup> [References omitted.]

We consider that ground rules hearings are likely to have significant educational value for judges and practitioners in terms of the best way to obtain evidence from vulnerable witnesses and the need to carefully plan their questioning. Ground rules hearings may well be the most important forum for the intermediary’s contribution in the prosecution phase of the criminal justice process.

We are satisfied that states and territories should work with their courts administrations to ensure that ground rules hearings are able to be held – and are in fact held – in child sexual abuse matters to discuss the questioning of prosecution witnesses with specific communication needs, whether the questioning is to take place via a prerecorded hearing or during the trial. This should be essential where a witness intermediary scheme is in place and should allow, at a minimum, a report from the intermediary to be considered.

The ground rules themselves should focus on how questions are to be asked rather than what is to be asked, although we note that in certain circumstances – for example, where there are multiple accused who are separately represented – the judge may make rulings on which issues different counsel may ask questions so as to avoid unnecessary repetition. In some cases, it may also be appropriate for the judge to make rulings on whether and the extent to which the defence is required to comply with the rule in *Browne v Dunn*. This issue is discussed in section 30.8.2.

### **Recommendations**

59. State and territory governments should establish intermediary schemes similar to the Registered Intermediary Scheme in England and Wales which are available to any prosecution witness with a communication difficulty in a child sexual abuse prosecution. Governments should ensure that the scheme:
- a. requires intermediaries to have relevant professional qualifications to assist in communicating with vulnerable witnesses
  - b. provides intermediaries with training on their role and in understanding that their duty is to assist the court to communicate with the witness and to be impartial
  - c. makes intermediaries available at both the police interview stage and trial stage
  - d. enables intermediaries to provide recommendations to police and the court on how best to communicate with the witness and to intervene in an interview or examination where they observe a communication breakdown.
60. State and territory governments should work with their courts administration to ensure that ground rules hearings are able to be held – and are in fact held – in child sexual abuse prosecutions to discuss the questioning of prosecution witnesses with specific communication needs, whether the questioning is to take place via a prerecorded hearing or during the trial. This should be essential where a witness intermediary scheme is in place and should allow, at a minimum, a report from an intermediary to be considered.

### **Other special measures**

We are satisfied that the other special measures generally used for vulnerable witnesses should be available for complainants, other vulnerable witnesses and other prosecution witnesses that the prosecution considers necessary in child sexual abuse prosecutions. We discussed who should be included in the category of ‘other prosecution witnesses that the prosecution considers necessary’ above in relation to prerecording. While some of these measures will not be needed for many prosecution witnesses, we are satisfied that it should be at the discretion of the prosecution that they be used where there is a significant benefit in doing so.

These special measures should include:

- giving evidence via CCTV or AV link so that the witness is able to give evidence from a room away from the courtroom
- allowing witnesses to have a support person with them when giving evidence, whether in the courtroom or remotely

- if the witness is giving evidence in court, using screens, partitions or one-way glass so that the witness cannot see the accused while giving evidence
- clearing the public gallery of a courtroom during the witness's evidence
- the judge and counsel removing their wigs and gowns.

Improving police investigative interviewing, including through improved skills and training, would also improve the effectiveness of special measures and should be a particular priority. This is discussed in Chapter 8.

### **Recommendation**

61. The following special measures should be available in child sexual abuse prosecutions for complainants, vulnerable witnesses and other prosecution witnesses where the prosecution considers it necessary:
- a. giving evidence via closed circuit television or audiovisual link so that the witness is able to give evidence from a room away from the courtroom
  - b. allowing the witness to be supported when giving evidence, whether in the courtroom or remotely, including, for example, through the presence of a support person or a support animal or by otherwise creating a more child-friendly environment
  - c. if the witness is giving evidence in court, using screens, partitions or one-way glass so that the witness cannot see the accused while giving evidence
  - d. clearing the public gallery of a courtroom during the witness's evidence
  - e. the judge and counsel removing their wigs and gowns.

## **Resources**

Some of the special measures discussed above, particularly the prerecording of evidence and the use of CCTV and AV links, have significant resource implications. These implications may be particularly significant for states and territories with many regional courts. Resourcing issues may be exacerbated if eligibility for these measures is expanded. We understand that states and territories face limited budgets for criminal justice system infrastructure and have a range of priorities to address in upgrading existing facilities.

It may be that full implementation of our recommendations in relation to special measures, if they are accepted, has to occur over a period of time, with states and territories ensuring that relevant facilities and training are made available as courts are upgraded or renovated or new court facilities are built.

However, we consider that implementation of our recommendations in relation to special measures may also deliver savings for the criminal justice system in the longer term, including through increased appropriate guilty pleas or withdrawn charges in some cases, thus avoiding trials, and shorter and more focused trials in other cases. Moreover, we make these recommendations on the basis that they will help to achieve justice for victims and survivors of child sexual abuse by supporting them to give their best evidence in child sexual abuse prosecutions.

We consider that states and territories should implement these recommendations as soon as resources allow and, where a staged implementation is required, priority should be given to assisting complainants and other vulnerable witnesses, particularly in matters tried on indictment.

## 30.8.2 Courtroom issues

### Competency testing

As discussed in section 30.5.1, there appears to be strong support for the view that the practice of questioning younger children on the difference between truth and lies is not effective in ensuring that the witness subsequently tells the truth. Based on what we have heard in our consultations, we are satisfied that, where there is any doubt about a child's competence to give evidence, a judge should establish the child's ability to understand basic questions asked of them by asking simple, non-theoretical questions – for example, about their age, school, family et cetera. Where it does not appear that the child can give sworn evidence, the judge should simply ask the witness for a promise to tell the truth and allow the examination of the witness to proceed.

While we express our recommendation in relation to child sexual abuse prosecutions only, we consider that the reform could be adopted for testing children's competency in all criminal and civil proceedings.

#### **Recommendation**

62. State and territory governments should introduce legislation to allow a child's competency to give evidence in child sexual abuse prosecutions to be tested as follows:
- a. Where there is any doubt about a child's competence to give evidence, a judge should establish the child's ability to understand basic questions asked of them by asking simple, non-theoretical questions – for example, about their age, school, family et cetera.
  - b. Where it does not appear that the child can give sworn evidence, the judge should simply ask the witness for a promise to tell the truth and allow the examination of the witness to proceed.

## Reforming courtroom questioning

As discussed in section 30.8.1, introducing intermediaries and ground rules hearings should help to improve the skills of police, prosecutors, defence counsel and judges in dealing with vulnerable witnesses.

However, even if intermediaries and ground rules hearings are available in all the circumstances we have recommended, there will still be many complainants for whom they are not made available. The question arises as to what improvements can be made for those who are not eligible for these special measures or what should be adopted if these special measures are not supported for implementation.

In the recent case of *GO v Western Australia*, discussed in section 30.5.1, the Western Australian Court of Appeal made some comments about the preparations counsel should make prior to questioning child witnesses:

As we have noted, the commencement of M's evidence was delayed by last-minute objections by counsel. It was highly unsatisfactory for a witness of M's age to be kept waiting by reason of objections which counsel should have made earlier.

The receipt of evidence from very young children presents many challenges for counsel and the court. In considering how that evidence is to be received, account must be taken of the shorter attention span of a young child, and the swiftness with which they may become fatigued. Further, children who are allegedly the victims of sexual offences will frequently have experienced other forms of abuse and neglect which affect their development, reducing attention span and increasing their propensity to become fatigued. The challenges which a child faces when giving evidence will be unnecessarily exacerbated if the child is required to wait for hours in the court precincts before giving evidence. Delays of that kind have a real potential to affect the quality of the evidence which the child is able to give. It is both in the interests of the child and the interests of justice that delays of this kind do not occur. In this context, the following points should be kept in mind by all concerned:

- a) Parties should do all that they can to ensure that child witnesses are not unduly kept waiting to give evidence.
- b) The usual procedure, as we have said, is that a child witness attends to give evidence, where court is due to start at 10.00 am, at approximately 9.00 am.
- c) Facilities for witnesses vary in courthouses in Western Australia, but it should not be assumed, even in courts with suitable waiting facilities, that no harm will be done should a child witness be kept waiting unnecessarily before they are called to testify.
- d) It follows that, when child witnesses are involved in trials, it is particularly important that pre-trial issues are dealt with as far in advance as possible before the trial starts, or at least at a time which minimises the period before the child is called to testify.



- e) Defence counsel questioning child witnesses is expected to conduct his or her cross-examination in a manner appropriate to the age and capacity of the child. Where a child exhibits difficulties during the course of the cross-examination, counsel must do what they can, consistently with their duties to the court and their client to minimise any trauma to the child.<sup>436</sup>

In our private roundtables, public hearings and research, a number of stakeholders identified additional training and professional development as a high priority to improve the skills of police and legal professionals. This should in turn improve the experience of vulnerable witnesses in particular but also that of survivors who might not be entitled to special measures.

In the absence of additional, or more widely available, special measures, we are of the view that specific training for the judiciary and legal practitioners is warranted on the needs of vulnerable witnesses and the ways in which existing aspects of the criminal justice system are particularly challenging for victims and survivors of child sexual abuse. Examples of useful resources in this regard include the Victorian Charter of Advocacy for prosecuting or defending sexual offence cases, noted in section 30.7.4, and the Advocate's Gateway website, noted in section 30.6.1.<sup>437</sup>

In its report *The Role of victims of crime in the criminal trial process*, the Victorian Law Reform Commission made a number of recommendations regarding additional training and accreditation for the legal profession to better equip practitioners in dealing with victims of crime.<sup>438</sup>

However, we have also heard that training is more effective when it is grounded in the practicalities that professionals face day to day and when it is accompanied with feedback and follow-up over an extended period to ensure that new skills do not fade over time.

We discuss Memory Research in Chapter 4 and in relation to informing the jury in Chapter 31.

We make recommendations in relation to training and education for judges and the legal profession in Chapter 31. We also make recommendations in Chapter 31 in relation to judicial directions containing educative information about children and the impact of child sexual abuse. We consider it likely that the perceived value to the defence of some of the more objectionable lines of courtroom questioning will be reduced if juries are given relevant directions from the judge.

## The rule in *Browne v Dunn*

In the recent Victorian case of *Ward (a Pseudonym) v The Queen*, discussed above, Maxwell P and Redlich JA of the Victorian Court of Appeal discussed how counsel might 'put' the defence case to a child as follows:

As we have said, a child cannot be expected to respond to option-posing, suggestive or assertive questions in an explanatory or expansive way. Thus, acceptance of a proposition by the child may not result in any forensic gain to the cross-examiner. As Maxwell P observed during oral argument, it will not ordinarily be fair unless the cross-examiner in an appropriate way asks the child whether what she has said is true or whether the alleged act occurred. If that is not done, the child is not given the opportunity to make their position clear.

Although it is ordinarily a matter for counsel how they choose to cross-examine, fairness dictates that counsel should only ask questions in a form that is appropriate to the age of the child. As to compliance with the rule in *Browne v Dunn*, if counsel does not give the child a fair opportunity to respond to the attack that is to be made on their evidence, counsel runs the risk that their opponent, or the judge, will take the view that there has been a breach of the rule. Moreover, if they do not give the child the opportunity to state whether they maintain their initial account, the tribunal's ability to assess the merits of the issue is thereby diminished. As a result, counsel will not have satisfied their forensic purpose, which is to elicit evidence which may cause the tribunal to doubt the child's primary allegations.

Of course, to ask the child whether their allegation is true, or whether the event they have described actually happened, may result in the child confirming the allegation. But that is a risk which always inheres in the discharge of the rule with every witness, whether adult or child.<sup>439</sup>

We are satisfied that, for some child witnesses, or witnesses with disability, offering them the opportunity to dispute a proposition that they are not telling the truth, even if done with a view to providing that witness with procedural fairness, may be confusing and distressing. While such an approach might be appropriate in some cases, we are satisfied that, in any guidance prepared to assist courts and practitioners in conducting ground rules hearings in relation to vulnerable witnesses, the issue of whether, or the extent to which, it is necessary for the defence to comply with the rule in *Browne v Dunn* should be considered. The prosecution should also consider proactively seeking agreement or direction before a relevant witness is cross-examined as to whether and to what extent the rule should be complied with in a particular case.

## Evidence of disclosure by third parties

As discussed in section 30.5.3, it seems unlikely that child sexual abuse could be proved beyond reasonable doubt on the evidence of a third party about a disclosure made by an alleged victim unless there is also other evidence to prove the abuse.

Given that the provision in section 34LA of the *Evidence Act 1929* (SA) was only recently introduced, we do not consider that we should recommend that such a provision be implemented in other jurisdictions. Other jurisdictions may wish to consider introducing such a provision if its use in South Australia develops to the point that it appears to be worthwhile.

### 30.8.3 Use of interpreters

All Australian jurisdictions accept that interpreters should be provided for witnesses who require them in order to understand and reply to questions. The need for interpreters to assist witnesses from culturally and linguistically diverse backgrounds is obvious.

In our private roundtable consultations, participants have raised the particular interpreting needs of Aboriginal and Torres Strait Islander victims and survivors. If matters are proceeding to trial, we have been told that Aboriginal and Torres Strait Islander victims, as complainants in a trial, may face particular communication barriers in court and in preparing for court, including the following:

- **Problematic processes:** Court and criminal justices processes, including court support services and legal language, can be insensitive to the culture and the needs of complainants or, at the very least, unfamiliar.
- **Language differences:** For some Aboriginal and Torres Strait Islander complainants, English does not provide the nuances needed to properly express what has happened to them. Even if they can generally communicate in English, they may not be able to do so to give evidence of the child sexual abuse they suffered.
- **Lack of appropriate interpreters:** In some situations, it may be hard to find an interpreter who is an expert in the complainant's language but who is not related to or an associate of either the complainant or defendant.

Interpreters can address some of the language barriers that Aboriginal and Torres Strait Islander people face. The Kimberley region of Western Australia and the Northern Territory have dedicated Aboriginal interpreting services. In Queensland and South Australia, interpreting services employ some interpreters qualified in the Aboriginal and Torres Strait Islander languages that are unique to those jurisdictions. Nationwide interpreting services also employ some interpreters qualified in various Aboriginal and Torres Strait Islander languages.

The Royal Commission has heard that interpreter services are essential in remote and very remote Aboriginal and Torres Strait Islander communities, where English is at most a secondary language. Interpreters are required for interactions with police and throughout the criminal justice process should a complaint proceed to prosecution. We heard that in rural and remote locations, where community legal services and courts often face budget constraints and limited time, it is sometimes wrongly assumed that an interpreter is not required.

We are satisfied that states and territories should provide adequate interpreting services such that any witness in a child sexual abuse prosecution who needs an interpreter is entitled to an interpreter who has sufficient expertise in their primary language, including sign language, to provide an accurate and impartial translation for any engagement with the criminal justice system.

**Recommendation**

63. State and territory governments should provide adequate interpreting services such that any witness in a child sexual abuse prosecution who needs an interpreter is entitled to an interpreter who has sufficient expertise in their primary language, including sign language, to provide an accurate and impartial translation.

# 31 Judicial directions and informing juries

## 31.1 Introduction

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The trial judge is obliged to ensure that a trial of the accused is fair. To that end, the judge must direct the jury as to the appropriate law and remind the jury of the relevant facts. In *RPS v The Queen*,<sup>440</sup> Acting Chief Justice Gaudron and Gummow, Kirby and Hayne JJ described the role of jury directions in the following terms:

The fundamental task of a trial judge is, of course, to ensure a fair trial of the accused. That will require the judge to instruct the jury about so much of the law as they need to know in order to dispose of the issues in the case. No doubt that will require instructions about the elements of the offence, the burden and standard of proof and the respective functions of judge and jury. Subject to any applicable statutory provisions it will require the judge to identify the issues in the case and to relate the law to those issues. It will require the judge to put fairly before the jury the case which the accused makes. In some cases it will require the judge to warn the jury about how they should *not* reason or about particular care that must be shown before accepting certain kinds of evidence.<sup>441</sup>  
[Emphasis original. References omitted.]

A misdirection by the trial judge may result in a miscarriage of justice. In *Conway v The Queen*,<sup>442</sup> Kirby J stated:

A high store is placed on the accuracy of judicial instructions to a criminal jury about the law and the evidence relevant to such law. In a sense, this principle recognises that a criminal trial that has departed from such accuracy is not one that has been entirely conducted according to law. The strictness observed in such matters reflects an acceptance that, in one sense, a single misdirection can amount to a form of miscarriage of justice.<sup>443</sup>

When giving directions in a trial, the judge may in some circumstances be required to give the jury an appropriate warning or caution. The Australian Law Reform Commission (ALRC) and the New South Wales Law Reform Commission (NSW LRC) have described it as including responsibility to give an appropriate warning or caution where acting upon particular evidence involves potential ‘dangers’.<sup>444</sup> When a warning is required, it usually concerns legal matters, where the court is said to have ‘special experience’ not possessed by members of the jury.<sup>445</sup>

When discussing the concerns that courts express about the risk of unfair prejudice arising from tendency and coincidence evidence in Chapter 25, we referred to the common law’s longstanding concern that sexual offences, including child sexual offences, are of a class for which special care needs to be taken to ensure that the accused is not unfairly prejudiced.<sup>446</sup> In *KRM v The Queen*<sup>447</sup> (*KRM*), Kirby J stated that:

In cases involving accusations of sexual offences, courts and prosecutors must exercise particular vigilance, so far as they can, to ensure that the fairness of the trial is maintained because the circumstances are peculiarly likely to arouse feelings of prejudice and revulsion. This duty imposes special difficulties for judges presiding at such trials where they are conducted before a jury ...<sup>448</sup> [References omitted.]

It is common in trials of child sexual offences for some directions and warnings to be given over and above the directions commonly given in trials for other offences. The law with respect to judicial directions and warnings in sexual offence trials – including child sexual abuse trials – is complex and controversial, and it has been the subject of considerable review and research in Australia over the last decade.<sup>449</sup>

Victoria has recently enacted major legislative reform in relation to jury directions. In 2013, the Parliament enacted the *Jury Directions Act 2013* (Vic), which commenced on 1 July 2013. The effect of the 2013 Act was continued, with some refinements and additions, in the *Jury Directions Act 2015* (Vic).<sup>450</sup>

The initial legislation in 2013 followed the report of the Judicial College of Victoria and the Department of Justice, *Simplification of jury directions project: A report to the Jury Directions Advisory Group August 2012* (the Weinberg Report). The *Jury Directions Act 2015* then followed the Victorian Department of Justice and Regulation report, *Jury directions: A jury-centric approach* (the Victorian Department of Justice and Regulation Report), which details the reasons for the reforms incorporated into the *Jury Directions Act 2015*. In introducing the Jury Directions Bill 2015, the Victorian Attorney-General told Parliament: ‘The title of the [Department’s] report highlights that ensuring that jury directions assist juries in performing their task is central to improving jury directions.’<sup>451</sup>

The reforms in the *Jury Directions Act 2015* relating to directions on delay and credibility were designed to ‘simplify the current law, which requires the trial judge to give competing and apparently contradictory directions in some cases’.<sup>452</sup> They were also designed to ‘address common misconceptions about the behaviour of legitimate sexual offence complainants (in particular, that a genuine victim would complain about the offence soon after it occurred)’.<sup>453</sup>

For centuries, judges have relied on their own understandings of human behaviour to inform the content of the relevant directions and warnings. The difficulty is that, in the absence of research or other evidence as to how people behave, we do not know whether the judges’ assumptions are correct.<sup>454</sup>

In some cases, we know that judges’ assumptions have been far from correct. For years, judges assumed that victims of sexual offences will complain at the first reasonable opportunity. As a consequence, delay was accepted to adversely affect the complainant’s credibility. The common law developed special rules for warning the jury in accordance with this assumption.

Research has discredited this assumption. We now know that delay in complaint of sexual abuse is common rather than unusual, particularly in the context of child sexual abuse. Parliaments have legislated to limit or displace this erroneous assumption and the common law rules that developed from it.

As the Victorian Department of Justice and Regulation Report stated, the law as it applied before the major legislative reforms in 2015 ‘was based on assumptions about the expected behaviour of legitimate complainants that have since been discredited. Legislative reforms have been attempted to address this issue, but jury directions in this area continue to be problematic’.<sup>455</sup>

The research report *Jury reasoning in joint and separate trials of institutional child sexual abuse: An empirical study* (Jury Reasoning Research), which we discussed in Chapter 25, examined how juries reason and empirically tested the accuracy of the courts’ concerns about the risks of unfair prejudice to the accused arising from the admission of tendency and coincidence evidence. As discussed in chapters 25 and 28, we consider that the Jury Reasoning Research provides strong support for the view that the courts’ long and strongly held concerns about tendency and coincidence evidence are misplaced.

Whether the issue is delay in reporting or the risks arising from tendency and coincidence evidence, there is reason to doubt that the assumptions underlying judicial directions and warnings are accurate. When given, they will undoubtedly have a significant impact on the juries in some trials.

In the Consultation Paper, we sought submissions on the issues of judicial directions and informing juries. In particular, we sought submissions on:

- whether judicial directions and warnings continue to create difficulties in child sexual abuse trials in any jurisdictions
- whether judicial directions should be codified
- whether particular judicial directions should be abolished or reformed
- what education or training would be most effective in ensuring judges – including appellate judges – and lawyers are better informed about child sexual abuse, including from up-to-date social science research
- what method or methods are most effective for improving jurors’ understanding of child sexual abuse, including:
  - expert evidence
  - particular judicial directions
  - giving judicial directions early and repeating them through the trial
  - providing other educational material.

## 31.2 Case studies and research

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### 31.2.1 Case studies

The issues related to jury directions have been raised in some Royal Commission hearings.

Case Study 11 examined the experiences of a number of men who were resident at Christian Brothers residences in Western Australia and the responses of the Christian Brothers and relevant Western Australian authorities to allegations of child sexual abuse at the residences. In or around November 1993, the then Director of Public Prosecutions (DPP) for Western Australia issued a media release setting out his reasons for deciding not to prosecute in respect of allegations of child sexual and physical abuse by a small group of Christian Brothers 40 years earlier.<sup>456</sup>

Mr Bruno Fiannaca SC, Deputy DPP for Western Australia, discussed the need in 1993 for the judge to direct the jury about the disadvantages to the accused resulting from long delay in the making of the complaint and the impact it may have on the jury's decision.<sup>457</sup> These directions are referred to as Longman directions or warnings after the High Court's decision in 1989 in *Longman v The Queen*<sup>458</sup> (*Longman*).

Mr Fiannaca gave evidence that the need to give a jury these warnings, together with the need for the jury to be satisfied of the accused's guilt beyond reasonable doubt, meant that the prospects of conviction were fairly small. This was a factor in the 1993 allegations not being prosecuted.<sup>459</sup>

Case Study 12 examined the response of an independent school in Perth, Western Australia, to concerns raised about the conduct of a teacher between 1999 and 2009. In September 2009, WP, a former student at the school, disclosed to the Western Australia Police that YJ (the pseudonym used by the Royal Commission) had sexually assaulted him while he was a student at the school. YJ was later charged with having committed sexual offences against five students, including WP.<sup>460</sup>

On 30 June 2010, after a trial by jury in the District Court of Western Australia, YJ was convicted of 13 charges of indecent dealing with a child under 13. He was convicted of indecently dealing with each of the five complainants.

YJ appealed against his conviction and sentence. The appeal succeeded. The Western Australian Court of Appeal held that the trial judge failed to give the jury an adequate Longman direction in relation to the three complainants who were the subject of the earlier abuse.<sup>461</sup> A retrial was ordered on six counts in relation to offences against WP and two other complainants. It is of interest that the retrial resulted in convictions on all six counts.<sup>462</sup>



The Longman direction was also raised in Case Study 38 in relation to criminal justice. In relation to the prosecutions of John Maguire, which are discussed in section 24.1, Ms Nanette Williams, a Crown prosecutor in New South Wales, noted that at the time of those trials (2003 and 2004):

there was a standard direction called the Longman direction that was to be given in cases if there was just the evidence of a single complainant. That direction, which was a standard direction, was to the effect that if the evidence of the complainant could not be adequately tested because of the passage of time, it would be unsafe or dangerous to convict on uncorroborated evidence of the complainant alone, unless satisfied of its truth and accuracy after scrutinising it and the relevant circumstances with great care and after taking the warning into account. That is a general summation of that direction.<sup>463</sup>

When asked about whether the law has changed, Ms Williams noted that:

what we refer to as the Longman direction is no longer to be given and, in my view, that has significantly changed the landscape of prosecuting these types of historical matters.

The Longman direction, when it was given, in my own opinion, was the kiss of death to many prosecutions. It was very difficult for a Crown case, no matter how credible, how reliable, how strongly the complainant gave evidence – it was very difficult for the prosecution to withstand that direction. It was a direction – and I’ve talked about this with my colleagues over the years, that you would see the juries attending to the directions given by the presiding judge and it was almost visceral, a juror’s direction to hearing that direction, ‘dangerous to convict’. They are heavy words.<sup>464</sup>

Tendency and coincidence issues have also been the subject of discussion. In Case Study 38 we heard evidence from a number of DPPs, as discussed in section 27.4.4. Mr Adam Kimber SC, the South Australian DPP, suggested that appeals in relation to judicial directions on tendency and coincidence evidence remain a challenge:

Certainly there have been a number of appeals. Those appeals have been perhaps more directed towards directions than they have towards severance. I’m not saying there haven’t been appeals about severance, there plainly have, and there have been a number. But the more difficult appeals and the ones that have tended to be allowed have more been in the area of directions given to juries, not so much about whether or not the trial judge made the right choice about severance.<sup>465</sup>

## 31.2.2 Research

### Jury Reasoning Research

The Jury Reasoning Research discussed in Chapter 25 examined the influence of jury directions on jury reasoning and decision-making. Otherwise identical trials were run, with the only difference being the presence of a specific context or tendency direction, depending on the character of evidence tendered in the trial. The researchers then analysed a number of variables, including the verdicts, juror ratings of the culpability of the defendant and cognitive effort, and the error rate in deliberations to assess the impact of the directions.<sup>466</sup>

The findings of the Jury Reasoning Research are in line with a large body of empirical research demonstrating the ineffectiveness of most jury directions.<sup>467</sup> The researchers found that:

- the context evidence direction has a greater impact on jurors than the tendency evidence direction, which produced no apparent benefits, whether deployed in a separate trial or joint trial<sup>468</sup>
- the context evidence direction raised conviction rates for the penetrative offence but had no impact on conviction rates for the non-penetrative offence, although juror ratings of the factual culpability of the defendant increased significantly on both counts when the direction was given.<sup>469</sup>

In terms of the impact of the directions on the reasoning of individual jurors, the Jury Reasoning Research revealed that:

mock jurors who received context directions as opposed to the standard directions perceived the judge's instructions as more confusing; found it more difficult to assess witness credibility and apply the law; reported a higher cognitive load; and felt that the judicial instructions made it harder to understand the charges, recall the facts, weigh the evidence and assess the case for the prosecution. Similarly, compared to the standard directions, mock jurors rated tendency evidence directions as more difficult to understand, and perceived that these directions increased their cognitive load. However, mock jurors rated the charges as easier to understand when they were given tendency evidence directions in a joint trial than when they were not given these directions.<sup>470</sup>

The Jury Reasoning Research concluded that the level of jury error in using context and tendency evidence was unaffected by the presence of context evidence or tendency evidence directions.<sup>471</sup>

## Appeals Study

The Royal Commission also commissioned research on child sexual abuse appeals in New South Wales (the Appeals Study). It discusses judicial directions. The Appeals Study, which is discussed further in Chapter 35, concludes that errors in judicial directions – judicial misdirections – continue to be a source of error in child sexual abuse trials.

The study found that 16.5 per cent of all conviction appeals succeeded on the basis of judicial misdirection, and over half of the successful appeals against conviction cases involved judicial misdirection.<sup>472</sup> This is consistent with a prior study by the Judicial Commission of New South Wales. While that study examined all appeals rather than just those relating to child sexual assault convictions, it found that one or more misdirections were present in 53 per cent of successful conviction appeal cases.<sup>473</sup> Most of the judicial errors identified in the Appeals Study related to giving inadequate warnings to the jury, unbalanced judicial summing-up, and failure to correctly direct the jury.<sup>474</sup>

Research undertaken in Victoria for the period from July 2000 to June 2007 indicates that error in the judge's directions was a ground of appeal in approximately 52 per cent of successful appeals against convictions decided in the Victorian Court of Appeal.<sup>475</sup> The Victorian Law Reform Commission (VLRC) *Jury directions: Final report* suggested that a primary cause of error resulting in appeals based on misdirection lies in the complexity and uncertainty of the law concerning jury directions.<sup>476</sup>

## Memory Research

The research report *Empirical guidance on the effects of child sexual abuse on memory and complainants' evidence* (Memory Research), which we discussed in Chapter 4, provides a detailed survey of the current psychological literature relevant to memory issues in relation to child sexual abuse reports and prosecutions. It also provides a succinct stand-alone summary of guidance on memory in cases of child sexual abuse.<sup>477</sup> The summary presents the main findings derived from the detailed report.<sup>478</sup>

The Memory Research reported on a number of studies that have identified misconceptions held by laypeople and others about memory, which we outline in section 31.4.2. The Memory Research also reported on:

- the nature of human memory
- the effects of delay on memory
- the effects of emotion and trauma on memory
- memories for repeated or recurring abuse.

The Memory Research also discussed existing guidance on memory for judges and other decision-makers and how issues in relation to memory might be addressed through education and training, expert evidence and judicial directions.

The Memory Research is intended to contribute to the development of guidance for fact-finders and the legal profession, whether through bench books, judicial directions, expert evidence or legal education. We discuss these issues in this chapter.

## 31.3 Judicial directions and warnings

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The history of judicial directions and warnings – particularly directions and warnings based on judicial assumptions about the unreliability of women, children and complainants of sexual offences, including child sexual abuse – reflects a tension between the view of the High Court and the legislation of the parliaments, at least in New South Wales and Victoria.

### 31.3.1 Sexual offences

#### The common law

The common law identified sexual assault complainants – who were assumed to be women – as a class of witnesses whose evidence was said to be inherently unreliable.<sup>479</sup> Children were also considered to be inherently unreliable witnesses.<sup>480</sup>

As a result, the common law required directions to be given in respect of the need for corroboration of evidence given by sexual assault complainants and child witnesses.

The common law has also required warnings about delay in complaint by women and children in sexual offences. The jury was required to consider whether delay in complaint reduced the credibility of the complainant and disadvantaged the accused in defending the charges.

In 1973, in *Kilby v The Queen*<sup>481</sup> (*Kilby*), Barwick CJ stated the common law requirement to warn the jury that delay in complaint adversely affects a complainant's credibility as follows:

It would no doubt be proper for a trial judge to instruct a jury that in evaluating the evidence of a woman who claims to have been the victim of a rape and in determining whether to believe her, they could take into account that she had made no complaint at the earliest reasonable opportunity. Indeed, in my opinion, such a direction would not only be proper, but depending of course on the particular circumstances of the case, ought as a general rule to be given.<sup>482</sup>

## Legislative reform and cases in the 1980s

In 1981, New South Wales enacted sections 405B and 405C of the *Crimes Act 1900* (NSW). If delay in complaint was raised in a trial for a prescribed sexual offence, section 405B required the trial judge to warn the jury that delayed complaint does not necessarily indicate that the allegation was false and to inform the jury that there may be a good reason why a sexual assault victim may hesitate in complaining.

Section 405C of the *Crimes Act 1900* (NSW) removed the requirement in a trial for a prescribed sexual offence that a judge warn the jury that it is unsafe to convict a person accused of certain sexual offences on the uncorroborated evidence of the alleged victim. Section 405C(3)(c), as enacted in 1981, preserved any law or practice that required a judge to warn the jury that it is unsafe to convict on the uncorroborated evidence of a child. However, section 405C(3) was repealed in 1986.<sup>483</sup>

Sections 405B and 405C were considered in 1987 by the New South Wales Court of Criminal Appeal in *R v Murray*<sup>484</sup> (*Murray*). The ‘delay’ in complaint in this case was a period of two to three days.

In relation to corroboration and section 405C, Lee J (with Maxwell and Yeldham JJ agreeing) said:

Section 405C has brought about the result that women are no longer, in the eyes of the law, to be put before juries as persons whose evidence requires corroboration before it is safe to act upon it. That concept which has been in the law for a long time has now gone ... this does not mean that the judge cannot or should not, as is done in all cases of serious crime, stress upon the jury the necessity for the jury to be satisfied beyond reasonable doubt of the truthfulness of the witness who stands alone as proof of the Crown case. *In all cases of serious crime it is customary for judges to stress that where there is only one witness asserting the commission of the crime, the evidence of that witness must be scrutinised with great care before a conclusion is arrived at that a verdict of guilty should be brought in;* but a direction of that kind does not itself imply that the witness’ evidence is unreliable.<sup>485</sup> [Emphasis added.]

While the decision in *Murray* acknowledged section 405C, it introduced what became known as the ‘Murray direction’. Arguably, this had an effect similar to the corroboration direction in undermining the jury’s view of the complainant’s evidence in sexual offence cases. The Murray direction required that, where there was only one witness to the crime, the jury must be warned to scrutinise the evidence of that witness with great care. As discussed in Chapter 2, in most child sexual abuse cases, the only witness to the offences will be the complainant.

*Murray* was approved by the High Court in *Robinson v The Queen*.<sup>486</sup> The Victorian Court of Appeal held in *R v Aden & Toulle*<sup>487</sup> that, when Lee J in *Murray* referred to the giving of the direction as customary, he was not to be taken to have meant that the direction was obligatory.<sup>488</sup>

In 1989, in *Longman*,<sup>489</sup> the High Court said that, in cases of delayed complaint, the trial judge should warn the jury that it may be more difficult for the accused to defend themselves because of the delay. Justices Brennan, Dawson and Toohey stated that:

The jury should have been told that, as the evidence of the complainant could not be adequately tested after the passage of more than 20 years, *it would be dangerous to convict on that evidence alone* unless the jury, scrutinizing the evidence with great care, considering the circumstances relevant to its evaluation and paying heed to the warning, were satisfied of its truth and accuracy.<sup>490</sup> [Emphasis added.]

This has become known as the ‘Longman direction’.

Commenting in 2015, the Victorian Department of Justice and Regulation described the Longman direction as ‘one of the most problematic and controversial jury directions’.<sup>491</sup> It identified a number of problems with the decision, including the following:

- It has been criticised for reinstating false stereotypes about the unreliability of sexual assault complainants and for undermining legislative attempts to address these stereotypes.
- The meaning of ‘substantial delay’ is unclear, with broad variations between trial judges and judges erring on the side of caution.
- It creates an irrebuttable presumption that the delay has prejudiced the accused.
- The wording ‘dangerous to convict’ encroaches on the fact-finding role of the jury and may be interpreted as a coded instruction to acquit.<sup>492</sup>

## Legislative reform and cases in the 1990s

In 1991, Victoria enacted section 61 of the *Crimes Act 1958* (Vic). Section 61(1)(a) provided that the judge must not warn the jury that the law regards complainants in sexual cases as an unreliable class of witness. Section 61(1)(b) was very similar to section 405B of the *Crimes Act 1900* (NSW). It provided that, in cases of delayed complaint, the judge must warn the jury that delay does not necessarily indicate that the allegation is false and inform the jury that there may be good reasons that a victim may hesitate in complaining. Section 61(2) preserved the judge’s ability to make any comment on evidence that it is appropriate to make in the interests of justice.

In 1995, New South Wales enacted the *Evidence Act 1995* (NSW). Section 164 of the Evidence Act abolished the requirements for corroboration and removed any requirement for the judge to warn the jury that it is dangerous to act on uncorroborated evidence. It did not prohibit the giving of a warning. (Section 405C of the *Crimes Act 1900* (NSW) was repealed at the same time.)

Section 165 of the *Evidence Act 1995* (NSW) also made provision for warnings on the request of a party about evidence of a kind that might be unreliable. Examples of evidence of a kind that may be unreliable included evidence the reliability of which may be affected by age.

In 1996, in *Crofts v The Queen*<sup>493</sup> (*Crofts*), the High Court considered the Victorian provisions enacted in 1991. That case concerned complaints of child sexual abuse made some six years after the first alleged incident of abuse and six months after the last alleged incidence of abuse. Justices Toohey, Gaudron, Gummow and Kirby stated, '[b]y the measure of cases of this kind, that was a substantial delay'.<sup>494</sup> The work of the Royal Commission has confirmed that this statement is wrong. In cases of that kind, the delay in *Crofts* was short.

Justices Toohey, Gaudron, Gummow and Kirby held that provisions such as section 61(1)(b) and 61(2) in Victoria (and section 405B in New South Wales) require a balanced direction. They referred to the High Court's decision in 1989 in *Longman*, saying:

That decision makes it clear that the purpose of such legislation, properly understood, was to reform the balance of jury instruction not to remove the balance. The purpose was not to convert complainants in sexual misconduct cases into an especially trustworthy class of witnesses. It was simply to correct what had previously been standard practice by which, based on supposed 'human experience' and the 'experience of courts', judges were required to instruct juries that complainants of sexual misconduct were specially suspect, those complained against specially vulnerable and delay in complaining invariably critical. In restoring the balance, the intention of the legislature was not to 'sterilise' complainants from critical comment where the particular facts of the case, and the justice of the circumstances, suggested that the judge should put such comments before the jury for their consideration. The overriding duty of the trial judge remains to ensure that the accused secures a fair trial. It would require much clearer language than appears in s 61 of the Act to oblige a judge, in a case otherwise calling for comment, to refrain from drawing to the notice of the jury aspects of the facts of the case which, on ordinary human experience, would be material to the evaluation of those facts.

Had the Victorian Parliament intended to overrule the practice followed in Australian courts, at least after *Kilby*, s 61(1)(b) would have been expressed in much clearer language than appears. This view of the section is confirmed by the presence in it of s 61(2) and by the established construction of the equivalent section in New South Wales at the time the amendment to the Victorian Act was adopted in 1991.<sup>495</sup> [References omitted.]

In 1997, Victoria further amended its legislation to respond to *Crofts*. The amendment to section 61 of the *Crimes Act 1958* (Vic) removed the requirement to warn the jury that delay in complaining does not necessarily indicate that the allegation is false. The judge was required only to inform the jury that there may be good reasons why a victim of sexual assault may hesitate in complaining. It also prohibited the judge from making any comment on the reliability of the complainant's evidence 'if there is no reason to do so in the particular proceeding in order to ensure a fair trial': section 61(3).

## Legislative reform and cases in the 2000s

In 2000 and 2001, the High Court applied its 1989 decision in *Longman* in the cases of *Crompton v The Queen*<sup>496</sup> (*Crompton*) and *Doggett v The Queen*<sup>497</sup> (*Doggett*). *Crompton* involved allegations of sexual abuse made against a teacher of children with learning disabilities by two of his former students. The trial commenced about 20 years after the abuse was alleged to have occurred. The High Court reversed the decision of the New South Wales Court of Criminal Appeal and held that the trial judge's directions to the jury on delay did not satisfy the requirements of *Longman*.<sup>498</sup>

In *Doggett*, the abuse was alleged to have occurred between 1979 and 1986. The complainant disclosed the abuse to her mother in 1986, but the abuse was not reported to the police until 1998. There was evidence of a taped telephone conversation between the complainant and the accused which the prosecution relied on to corroborate the complaints. The defence did not seek a Longman direction during the trial, and none was given.

The Queensland Court of Appeal considered that a Longman direction would have been inappropriate given the nature of the corroboration in the telephone call. However, a majority of the High Court (Gaudron, Kirby and Callinan JJ; Gleeson CJ and McHugh J dissenting) held that a Longman direction was required, regardless of corroboration or the strength of the case.<sup>499</sup>

In 2001, New South Wales amended section 165 of the *Evidence Act 1995* (NSW) and inserted sections 165A and 165B concerning warnings about children's evidence.<sup>500</sup> The provisions prohibited a judge from warning or suggesting that children as a class are unreliable witnesses or warning of the danger of convicting on the uncorroborated evidence of a child: sections 165(6) and 165A. However, the judge could warn the jury that a particular child may be unreliable because of their age and of the need for caution in considering the child's evidence if the warning was requested and the judge was satisfied that circumstances particular to the child affected the reliability of their evidence and warranted the giving of the warning: section 165B.

In 2006, Victoria made further amendments in relation to *Crofts* and Longman directions.

In relation to *Crofts* and the impact of delay on credibility, Victoria added two prohibitions to section 61(1)(b) of the *Crimes Act 1958* (Vic).<sup>501</sup> In addition to the existing requirement that the judge must inform the jury that there may be good reasons why a victim of a sexual assault may delay or hesitate in complaining, the amendments required that the judge must not warn or suggest in any way to the jury that:

- delay may affect the credibility of the complainant, unless the accused applied for the direction and the judge was satisfied that there was sufficient evidence tending to suggest that the credibility of the complainant was so affected by the delay to justify the warning: section 61(1)(b)(ii)
- it would be dangerous or unsafe to find the accused guilty because of the delay: section 61(1)(b)(iii).



In relation to *Longman* and delay causing forensic disadvantage to the accused, Victoria inserted section 61(1A)–(1F) into the *Crimes Act 1958* (Vic). Under these provisions, on application by the accused and if the judge was satisfied that the accused had suffered a significant forensic disadvantage because of the delay in complaint, the judge was required to inform the jury of the nature of the forensic disadvantage and to instruct the jury to take it into consideration: section 61(1A). However, the provision also prohibited the judge from warning or suggesting that it would be dangerous or unsafe to convict because of the delay: section 61(1B). Also, passage of time alone was not sufficient to cause a significant forensic disadvantage: section 61(1C).

In 2006, New South Wales amended its provisions relating to the Longman direction, corroboration and the Murray direction, and delay and credibility.<sup>502</sup>

In relation to *Longman*, section 294(3)–(5) of the *Criminal Procedure Act 1986* (NSW) made similar amendments to those introduced in Victoria in relation to *Longman*. The New South Wales provisions also gave examples of factors that might establish significant forensic disadvantage, being the death or inability to locate potential witnesses or the loss or unavailability of potential evidence: section 294(4).

In relation to corroboration, section 294AA was inserted into the *Criminal Procedure Act 1986* (NSW) to prohibit judges from warning the jury of the danger of convicting on the uncorroborated evidence of any complainant.<sup>503</sup> The Minister introducing the amending Bill on behalf of the Attorney-General said:

The direction in *Regina v Murray* (1987) 11 NSWLR 543 provides that where there is only one witness asserting the commission of the offence, the evidence of the witness is to be scrutinised with great care. The typical sexual assault offence takes place in private without any other witnesses. The members of the task force agreed that the direction was unnecessary, as existing directions as to reasonable doubt were sufficient to protect the accused. Item [8] of the schedule therefore adds a new section s 294AA ...<sup>504</sup>

The New South Wales Court of Criminal Appeal considered the effect of section 294AA in *Ewen v R*.<sup>505</sup> The court held that section 294AA prohibits a Murray direction if the only factor said to give rise to the requirement for a direction of that kind is the absence of corroboration.<sup>506</sup>

The 2006 amendments also included a prohibition on the judge warning the jury that delay in complaining is relevant to the victim's credibility unless there is sufficient evidence to justify a warning: section 294(2)(c) of the *Criminal Procedure Act 1986*.<sup>507</sup>

In *Jarrett v R*,<sup>508</sup> Basten JA stated that the introduction of section 294(2)(c) 'significantly recasts' that section, there now being a 'critical difference'<sup>509</sup> between this provision and the provision considered in *Crofts*.<sup>510</sup> Justice Basten also stated that section 294(2)(c) 'must also be read as complemented by s 294AA' in relation to corroboration, which was enacted at the same time.<sup>511</sup>

On the content of any warning to be given under section 294(2)(c) Basten JA said:

First, and most obviously, both the circumstances and the nature of the warning will vary from case to case. This is not an area in which a standard form warning is appropriate. Secondly, the requirement of 'sufficient evidence' must not only mould the content of the warning, but it must also fit with the mandatory directions required by paragraphs (a) and (b). Without being prescriptive, there must be something in the evidence sufficient to raise in the judge's mind the possibility that the jury may legitimately consider that the delay could cast doubt on the credibility of the complaint. Usually, one would expect that such matters would have been put to the complainant in the course of cross-examination. Those very matters may constitute the 'good reasons' why there was no timely complaint for the purposes of par (b), but, if not believed, may form the evidence justifying the warning under par (c).<sup>512</sup>

In 2007, New South Wales enacted further provisions in relation to children's evidence and *Longman*. The provisions commenced in 2009.<sup>513</sup> The provisions about warnings in relation to children's evidence were consolidated and amended in section 165A of the *Evidence Act 1995* (NSW). The specific provisions to allow a warning that the evidence of a particular child may be unreliable because of their age was removed, and the judge was prohibited from giving a warning about the particular child's evidence solely on account of the age of the child: section 165A(1)(c). The judge is permitted, on request, to inform the jury that the evidence of a particular child may be unreliable and to inform the jury of the reasons why it may be unreliable if satisfied that there are circumstances other than solely the age of the child that warrant it: section 165A(2).

The New South Wales Court of Criminal Appeal recently considered the effect of sections 165 and 165A of the *Evidence Act 1995* (NSW) and section 294AA of the *Criminal Procedure Act 1986* (NSW) in *AL v R*.<sup>514</sup> The court referred to the legislative amendment since 1989 'which has dramatically altered the common law as it applied to warnings required to be given to juries in sexual assault cases'.<sup>515</sup> The court set out sections 165 and 165A of the *Evidence Act 1995* (NSW) and section 294AA of the *Criminal Procedure Act 1986* (NSW) and stated:

In all cases a direction cautioning the jury about the possible unreliability of the evidence of a child complainant in a sexual assault case can only focus on matters relevant to the particular child in the particular circumstances of the case. It cannot focus on the mere fact that the witness is a child, or derive from a feature about the witness which is an inherent feature of children more generally, such as a warning based on an assumption about the capacity of a child to lay down memory or accurately recall memory later.

To adopt the latter approach is to contravene the provisions of s 165A of the *Evidence Act 1995* (NSW) and s 294AA of the *Criminal Procedure Act 1986* (NSW).

Section 165 of the *Evidence Act 1995* (NSW) refers to ‘evidence of a kind that may be unreliable’, without purporting to exhaustively define or identify what may be meant by the phrase. Arguably, much of the evidence given by lay witnesses as to what an individual saw or heard could be challenged on one basis or another as unreliable. However, in circumstances where the history of statutory amendment suggests a desire to limit jury warnings rather than to enlarge them, it cannot have been the intent of the legislature to engage s 165 in every case where an assertion of unreliability is made.<sup>516</sup>

The court dismissed the appeal. It held that the trial judge did not err by failing to give a Murray direction or a warning under section 165 of the *Evidence Act 1995* (NSW).<sup>517</sup> The court stated:

the trial judge was conscious of the distinction to be drawn between the need for a warning about matters of which the jury could have little understanding or appreciation, but where the court would have such an understanding; and matters which the jury was well able to assess without particular assistance.

...

The jury saw the complainant give evidence and observed his responses to questions in cross-examination that were directed to the potential unreliability of his evidence. The jury additionally had the advantage of a very comprehensive address from trial counsel in which all of the features which could point to unreliability in the complainant’s evidence, including the failure to give particulars in the first JIRT interview and the role of dreams or nightmares in memory, were highlighted, with some skill.

There is no reason to conclude that the refusal of the trial judge to direct the jury as to the possible unreliability of the complainant’s evidence, or the need to scrutinise it with great care, or as to the dangerousness of convicting upon it, gives rise to a risk of a miscarriage of justice.<sup>518</sup>

In relation to *Longman*, the 2007 amendments inserted a new section 165B and repealed section 294(3)–(5) of the *Criminal Procedure Act 1986* (NSW). Section 165B(2) continued the requirement that, on application and if satisfied that the accused has suffered a significant forensic disadvantage because of the delay in complaint, the judge must inform the jury of the nature of the forensic disadvantage and instruct the jury to take it into consideration. Additional provisions allowed the judge not to comply with section 165B(2) if there are good reasons for not doing so: section 165B(3). They made clear that no particular form of words need be used, but the judge must not in any way suggest that it would be dangerous or unsafe to convict solely because of the delay or the forensic disadvantage suffered: section 165B(4). Section 165B also included examples of the factors that may be regarded as establishing significant forensic disadvantage: section 165B(7).

The Explanatory Note to the Bill inserting section 165B stated:

The section is intended to make it clear that (contrary to the tendency at common law following *Longman v The Queen* (1989) 168 CLR 79 for judges to routinely give warnings in relation to forensic disadvantage arising from delay) information about forensic disadvantage need only be given if a party applies for it, and should only be given where there is an identifiable risk of prejudice to the accused. Such prejudice should not be assumed to exist merely because of the passage of time.<sup>519</sup>

In 2008, Victoria enacted the *Evidence Act 2008* (Vic), which commenced in 2010. It abolished the rules requiring warnings or directions about corroboration: section 164. Section 165B of the *Evidence Act 2008* (Vic) also replaced section 61(1A)–(1F) of the *Crimes Act 1958* (Vic) in relation to Longman warnings.

### Jury Directions Act 2015 (Vic)

As noted above, Victoria has recently implemented major legislative reform to jury directions. The *Jury Directions Act 2015* provides for a number of directions which the trial judge must give in relation to various issues. It also contains provisions in relation to directions which affect the *Evidence Act 2008* (Vic).

In relation to directions as to the absence of corroboration, Victoria has gone further than other Uniform Evidence Act jurisdictions in its reforms. Victoria has prohibited – rather than simply removing the requirement for – the warnings and directions covered by section 164(3) (other than in cases of perjury): section 164(5) of the *Evidence Act 2008* (Vic). It has also abolished ‘the principles and rules of the common law that relate to jury directions or warning on corroboration of evidence, or the absence of corroboration of evidence, in criminal trials’ that are to the contrary of section 164: section 164(6) of the *Evidence Act 2008* (Vic).

Victoria has also codified the law relating to directions on the relevance of delay to credit in sexual offences, abolishing the rules attributed to *Kilby* and *Crofts*.<sup>520</sup> Section 54 of the *Jury Directions Act* provides that:

Any rule of common law under which a trial judge is required to direct the jury that –

- (a) a complainant’s delay in making a complaint or lack of complainant may cast doubt on the reliability of the complainant’s evidence; and
- (b) the jury should take this into account when evaluating the credibility of the allegations made by the complainant –

is abolished.

From 29 June 2015, the relevant law in Victoria is that set out in Part 5, Division 2, of the *Jury Directions Act*. The division applies to a criminal proceeding that relates (wholly or partly) to a charge for a sexual offence.<sup>521</sup>

The division provides for:

- a mandatory direction which the trial judge must give if he or she considers that there is likely to be evidence suggesting the complainant delayed in making a complaint: section 52
- a discretion to give an additional direction at the request of the prosecution: section 53
- a legislative prohibition on statements and suggestions that binds the judge, the prosecution and defence counsel: section 51.

The mandatory direction under section 52 requires as follows (under section 52(4)):

the trial judge must inform the jury that experience shows that –

- (a) people may react differently to sexual offences and there is no typical, proper or normal response to a sexual offence; and
- (b) some people may complain immediately to the first person they see, while others may not complain for some time and others may never make a complaint; and
- (c) delay in making a complaint in respect of a sexual offence of a sexual offence is a common occurrence.

It is the judge's assessment of what the likely evidence will suggest that triggers the need for a direction, and the direction must be given before any evidence regarding delay is adduced. This is a key distinction from previous iterations of section 61 of the *Crimes Act 1958*. The judge is therefore required to make objective assessments of the interval between the alleged offending, the complainant and the evidence that is likely to be led in the trial.<sup>522</sup>

The direction under section 53, which the prosecution may request, is a direction that there may be good reasons why a person may not complain, or may delay in complaining, about a sexual offence. The trial judge must give this direction, if requested, unless there are good reasons for not doing so.<sup>523</sup> The trial judge can also give the direction in the absence of a specific request if he or she considers that there are substantial and compelling reasons for doing so.<sup>524</sup>

Section 51(1)(c) provides that the trial judge, prosecution and defence counsel (or unrepresented accused) must not say, or suggest in any way, to the jury that 'complainants who delay in making a complaint or do not make a complaint are, as a class, less credible or require more careful scrutiny than other complainants'.

Section 51(2) imposes a further restriction on the trial judge as follows:

The trial judge must not say, or suggest in any way, to the jury that, because the complainant delayed in making a complaint or did not make a complaint –

- (a) it would be dangerous or unsafe to convict the accused; or
- (b) the complainant's evidence should be scrutinised with great care.

A note to section 51 states that the section does not prohibit those parties from stating or suggesting that the particular complainant's delay does or may affect their credibility.

The trial judge is required to correct any statement or suggestion made in breach of section 51 unless there are good reasons for not doing so.<sup>525</sup>

Victoria has also codified the law relating to directions on delay and forensic disadvantage, abolishing the rules attributed to *Longman*, *Crompton* and *Doggett*.<sup>526</sup> Section 40 of the *Jury Directions Act* provides that:

Any rule of common law under which a trial judge is required or permitted to direct a jury on a disadvantage to the accused in challenging, adducing or giving evidence or conducting his or her case because of delay is abolished.

Section 39 provides for when a direction in relation to forensic disadvantage may be given and the content of the direction. The judge may only give the direction where the forensic disadvantage is both significant and identifiable.

Section 39 allows the trial judge to direct the jury on forensic disadvantage experienced by the accused if defence counsel requests a direction and the trial judge is satisfied that the accused has experienced a 'significant forensic disadvantage'. Under section 39(3), if the trial judge gives a direction, the trial judge:

- (a) must inform the jury of –
  - (i) the nature of the disadvantage experienced by the accused; and
  - (ii) the need to take the disadvantage into account when considering the evidence; and
- (b) must not say, or suggest in any way, to the jury that –
  - (i) it would be dangerous or unsafe to convict the accused; or
  - (ii) the complainant's evidence should be scrutinised with great care.

'Forensic disadvantage' is defined in section 38 as follows:

**forensic disadvantage** means a disadvantage (that is more than the mere existence of delay) to the accused in –

- (a) challenging, adducing or giving evidence; or

(b) conducting his or her case –

because of the consequences of delay due to the period of time that has elapsed between the alleged effect and the trial.

The trial judge is required to give the direction, if requested, unless there are good reasons for not doing so.<sup>527</sup> If a direction has not been requested, the trial judge is required to give the direction if he or she considers that there are substantial and compelling reasons for doing so.<sup>528</sup>

The Judicial College of Victoria's *Criminal charge book* refers to some forensic disadvantages that the case law has indicated may result from delay.<sup>529</sup> They include:

- loss of a chance to explore the circumstances of the alleged offending in detail
- loss of a chance to identify the occasion of the allegations with any specificity
- loss of a chance to make any defence other than a simple denial
- loss of a chance of medical examination of the complainant
- loss of chance to establish an alibi
- loss of chance to call evidence contradicting the broader evidence of the complaint
- loss of chance to obtain documents that may have assisted the defence
- disadvantage in testing events that may have affected the complainant's recollection or reliability.

The *Criminal charge book* also states that, while the passage of time alone cannot be determinative of whether a direction is required, the length of the delay will be a significant factor.<sup>530</sup>

Unreliable evidence generally is addressed in Division 3, Part 4, of the *Jury Directions Act*. Section 31 provides a list of types of evidence that may be unreliable. Evidence given after a lengthy delay is not specifically identified.

Under section 32, either the prosecution or the defence may request a direction. They must specify the significant matters that may make the evidence unreliable or, if the request concerns the evidence of a child, the significant matters, other than age alone, that may make the evidence unreliable. Under section 14, the judge must give the direction if requested unless there are good reasons for not doing so.

In giving a direction under section 32, the trial judge must:

- warn the jury that the evidence may be unreliable
- inform the jury of:
  - the significant matters the judge considers may cause the evidence to be unreliable or
  - if the direction concerns a child's evidence, the significant matters, other than solely the child's age, that the judge considers may make the evidence of the child unreliable

- warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.<sup>531</sup>

The *Criminal charge book* notes that the common law rules regarding unreliable evidence have been abolished and that the *Jury Directions Act 2015* (Vic) is now the only source of obligations on a judge to direct the jury about evidence of a kind that may be unreliable.<sup>532</sup> However, the common law may give guidance about the kinds of evidence that may be unreliable in addition to the categories listed in section 32 of the Act.<sup>533</sup>

The *Criminal charge book* also states that the *Jury Directions Act* provisions are not directly concerned with directions about honest but erroneous memory following delay and suggests that these issues should now be considered by reference to section 32 of that Act.<sup>534</sup>

It states that cases such as *Longman* and *Crampton* identified that after a period of lengthy delay there was a risk that false recollections may be converted to honestly and strongly held beliefs.<sup>535</sup> The risk of honest but erroneous memory must be assessed in the circumstances of the case, but it will be strongest where the alleged offence was discovered while the complainant was half asleep or there is evidence suggesting the complainant was suggestible.<sup>536</sup>

The *Criminal charge book* also notes that a number of commentators and judges have cast doubt on the validity of some of the common law assumptions about child psychology that underlie the asserted need for directions about honest but erroneous memory but states that, '[d]espite those doubts, it seems that judges should continue to consider the necessity for giving a warning about honest but erroneous memory in cases involving a long delay in complaint'.<sup>537</sup>

In relation to the evidence of children, the provisions in sections 32 and 33 of the *Jury Directions Act* are similar to sections 165(6) and 165A of the *Evidence Act 1995* (NSW). The new provisions are broader than those under the *Evidence Act 1995* (NSW). Under sections 165(6) and 165A of the *Evidence Act 1995* (NSW), only the judge is prohibited from giving certain warnings or information. The *Jury Directions Act* provisions extend these prohibitions to counsel.

Section 33 provides:

The trial judge, the prosecution and defence counsel (or, if the accused is unrepresented, the accused) must not say, or suggest in any way, to the jury that –

- (a) children as a class are unreliable witnesses; or
- (b) the evidence of children as a class is inherently less credible or reliable, or requires more careful scrutiny, than the evidence of adults; or
- (c) a particular child's evidence is unreliable, or requires more careful scrutiny, than the evidence of adults; or
- (d) it would be dangerous to convict on the uncorroborated evidence of a witness because that witness is a child.



Section 7 imposes a positive obligation on the judge to correct any statement or suggestion by counsel that is prohibited by this provision.

In February 2017, the Victorian Government proposed further reforms to jury directions. The Victorian Department of Justice and Regulation report, *Jury directions: A jury-centric approach part 2* (the Victorian Department of Justice and Regulation Second Report) details the reasons for the further reforms. The Jury Directions and Other Acts Amendment Bill 2017, which is currently before the Victorian Parliament, if enacted, will introduce the reforms. Some of the areas of reform relate to directions relevant to prosecutions of child sexual abuse offences, and we discuss them further in this chapter.

### 31.3.2 Separate counts and Markuleski

As discussed in Chapter 25, courts are concerned that the joinder of charges in sexual offences cases may create a risk of unfair prejudice to the accused. It is common in cases involving more than one charge – whether or not there is more than one complainant – for the judge to give a direction requiring the jury to consider each count separately.

The ‘separate consideration’ direction, or ‘KRM direction’, has its origins in the common law. In the High Court’s decision in 2001 in *KRM*,<sup>538</sup> McHugh J said:

It has become the standard practice in cases where there are multiple counts ... for the judge to direct the jury that they must consider each count separately and to consider it only by reference to the evidence that applies to it (a ‘separate consideration warning’).<sup>539</sup>

Separate consideration directions are given in New South Wales and Victoria. A separate consideration warning may often be supplemented by a Markuleski direction, discussed below. In Victoria, a separate consideration warning is given in circumstances where there is more than one count on the indictment.

In 1998 in *R v Robertson*,<sup>540</sup> in the Victorian Court of Appeal, Winneke P said:

In cases where the presentment contains multiple counts, and where the Crown is not contending ... that the evidence relied upon to support one count is admissible to support other counts, it is necessary for the trial judge to give clear directions to the jury as to the separate consideration which they must give to each of the counts and that they must confine their attention, when considering their verdict on each such count, to the evidence which has been given in respect of that count. It is customary to instruct the jury that the combining of more than one count in the presentment is a procedure of convenience but that such convenience should not be permitted to usurp a just outcome which entitles the parties to a separate consideration of each crime charged in the light of the evidence which applies to the particular count being considered. It is also customary to tell the jury that it would be quite wrong to say that, because they find the accused guilty or not guilty of one count that, therefore, the accused is guilty or not guilty of another.<sup>541</sup>

In 2001, in *R v Markuleski*<sup>542</sup> (*Markuleski*), the New South Wales Court of Criminal Appeal sitting with five judges allowed an appeal in a child sexual abuse case. The accused had been convicted on four counts of indecent assault and one count of sexual intercourse and had been acquitted on another count of sexual intercourse. The offending had occurred some 20 years earlier, and the case was largely word against word.

By majority (Spigelman CJ with Carruthers AJ agreeing, and Wood CJ at CL), the court held that, as a general rule in word against word cases, the trial judge should direct the jury that a reasonable doubt with respect to the complainant's evidence on any count ought to be taken into account in its assessment of the complainant's credibility generally – a 'Markuleski direction'.<sup>543</sup> The majority held that the trial judge did not give an adequate direction on this issue in this case.

Chief Justice Spigelman stated:

it is desirable that the traditional direction as to treating each count separately is supplemented in a word against word case. Some reference ought to be made to the effect upon the assessment of the credibility of a complainant if the jury finds itself unable to accept the complainant's evidence with respect to any count.

Some form of direction assisting the jury in this respect should be given, to employ the terminology found in *Kilby* and *R v Davies* 'as a general rule'. Its absence is not necessarily fatal (as it was not in *R v Davies* itself). Furthermore, as the joint judgment in *Crofts* affirmed (at 451), the 'general rule' does not apply 'where the particular facts of the case and the conduct of the trial do not suggest the need for a warning to restore a balance of fairness' ...

The precise terminology must remain a matter for the trial judge in all the particular circumstances of the specific case. The crucial matter is to indicate to the jury that any doubt they may form with respect to one aspect of the complainant's evidence, ought be considered by them when assessing the overall credulity of the complainant and, therefore, when deciding whether or not there was a reasonable doubt about the complainant's evidence with respect to other counts.<sup>544</sup>

Although Spigelman CJ referred to the desirability of the KRM direction being supplemented in 'word against word' cases, subsequent cases have held that the direction may be required even where the case concerned is not strictly one of 'word against word'.<sup>545</sup>

However, limits to the appropriateness of a Markuleski direction have also been identified. In *R v GAR*,<sup>546</sup> Miles JA (with Spigelman CJ and Bell J agreeing) stated:

Far from being required in all cases, the direction required in *Markuleski* may be quite inappropriate where it is open to the jury to convict on one count and to acquit on another, as was the case in the present matter. Further, a *Markuleski* direction, given when it is not required, may give the jury the mistaken impression that the jury, having come to a view on one count, may not take their view on that count into consideration for the purpose of considering their findings on another count, having regard to whatever evidence may be common to the several counts.<sup>547</sup>

Victorian courts have held that Markuleski directions should generally be avoided. In *The Queen v Goss*,<sup>548</sup> Redlich JA said '[n]o such direction need be given in the absence of some unusual feature of the case which gives rise to a specific risk that a miscarriage of justice may occur without such a direction'.<sup>549</sup>

Victorian courts have doubted the desirability of giving a Markuleski direction on the basis that '[t]he direction given in the New South Wales cases may be thought to undermine the separate consideration direction and swing a delicate balance towards propensity reasoning'.<sup>550</sup>

In *R v PMT*,<sup>551</sup> Buchanan JA stated that a direction of this nature is unnecessary, as it directs the jury to do something they are already likely to do:

I think it unlikely that a jury given a separate consideration direction will be entirely uninfluenced by the impressions they derive from the evidence of a witness taken as a whole; I doubt that such a natural tendency needs judicial encouragement in the form of a Markuleski direction.<sup>552</sup>

While not naming *Markuleski*, in *Flora v The Queen*<sup>553</sup> (*Flora*), Coghlan JA suggested that the ground of appeal based on the absence of a Markuleski direction 'assumes, in a somewhat condescending way, that jurors are utterly devoid of common sense'.<sup>554</sup>

The *Criminal charge book* cites *R v PMT* and *Flora* as authority for the proposition that a Markuleski direction should generally be avoided.<sup>555</sup>

The Jury Directions and Other Acts Amendment Bill 2017 (Vic), which we discussed in section 31.3.1, provides for the abolition of the Markuleski direction under proposed section 44F. Proposed section 44F provides:

In a trial in which more than one offence is charged, the trial judge must not direct the jury that if the jury doubts the truthfulness or reliability of the victim's evidence in relation to a charge, that doubt must be taken into account in assessing the truthfulness or reliability of the victim's evidence generally or in relation to other charges.

Proposed section 44G, if enacted, will abolish any rule of common law under which a trial judge is required or permitted to give the direction referred to in section 44F. The first note to proposed section 44G states that the section 'abolishes the rule attributed to *R v Markuleski* (2001) 52 NSWLR 82'.

### 31.3.3 Evidence given using special measures

We discussed the special measures available for vulnerable witnesses in Chapter 30.

New South Wales and Victoria provide for a number of directions to be given if vulnerable witnesses give evidence using special measures. These directions are generally framed to provide that the jury should not regard the fact that a vulnerable witness uses special measures to give evidence as adverse to the accused and or as giving the evidence any greater or lesser weight.

For example, in New South Wales, section 306X of the *Criminal Procedure Act 1986* (NSW) provides in relation to the use of a prerecorded police investigative interview as evidence in chief:

If a vulnerable person gives evidence of a previous representation wholly or partly in the form of a recording made by an investigating official in accordance with this Division in any proceedings in which there is a jury, the judge must warn the jury not to draw any inference adverse to the accused person or give the evidence any greater or lesser weight because of the evidence being given that way.

In Victoria, section 361 of the *Criminal Procedure Act 2009* (Vic) provides generally in relation to the use of alternative arrangements for giving evidence (including, for example, closed circuit television (CCTV), screens or support persons):

If the court directs that alternative arrangements be made in a trial for the giving of evidence by a witness, the trial judge must warn the jury not to draw any inference adverse to the accused or give the evidence any greater or lesser weight because of the making of those arrangements.

However, the Jury Directions and Other Acts Amendment Bill 2017 (Vic), which we discussed in section 31.3.1, provides for the repeal of the requirement to give alternative evidence directions, including through the repeal of section 361 of the *Criminal Procedure Act 2009* (Vic).

The Victorian Department of Justice and Regulation Second Report explains the reason for the repealing the requirement to give alternative evidence directions as follows:

Currently, provisions in the *Criminal Procedure Act* and the *Evidence (Miscellaneous Provisions) Act 1958* require mandatory directions to be given if evidence is given by alternative means (e.g. by CCTV or pre-recorded evidence is played for the jury).

The directions warn jurors not to draw any adverse inference against the accused, or give the witness's evidence any greater or lesser weight because of the making of the arrangements. Certain provisions also require trial judges to refer to the routine nature of the arrangements.

As alternative arrangements are now common, mandatory directions are no longer necessary. The language of the directions is problematic, and there is also a risk of the directions having the opposite effect of what is intended. Accordingly, the Bill will repeal these provisions, so that the directions are no longer mandatory. However, trial judges will retain the discretion to give the directions if appropriate or necessary.<sup>556</sup>

## 31.4 Juries' understanding and reasoning

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### 31.4.1 Introduction

As discussed in section 2.4.3 and Chapter 4, there are a number of myths and misconceptions about sexual offences, including child sexual abuse, that have affected the criminal justice system's responses to child sexual abuse prosecutions.

The myths and misconceptions have influenced the law – including judicial directions – and the attitudes jury members bring to their decision-making. The myths and misconceptions may lead to a complainant's behaviour being regarded as 'counterintuitive' to the behaviour expected of a 'real' victim of sexual abuse, even though social science research establishes that the behaviour is common – and sometimes even typical – for victims of sexual abuse.

Misconceptions about children's responses to child sexual abuse and the reliability of children's evidence have been shown to exist among the general public, who are potential jurors.<sup>557</sup>

Judges and counsel ask jurors to draw on their 'common sense' and 'life experience' when assessing whether a child complainant is telling the truth.<sup>558</sup> However, a significant body of research has shown that children's behaviours and reactions to child sexual abuse can be counterintuitive and inconsistent with juror expectations.<sup>559</sup> This may lead jurors to question whether abuse has in fact occurred, with child complainants' credibility undermined on the basis of incorrect assumptions. The misconceptions may negatively affect jurors' perceptions of both child and adult complainants in child sexual abuse trials.

### 31.4.2 Myths and misconceptions

A 2009 study by Cossins, Goodman-Delahunty and O'Brien showed that Australian jury-eligible participants reported high levels of uncertainty about whether children were suggestible about sexual abuse and whether they were truthful and reliable witnesses.<sup>560</sup> One-third of participants were also unsure whether inconsistencies in a child's testimony were associated with lying.<sup>561</sup> Some participants held the following misconceptions:

- A victim of sexual abuse will avoid the abuser.
- Children who are abused display strong emotional reactions.
- A physical examination by a doctor will almost always show whether or not a child has been sexually abused.
- An abused child will typically cry for help and try to escape.<sup>562</sup>

There were high rates of uncertainty among participants as to:

- the extent to which children can, or cannot, be manipulated into inventing a false story
- the fact that non-leading, open-ended questions are unlikely to lead children to make false claims of sexual abuse
- the fact that suggestive questioning can lead children to make false reports of abuse.<sup>563</sup>

The authors concluded that these findings indicate that ‘the Australian public lacks a sound understanding of children’s reactions to sexual abuse, as well as children’s memory, reliability and suggestibility when disclosing and reporting sexual abuse’.<sup>564</sup> The authors noted that all jurors would benefit from specialised knowledge about child development and the impact of child abuse on children, although they identified a greater need for guidance among jurors whose formal education did not extend beyond high school, as well as juries dominated by men.<sup>565</sup>

Juror uncertainty or lack of information – as distinct from juror misconceptions – may be of particular concern in trials because it may make the jury ‘more malleable and susceptible to suggestions by counsel’.<sup>566</sup>

In the Jury Reasoning Research, discussed in Chapter 25, the researchers assessed the knowledge of the mock jurors about child sexual assault before they viewed the mock trial and participated in the mock jury deliberations, in order to assess the impact that their level of knowledge had on their reasoning and verdicts. Mock jurors completed a nine-item questionnaire, testing their understanding on the impact of child sexual abuse (for example, ‘expected’ reactions, including to the abuser, or the likelihood of a medical examination) and the reliability of children’s reports of child sexual abuse.<sup>567</sup>

The researchers found that those with better knowledge of the impact of child sexual abuse had better memory of the case facts. Those with better knowledge of factors that influence reports of child sexual abuse were more likely to perceive the complainant as credible.<sup>568</sup> Those with better knowledge of child sexual abuse overall were less likely to endorse other types of bias (for example, cynicism about the defence, racial bias, confidence in the justice system).<sup>569</sup>

The Memory Research reported on a number of studies that have identified misconceptions that laypeople hold about memory. A number of these misconceptions may affect how a fact-finder assesses a witness’s evidence. Misconceptions about memory can include:

- misconceptions about the nature of human memory and how it operates, leading to assumptions that memories will be complete, unchanging and ‘photographic’<sup>570</sup>
- wrong assumptions about a connection between accuracy of a memory (on the one hand) and the amount of specific details recalled or the vividness of the memory (on the other hand)<sup>571</sup>
- misconceptions about the accuracy of people’s memory generally, such that wrong assumptions may be made about:
  - a connection between accuracy of a memory and consistency of accounts given by a witness, where inconsistencies or gaps may be assumed to demonstrate inaccuracy in the witness’s account as a whole<sup>572</sup>
  - a witness recalling additional information over time as they give further accounts of the event, where this may be regarded with suspicion or indicating unreliability<sup>573</sup>
- misconceptions about the reliability of children’s memories, which may result in wrong assumptions that either older children are more reliable than younger children or that older children have a greater propensity to lie about sexual abuse than younger children<sup>574</sup>
- misconceptions about the relationship between memory and the passage of time, which may result in wrong assumptions about how memory fades<sup>575</sup>
- misconceptions about whether adults can accurately recall early childhood events – which may overstate the capacity of many adults to recall such events – and whether memories of child sexual abuse can be repressed or recovered<sup>576</sup>
- misconceptions about the greater durability of memory for traumatic events<sup>577</sup>
- misconceptions about the display of emotion while giving evidence being an indicator of accuracy of the memory retrieved<sup>578</sup>
- misconceptions about children’s ability to recall temporal details, such as exactly when an event occurred or how often it occurred.<sup>579</sup>

These misconceptions may be held by jury members or by other fact-finders and by members of the legal profession who are involved in child sexual abuse prosecutions.

There is also the issue of how myths and misconceptions may be used – and exploited – in cross-examination.

In the research report *An evaluation of how evidence is elicited from complainants of child sexual abuse* (Complainants’ Evidence Research), described in Chapter 30, the researchers examined how defence counsel use assumptions about victim behaviour and human memory to attack child complainants’ credibility at trial. The researchers analysed transcripts of evidence

given by 120 complainants from 94 child sexual abuse trials<sup>580</sup> and found that defence lawyers used strategies which questioned robust findings from psychological research. These findings are that:

- children are capable of giving reliable evidence
- errors about minor details do not indicate the central allegation is wrong
- victims respond to abuse in many ways.<sup>581</sup>

The transcript analysis showed that defence counsel routinely suggest a complainant's poor memory or inconsistency in relation to minor details indicated that the central allegation was wrong.<sup>582</sup> 'Minor details' included the colour of clothing or the weather.<sup>583</sup> Defence counsel also attacked the plausibility of the complainant's story – for example, by exploiting misconceptions about child abuse such as:

- the lack of resistance by the complainant at the time of the offence
- the delay in reporting
- the lack of emotion by the complainant at the time of the offence
- the continued relationship between the complainant and the accused after the offence.<sup>584</sup>

Defence counsel may legitimately cross-examine a complainant about their credibility in many ways. However, it appears that defence counsel currently also create doubt in the minds of jurors by relying on misconceptions and uncertainty, which may make jurors more susceptible to suggestions by counsel. As discussed above, misconceptions and uncertainty have been found to be common among jury-eligible citizens.<sup>585</sup>

### 31.4.3 Evidence about how juries reason

In the Jury Reasoning Research, discussed in Chapter 25, key findings were that:

- jury verdicts were not infected by factual errors of individual jurors. The small number of errors made by individual jurors were corrected by other jurors during deliberation
- jurors were not overwhelmed by the number of charges or witnesses, instead determining the defendant's culpability on the strength of the evidence
- juries did not base their decisions on the perceived 'bad character' of the defendant, viewing the defendant as equally convincing across the different trial types regardless of the number of charges or allegations against the defendant.<sup>586</sup>

The researchers concluded that juries:

- were capable of following instructions that they should consider different counts separately and base their verdicts on the evidence relevant to each count
- based their reasoning and verdicts on the probative value of the evidence.<sup>587</sup>



As outlined in section 27.4.4, we also heard evidence in Case Study 38 from DPPs from a number of jurisdictions who gave their views that properly instructed juries can be trusted to appropriately consider the evidence and deliver sound verdicts, despite allegations or evidence of abhorrent or terrible behaviour.

In considering reforms to the rules which govern whether tendency and coincidence evidence can be put before a jury, Counsel Assisting the Royal Commission, in their opinion on the issues considered in the first week of Case Study 38, stated:

The assessment of the significance of tendency and coincidence evidence itself involves consideration of human behaviour on which minds may differ, including because of different life experiences. That is the very sort of thing that we have juries for, rather than just relying on the assessment of individual judicial officers.<sup>588</sup>

## 31.5 Possible options for reform

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### 31.5.1 Introduction

In the Consultation Paper, we discussed some possible options for reform.

As noted in section 31.1, the purpose of judicial directions is to ensure the accused is tried according to the law. While this focuses on ensuring the accused receives a fair trial, the discussion in section 31.3.1 suggests that some judicial directions have been more likely to have improved the accused's prospects of acquittal, to the detriment of the community at large and the complainant in particular. Despite the legislated changes in some jurisdictions, this raises the question of whether further changes should be made.

Judicial directions should ensure that the accused receives a fair trial and that the jury is given the necessary information and assistance to perform its tasks. These considerations raise issues of possible reforms to judicial directions but also issues of improving the information and education available to judges and lawyers and to jurors.

### 31.5.2 Reforming judicial directions

As discussed in section 31.3, the history of judicial directions and warnings – particularly directions and warnings based on judicial assumptions about the unreliability of women, children and complainants of sexual offences, including child sexual abuse – reveals a tension between parliaments and the courts.

Judicial directions based on (incorrect) judicial assumptions about ordinary human behaviour have had a detrimental impact in the trials of child sexual assault and on complainants. As Justice McClellan has stated:

The decisions in Longman and Crofts had profound consequences for complainants in sexual assault cases; particularly complainants who were children at the time at which they were assaulted. They derive from what judges thought they knew about how genuine complainants behaved, and what they thought they knew about how memory worked. Those assumptions have turned out, with the benefit of empirical research, to be flawed. However, they became embedded in the fabric of the common law and proved difficult, even for Parliament, to dislodge.<sup>589</sup>

## Codifying and simplifying directions

The Victorian Parliament appears to have gone further than other parliaments towards resolving this tension with the courts over judicial directions by enacting the *Jury Directions Act 2013* (Vic) and the *Jury Directions Act 2015* (Vic).

Codifying judicial directions may assist in avoiding judicial directions that are not supported by social science and other research. It may also assist in simplifying directions with a minimisation of error and successful appeals.

In 2009, the VLRC *Jury directions: Final report* concluded that:

The law on jury directions has become complex, voluminous and uncertain within a relatively short period. The average duration of jury charges by Victorian judges thirty years ago was much shorter than today. The directions themselves were also generally far less complex.<sup>590</sup> [Reference omitted.]

The Victorian Department of Justice and Regulation's Report stated:

Jurors are less likely to listen to, understand or apply directions that are long and complex. If jurors are unclear on the law to be applied in the case, or on how to apply that law to the facts, this affects the integrity of their decision-making and the likelihood of a fair trial.<sup>591</sup>

The Weinberg Report specifically considered the length of judicial directions.<sup>592</sup> It referred to a 2006 survey of judges who were experienced in the conduct of criminal trials in Australia and New Zealand. The survey found that the average estimated length of the charge following a 10-day jury trial in Victoria was 255 minutes. For a 20-day trial, that figure increased to 349 minutes, or nearly six hours.<sup>593</sup> By contrast, the average estimated charge length for trials conducted in New Zealand was 76 minutes for a 10-day trial and 108 minutes for a 20-day trial.<sup>594</sup>

The Weinberg Report considered the length of judicial directions given in other jurisdictions and stated:

In Australia, only New South Wales came close to rivalling Victoria in terms of the sheer length of jury directions. In Western Australia, the average estimated length of a charge following a ten day jury trial was only 116 minutes, and for a twenty day trial, a mere 155 minutes. In other words, it took less than half the time to deliver a jury charge in Western Australia than it took to deliver a charge in an equivalent case in Victoria.

The brevity of jury instructions in Scotland puts the matter into even starker contrast. There, the standard jury direction takes between 15 and 18 minutes.

Directions in the United States are also substantially shorter than those given in Victoria. Typically, they take no more than about 30 minutes.<sup>595</sup> [References omitted.]

Trial judges face challenges in directing a jury in sexual offence cases, due to the number of directions that are required and the complexity of those directions.<sup>596</sup> The ALRC and NSW LRC, in their report *Family violence: A national legal response*, stated:

In a sexual assault trial, numerous complex directions and warnings ‘which focus on the unique characteristics of sexual assault such as delay, one witness to the offence and a lack of corroborating evidence’ may be required. The duties of the trial judge to direct the jury in a manner which is clear, intelligible, relevant, brief and insulated from appeal, and the duty of jurors to comprehend and apply each direction are problematic to discharge.<sup>597</sup> [References omitted.]

The complexity of jury directions has been the subject of judicial comments. In 2011 in the Victorian Court of Appeal’s decision in *Wilson v The Queen*<sup>598</sup> – a case involving multiple sexual offence counts and multiple complainants – Maxwell P noted:

The issues raised by this appeal serve as a salutary reminder of the urgent need for legislative simplification of jury directions ... [T]he law governing the trial of sexual offences is now so extraordinarily complex as to throw into doubt the expectations on which the system of trial by jury is founded. Those expectations are, first, that a judge can reasonably be expected to explain the relevant law to the jury, in all its permutations and combinations, without falling into error; and, secondly, that the jury can reasonably be expected not only to comprehend the law as so explained, but to apply it, in all its permutations and combinations, to the evidence which they have heard.<sup>599</sup>

Long and complex directions make the task of the trial judge more difficult, making errors in directions more likely.<sup>600</sup> Errors in jury directions result in appeals, retrials and delays in the court system.

The Victorian Department of Justice and Regulation Report also referred to the difficulties that can arise from attempts to ‘appeal proof’ directions as follows:

The risk that an appellate court may form a different view about what was ‘relevant’ to the case may lead to long, irrelevant and formulaic directions being given by trial judges in an attempt to ‘appeal proof’ their directions. This is problematic, as the jury is unlikely to be assisted by lengthy directions on matters that are not in issue.<sup>601</sup>

The Victorian codification of judicial directions appears to have been welcomed by the judiciary. In the County Court of Victoria 2012–2013 Annual Report, his Honour Judge Taft commented:

Judges in this Court have embraced the Jury Directions Act 2013 which is directed to simplifying jury directions in criminal trials and we welcome the prospect of further legislative intervention to assist judges in giving simpler and clearer jury directions.<sup>602</sup>

In the Consultation Paper, we suggested that, given the Victorian example, it may be that all states and territories should consider codifying judicial directions. Codification would be for the purposes of both:

- accuracy and fairness, by prohibiting judicial directions that are not supported by social science and other research, particularly in cases of sexual offending including child sexual abuse
- simplification, for the assistance of juries, trial judges and all parties.

However, if governments pursue codification then, particularly in cases of sexual offending, including child sexual abuse, they would need to keep appellate decisions on judicial directions under careful review to ensure that the law is applied as the parliaments intend.

## Particular directions and warnings in relation to sexual offences

In relation to the particular directions discussed in section 31.3.1, it seems that, through many legislative amendments responding to decisions of the appellate courts, both New South Wales and Victoria have arrived at a position in relation to corroboration, delay and reliability that is consistent with the social science research.

It should also be noted that the New South Wales and Victorian provisions continue to ensure that the accused can receive a fair trial by allowing for relevant directions to be given where necessary to assist the jury in a particular case, without relying on broad and incorrect assumptions based on stereotypes and misconceptions about women and children and how ‘real’ victims of sexual offences, including child sexual abuse, will behave.

If other states and territories have not yet arrived at similar positions in relation to these judicial directions, we suggested in the Consultation Paper that it may be appropriate for them to legislate in respect of these particular directions in advance of developing any broader codification. These directions are obviously of considerable significance in child sexual abuse trials and they may require immediate attention.

### **The Longman direction**

The Longman direction has not been reformed by legislation in Queensland or Western Australia.

The Longman direction in the Queensland Benchbook does not appear to require any evidence of actual forensic disadvantage to the accused. It provides as follows:

The complainant's long delay in reporting the incident she says happened on (insert date) has an important consequence: her evidence cannot be adequately tested or met after the passage of so many years, the defendant having lost by reason of that delay means of testing, and meeting, her allegations that would otherwise have been available.

By the delay, the defendant has been denied the chance to assemble, soon after the incident is alleged to have occurred, evidence as to what he and other potential witnesses were doing when, according to the complainant, the incident happened. Had the complaint instead been made known to the defendant soon after the alleged event, it would have been possible then to explore the pertinent circumstances in detail, and perhaps to gather, and to look to call at a trial, evidence throwing doubt on the complainant's story [or confirming the defendant's denial] – opportunities lost by the delay.

The fairness of the trial (as the proper way to prove or challenge the accusation) has necessarily been impaired by the long delay.

So I warn you that it would be dangerous to convict upon the complainant's testimony alone unless, after scrutinising it with great care, considering the circumstances relevant to its evaluation, and paying heed to this warning, you are satisfied beyond reasonable doubt of its truth and accuracy.<sup>603</sup> [References omitted.]

The notes to the Benchbook direction suggest that elaboration may be required, such that, where there is evidence of specific difficulties encountered by the defence, the specific difficulties should be highlighted. It appears the direction is intended to be given even if there is corroboration, as another note to the direction states: 'If there is such corroboration, the jury may be informed that there is evidence which, if the jury accepts it, might support or confirm the complainant's account, describing that evidence.'<sup>604</sup>

In *R v MBX*,<sup>605</sup> the complainant alleged that his uncle had raped him on three occasions when he was aged between four and six. There was a delay of some 10 years before he disclosed the abuse and the accused was charged. One of the issues in the offender's appeal against his convictions for three counts of rape was the adequacy of the Longman warning given by the trial judge.

In the Queensland Court of Appeal, Applegarth J stated:

The delay of about ten years between the alleged incidents of anal rape and the police investigation in 2010 led to a 'Longman direction' being given to the jury about the forensic disadvantage the appellant suffered in not being able to adequately test the complainant's evidence, to obtain forensic evidence and to assemble, soon after the alleged incidents, evidence as to what he and other potential witnesses were doing when, according to the complainant, the incidents happened.

The trial judge warned the jury that it would be 'dangerous to convict on the complainant's testimony alone unless, after scrutinising it with great care and considering the circumstances relevant to its evaluation and paying heed to this warning, you were satisfied beyond reasonable doubt of its truth and accuracy because there is not other evidence to support him. His evidence, in effect, stands alone.'<sup>606</sup>

The trial judge referred to particular difficulties caused by the delay. She also summarised the prosecution and defence contentions about the accuracy and reliability of the complainant's evidence in some detail.<sup>607</sup>

Justice Applegarth stated that:

the '*Longman* direction' is not a statute, and no particular form of words is required. But authority requires it to be in the form of a warning. The warning must be given the imprint of the Court's own authority.

...

The jury is to be warned that it would be dangerous to convict upon the complainant's testimony alone unless, after scrutinising it with great care, considering the circumstances relevant to its evaluation, and paying heed to the warning, it is satisfied beyond reasonable doubt of its truth and accuracy.

The essential requirements of such a *Longman* direction about the forensic disadvantage faced by an accused person where there has been a significant lapse of time are reflected in the Benchbook. As the Benchbook notes, the opportunities lost by the delay may require some elaboration, depending upon the circumstances. The specific difficulties encountered by the defence should be highlighted.<sup>608</sup> [References omitted.]

In this case, the offender challenged the adequacy of the direction on the basis that combined delay and the age of the complainant 'gave rise to a requirement to refer to the problem of erroneous memory, and child fantasy, on the part of a child complainant'.<sup>609</sup>

Justice Applegarth (with Fraser JA and Jackson J agreeing) rejected the appeal ground in relation to the Longman direction and the ground relating to the failure to give directions about particular aspects of the complainant's reliability.<sup>610</sup>

The Queensland Benchbook notes that any Longman direction must not transgress section 632(3) of the *Criminal Code* (Qld).<sup>611</sup> Section 632 of the *Criminal Code* deals with corroboration. It provides that a person may be convicted of an offence on the uncorroborated evidence of one witness and that a judge is 'not required by any rule of law of practice to warn the jury that it is unsafe to convict the accused' on the uncorroborated evidence of one witness: section 632(1) and 632(2). Section 632(3) provides that the judge is not prevented from making a comment on the evidence that it is appropriate to make, but 'the judge must not warn or suggest in any way to the jury that the law regards any class of persons as unreliable witnesses'.

Western Australia also retains the Longman direction without statutory amendment.

In 2016, in *MB v The State of Western Australia*,<sup>612</sup> the Western Australian Court of Appeal (Martin CJ, Mazza and Mitchell JJA) allowed an appeal on the basis that the trial judge gave an inadequate Longman direction.

The appellant was convicted in the District Court of Western Australia after trial by judge and jury on one count of indecent dealing with a child under the age of 16 and another count of sexual penetration of a child under the age of 16. The complainant alleged that her father committed the offences against her in 2004, when she was five years old, in the course of a single sequence of events. The complainant disclosed the offences in 2012, and the police informed the accused of the allegations in 2012. The trial took place in March 2015. The complainant's evidence was the only direct evidence of the alleged offences.<sup>613</sup>

The trial judge gave three specific directions of law as follows:

- a direction as to delay and the complainant's credibility
- a direction as to the use the jury could make of the accused's prior convictions for sexual offences – he had been convicted of sexual offences committed against two of the complainant's female cousins
- a Longman direction.

The Longman direction was the only direction challenged on appeal, although there were other grounds of appeal.

On the ground of appeal relating to the Longman direction, Mazza JA agreed with Mitchell JA.<sup>614</sup> Justice Mitchell agreed with Martin CJ's conclusion that the Longman warning was inadequate in the circumstances but gave separate reasons. The difference between them was that Mitchell JA did not agree with Martin CJ that the Longman direction would have been understood as advisory rather than mandatory.<sup>615</sup>

Chief Justice Martin referred to the 'many appeals' to the Court of Appeal on the ground of alleged inadequacy of a Longman direction.<sup>616</sup>

In this case, Martin CJ stated that it was common ground between the prosecution and defence that an adequate Longman direction was required given the 'long delay' (11 years) between the alleged offences and the trial and the fact that the prosecution case relied entirely upon the uncorroborated testimony of the complainant.<sup>617</sup> Counsel for the accused at the trial had not objected to the Longman direction given by the trial judge or asked that it be augmented.<sup>618</sup>

Chief Justice Martin stated:

In the course of the *Longman* direction, the judge directed the jury as to the approach which they 'should' take on six separate occasions. He used the imperative expression 'must' in the last paragraph of the direction he gave, but only in respect of the matters which the jury was required to 'bear in mind' when they 'approached' the issue of delay. At another point in the course of the direction, the judge used the word 'suggest' to describe one of the ways in which the complainant's evidence might have been tested. At another point the judge directed the jury that it was 'particularly important' that they scrutinise the evidence of the complainant with special care because of the delay.

The respondent [that is, the prosecution] submitted that the terminology used by the judge in the *Longman* direction should be assessed in the context of the charge as a whole, in which he had clearly told the jury that he was giving them a direction of law which they were obliged to apply. That proposition is undoubtedly correct. However, the critical issue is not whether the jury understood that they were obliged to apply the propositions developed by the judge, but rather, the nature and tenor of those propositions, and in particular, whether they conveyed in 'unmistakeable and firm' terms that, as a matter of law, *based upon the long experience of the courts they were obliged to take into account the danger of convicting in a case such as this.*

The terminology used by the judge considered in combination compels the conclusion that the direction which he gave is properly characterised as a comment to the jury on the approach which they should take to the evaluation of the veracity of the complainant's evidence having regard to the long delay. Although it is clear that no particular verbal formulation or terminology is required in order to give an adequate *Longman* direction, it is equally clear that the language used must convey the warning in 'unmistakeable and firm' or 'clear and emphatic' terms, given with the weight of the judge's office. *It must*



*convey the long experience of the courts that the impact of delay on the forensic process makes it dangerous or unsafe to convict on the uncorroborated testimony of a complainant unless the jury is completely satisfied of the veracity of that evidence, evaluated with an appreciation of the forensic disadvantages suffered by an accused where the trial occurs many years after the alleged offences.* There are no words in the direction given by the judge in this case which would have conveyed to the jury that they were being warned of the risks involved in convicting in the circumstances of the case before them. Rather, viewed as a whole, *the direction would have conveyed to the jury that the judge was suggesting to them that they needed to take special care in evaluating the evidence of the complainant because of the long delay.* It follows that the direction given was inadequate and did not fulfil the obligation imposed by the decision in *Longman*.<sup>619</sup> [Emphasis added.]

Chief Justice Martin stated:

I accept the appellant's submission that the thrust of the direction given by the judge was a comment to the jury to the effect that they should take special care in assessing the complainant's evidence because it was uncorroborated and because of the long delay. Such a direction falls short of, and is different in character to, the direction required by the decision in *Longman*, which requires the judge to warn the jury of the risks or dangers of convicting in such circumstances. As I have noted, there are no words in the direction given by the trial judge which conveyed that proposition to the jury. It follows that the direction was also deficient in this respect.<sup>620</sup>

Justice Mitchell held that the direction failed to convey the risk of a miscarriage of justice which arose from the forensic disadvantage suffered by the accused as a result of the delay. Justice Mitchell stated:

Considered as a whole in the context of the trial, the direction did not convey to the jury the risk of miscarriage of justice which arose in this case from the combination of delay in bringing the matter to trial and the circumstance that the complainant's account was the only evidence of the commission of the charged offence.

The message conveyed by the direction ... was that it was important to scrutinise the complainant's evidence with special care and that account should be taken of the delay in doing so. However, as counsel for the appellant correctly observed in her oral submissions, the direction does not link the delay with the real danger of a miscarriage of justice which arises from convicting on the complainant's evidence alone in those circumstances. I agree with her submission that there is a difference between a warning as [to] the danger or risk of a miscarriage of justice and a direction (which would be given in any case of this kind) about the importance of looking at the complainant's evidence and being satisfied about its truthfulness and reliability. In light of the manner in which the complainant's recollection of the offence developed over time, it was particularly important that the jury receive a clear and emphatic warning about the risk of a miscarriage of justice.

*The direction in this case did not, in my respectful view, contain any clear warning of the danger or risk of a miscarriage of justice if the appellant were to be convicted on the complainant's uncorroborated testimony, given the prejudice arising from delay.*<sup>621</sup>  
[Emphasis added.]

Justice Mitchell stated:

In my view, the difficulty with the *Longman* direction in this case was not that the jury would have understood it to be advisory rather than mandatory. Rather, the difficulty is that the direction of law which the trial judge gave *did not contain a clear warning alerting the jury to the danger of a miscarriage of justice if they were to convict on the complainant's uncorroborated evidence without the closest scrutiny of that evidence and taking account of the prejudice to the appellant as a result of the significant delay.*<sup>622</sup>  
[Emphasis added.]

In 2014, the Western Australian Court of Criminal Appeal suggested that it might be time to reassess warnings given in child sexual abuse trials. In *Anderson v The State of Western Australia*,<sup>623</sup> McClure P discussed the history and rationale of the Longman direction.<sup>624</sup> President McClure (with Buss and Mazza JJA agreeing) stated:

As substantial delay in complaining is frequently a factor in child sexual abuse cases, *Longman* warnings are routinely given. No doubt out of an abundance of caution, *Longman* type warnings are now being given after relatively short delays, as in this case. Trial judges have been permitted to soften the warning by omitting any reference to it being 'dangerous to convict': *Kemp v The State of Western Australia* [2006] WASCA 6 [9]. However, *given the now proven magnitude of past sexual offending against children and the scepticism which allowed it to flourish, the time may have arrived to reassess the rationale for or terms of the warnings given in child sexual abuse trials.*<sup>625</sup>  
[Emphasis added.]

In that case, a Longman warning was held not to be required because the complainant was not aware that she had been the victim of the sexual assault, which was filmed on the accused's mobile phone. Further, the delay between the offences and the accused being put on notice 'was not substantial'.<sup>626</sup> Police interviewed the accused in February 2010 about the sexual abuse alleged to have been committed on a date in 2009; other offences relating to the possession of child pornography were alleged to have been committed between the end of 2006 and February 2010. The Longman direction given by the trial judge was held to have advantaged the accused.<sup>627</sup>

Although the language of 'dangerous to convict' is not necessarily required,<sup>628</sup> it is still used in Longman warnings in Western Australia. For example, in *PAH v The State of Western Australia*,<sup>629</sup> (PAH) reference is made to the trial judge having given a Longman warning and a corroboration warning, concluding with the instruction:

You are at liberty to act upon [the victim's] evidence to convict [the appellant] of the charges that allegedly occurred between 3 and 8 years ago if you are satisfied of the truth and accuracy of her evidence. But *it would be dangerous, particularly in the circumstances of this case, to convict* [the appellant] on the uncorroborated evidence of [the victim] unless, having scrutinised her evidence with great care, having considered the circumstances relevant to that evidence to which I have referred, and taking full account of the warning I have just given to you, you are satisfied beyond reasonable doubt as to its truth and accuracy.<sup>630</sup> [Reference omitted. Emphasis added.]

The Longman direction was not the subject of appeal in *PAH*.

### **The Markuleski direction**

The Markuleski direction is a point of difference between New South Wales and Victoria. A Markuleski direction is given in relevant trials in Queensland<sup>631</sup> but is not given in Western Australia.<sup>632</sup> The judicial criticism of the Markuleski direction in Victoria and Western Australia is significant, and we suggested in the Consultation Paper that it is not clear that the Markuleski direction is warranted.

### **31.5.3 Improving information for judges and legal professionals**

As the discussion in section 31.3.1 indicates, assumptions that judges make about how complainants behave and how memory works are embedded in the common law. They have been repeated regularly over the decades by appellate judges, with limited, if any reference, to any relevant research to support them.

Some of the judicial directions that have been particularly significant in child sexual abuse cases stem from judges' assumptions that they are uniquely placed to warn jurors about the dangers of certain evidence.

In 1986, in the High Court's decision in *Bromley v The Queen*,<sup>633</sup> Brennan J stated:

The courts have had experience of the reasons why witnesses in the three accepted categories [accomplices, children giving evidence on oath, and complainants in sexual assault cases] may give untruthful evidence wider than the experience of the general public, and the courts have a sharpened awareness of the danger of acting on the uncorroborated evidence of such witnesses.<sup>634</sup>

The Queensland Law Reform Commission (QLRC), in its report *A review of jury directions*, stated:

The Commission notes the faith placed by courts in their own accumulated wisdom on matters in which it is assumed (by judges) that other judges have acquired insights that are not obvious to lay jurors. In the area of the long-accepted unreliability of complainants in

sexual offence cases, however, this faith has been displaced by empirical evidence which has offered a perspective on the reasons for the behaviour of victims of these crimes that is at odds with how it was assumed that they did and should behave.<sup>635</sup>

The discussion of *Longman and Crofts* in section 31.3.1 provides good examples. Similarly, the courts' concerns about how juries reason and risks of unfair prejudice arising from tendency and coincidence evidence discussed in Chapter 25 provide examples of other erroneous assumptions.

In the Consultation Paper, we suggested that part of the response to the problems associated with the complexity of jury directions may be enhanced skills training for both judicial officers and counsel.

The VLRC noted that '[d]irecting the jury is one of a trial judge's most difficult functions'.<sup>636</sup> Due to developments in the law and rapid changes to society and technology, even the most competent judges need access to educational resources.<sup>637</sup> The VLRC also suggested that there is now less resistance to judicial education, and professional development programs are generally accepted and valued by judicial officers.<sup>638</sup> Former High Court Chief Justice Murray Gleeson, writing extrajudicially, has said:

Judicial education is no longer seen as requiring justification. We are past the stage of arguing about whether there should be formal arrangements for orientation and instruction of newly-appointed judges and magistrates, and for their continuing education. Of course there should.<sup>639</sup>

Trial counsel have a role to play in ensuring that a trial is run competently and in the directions that are given to jurors. If trial counsel are to conduct trials competently, they also require appropriate training and professional development.<sup>640</sup> As the VLRC noted:

Counsel have a duty to assist the trial judge determine what directions to give the jury and to formulate the content of directions. Concerns were expressed to the commission that some counsel have not provided sufficient assistance in this regard. Retrials have been ordered because of erroneous directions in cases where counsel did not raise the error with the judge at trial.<sup>641</sup>

In 2015, the Australasian Institute of Judicial Administration Committee updated the *Bench book for children giving evidence in Australian courts*. The manual aims to promote accurate knowledge and understanding of children and their ability to give evidence and to assist judicial officers to enable a fair trial for both the accused and the child complainant.<sup>642</sup> However, some participants in our private roundtables have told us that there is currently no compulsory training for magistrates or judges regarding sexual offences or understanding myths or misconceptions in some jurisdictions.

Formal training and continuing legal education could provide, at least, greater awareness of current academic literature on victims of child sexual abuse and the impact that the abuse can have on them. The work of this Royal Commission may also play a role in raising awareness of these issues.

Participants in our private consultations have also told us that police investigators who have been trained in getting the ‘whole story’ of a sexual abuse matter can assist prosecution counsel in setting out the evidence at trial in a way that tells a more nuanced story of the context and impact of child sexual abuse. This presentation of the evidence can assist in avoiding exploitation of myths and misconceptions by explaining apparently ‘counterintuitive’ behaviour as part of the prosecution case. In section 8.5.5, we discussed the evidence given in Case Study 46 about Victoria Police’s ‘whole story’ approach. Sergeant Belinda Cowley gave evidence about the effectiveness of the whole story approach in relation to prosecutions which take place in the Magistrates’ Court and Children’s Court,<sup>643</sup> and Mr Andrew Grant gave evidence in relation to the effectiveness of the whole story approach from his perspective as a Crown Prosecutor.<sup>644</sup>

The Victorian Department of Justice and Regulation Report suggested that repetition can assist in juror comprehension. In the Consultation Paper, we suggested that this might also apply to judges and lawyers, provided that what is being repeated is based on current research and not on wrong assumptions.

We also queried whether the discussion in section 31.3.1 might suggest that appellate judges could also benefit from education on sexual offences, including child sexual abuse, and relevant and up-to-date findings from social science research.

### 31.5.4 Improving information for jurors

As discussed in section 31.4, jurors may need assistance in better understanding children’s responses to child sexual abuse.

In relation to the misconceptions that may affect jurors’ reasoning, Cossins and Goodman-Delahunty state:

Addressing laypeople’s reliance on these misconceptions would not only enhance the public’s faith in the criminal justice system, it would promote justice for victims in ways that are not presently possible.<sup>645</sup>

Ways of assisting juries to understand children’s responses to child sexual abuse have been discussed in several recent reports.<sup>646</sup> Cossins and Goodman-Delahunty discuss a number of research studies, which they say suggest that educational information presented by an expert witness can correct some jurors’ misconceptions about child sexual abuse.<sup>647</sup> Particular judicial directions have also been proposed as another possible method.

In the Consultation Paper, we discussed the following possible options to improve jurors' understanding:

- the use of expert evidence
- particular judicial directions
- the timing of giving judicial directions
- providing educational material to juries.

## Expert evidence

### Current legal position

The common law opinion rule traditionally tended to exclude expert evidence about the behaviour of child sexual abuse victims on the basis that such information is within the common knowledge or ordinary experience of the jury.<sup>648</sup>

In 2005, the joint ALRC, NSW LRC and VLRC report *Uniform Evidence Law* recommended the opinion rule be revised to allow expert evidence about child development and behaviour and the effect of sexual abuse on children.<sup>649</sup> The report noted this can be important evidence in assisting the jury 'to assess other evidence or to prevent inappropriate reasoning processes based on misconceived notions about children and their behaviour'.<sup>650</sup>

However, if expert opinion evidence about children was tendered to support a child's credibility, it would breach the credibility rule under section 102 of the Uniform Evidence Act. This rule prevents evidence being admitted about the credibility of a witness unless it falls under one of the exceptions. As a result, the report recommended that section 79 of the Uniform Evidence Act be amended and that a new exception to the credibility rule be introduced to allow the admission of such evidence.<sup>651</sup>

The Uniform Evidence Act jurisdictions have now enacted these provisions, which commenced in the different jurisdictions between 2009 and 2013.

The key provision is in section 79(2) of the Uniform Evidence Act. Section 79 provides:

- (1) If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.
- (2) To avoid doubt, and without limiting subsection (1):
  - (a) a reference in that subsection to specialised knowledge includes a reference to specialised knowledge of child development and child behaviour (including specialised knowledge of the impact of sexual abuse on children and their development and behaviour during and following the abuse), and

- (b) a reference in that subsection to an opinion of a person includes, if the person has specialised knowledge of the kind referred to in paragraph (a), a reference to an opinion relating to either or both of the following:
  - (i) the development and behaviour of children generally,
  - (ii) the development and behaviour of children who have been victims of sexual offences, or offences similar to sexual offences.

Section 108C was also introduced to create an exception to the credibility rule. It allows expert opinion evidence to be given about the behaviour of the child complainant, with the leave of the court, where the opinion is relevant to the complainant's credibility.<sup>652</sup>

Western Australia introduced a provision similar to the Uniform Evidence Act provisions in 2008 in section 36BE of the *Evidence Act 1906* (WA). This states that relevant expert evidence on 'child development and behaviour generally', or 'child development and behaviour in cases where children have been the victims of sexual offences', is admissible despite certain other rules of evidence.

In Queensland and South Australia, common law principles continue to apply and there may be difficulties in seeking to have such expert evidence admitted.

### Counterintuitive evidence in New Zealand

It appears that expert evidence is relied on in more child sexual abuse prosecutions in New Zealand than in most Australian jurisdictions. Following a review by the Law Commission of New Zealand,<sup>653</sup> the provisions allowing expert evidence were amended to remove the restrictions preventing experts from giving evidence about matters of common knowledge or the ultimate issue in the proceedings. Section 25 of the *Evidence Act 2006* (NZ) allows experts to give opinion evidence 'if the fact-finder is likely to obtain substantial help from the opinion in understanding other evidence in the proceeding or in ascertaining any fact that is of consequence in the determination of the proceeding': section 25(1).

The 'substantial helpfulness' test in section 25 of the *Evidence Act 2006* (NZ) has been relied on to admit 'counterintuitive evidence' in prosecutions for child sexual abuse offences that is designed to address issues that may be the subject of myths or misconceptions in the minds of the fact-finders.

The Supreme Court of New Zealand considered the admissibility of counterintuitive evidence in prosecutions for child sexual abuse offences in *DH v The Queen*<sup>654</sup> and *Kohai v The Queen*.<sup>655</sup> In both appeals, the Supreme Court upheld the admission of counterintuitive evidence under the substantial helpfulness test in section 25 of the *Evidence Act 2006* (NZ).<sup>656</sup>

In *DH v The Queen*, the court summarised relevant factors that emerged from decisions of the New Zealand Court of Appeal in relation to counterintuitive evidence as follows:

- a. In many cases involving allegations of sexual abuse, the jury's verdict will depend critically on their assessment of the complainant's credibility. In such cases, there is a risk that unjustified behaviour assumptions may influence the jury's assessment, and expert evidence as to those assumptions may be admissible. The evidence should be directed at correcting erroneous beliefs the jury might otherwise hold about the likely conduct of a victim of sexual abuse. The objective is to allow the jury to consider the complainant's credibility on a neutral basis.
- b. The evidence should not be linked to the circumstances of the complainant in the case in which the evidence is being given. This is an important limitation, designed to ensure that the evidence is not used in a diagnostic or predictive way. The witness should make it clear that the witness is not commenting on the facts of the particular case.
- c. The evidence must be relevant to a live issue in the case. Evidence about features in other cases of sexual abuse that are not raised in the particular case will not be relevant or substantially helpful in terms of s 25 of the Evidence Act. Having said that, it must be acknowledged that when the expert's brief of evidence is being prepared before a trial, it may not be apparent which matters involving counter-intuitive reasoning will arise in the trial.
- d. The witness should make it clear that the evidence draws on generic research in cases of sexual abuse and says nothing about the case in which evidence is being given. The witness should also make it clear to the fact finder that the purpose of the evidence is limited to neutralising misconceptions which may be held by the fact finder.
- e. Where counter-intuitive evidence is admitted in a jury trial, the judge must instruct the jury of the purpose of the evidence and that it says nothing about the credibility of the particular complainant. The judge must caution the jury against improper use of the evidence, such as reasoning that the fact that the complainant behaved in one of the ways described by the expert witness (for example, delayed in complaining) is itself indicative of the complainant's credibility or that sexual abuse occurred.<sup>657</sup> [References omitted.]

In *DH v The Queen*, the court found that the evidence given was in terms that were not diagnostic of sexual abuse and addressed matters that were live issues at trial. While the court found that the evidence had been unnecessarily long and detailed, with a degree of repetition that should have been avoided, the length was not such that it compromised the admissibility of the evidence or made it unfair to the defence. However, the Supreme Court referred to the Court of Appeal's suggestion that the expert evidence should have been summarised and presented as an agreed statement to the jury and agreed that such an approach ought to be considered in this kind of case.<sup>658</sup>



Dr Suzanne Blackwell from the School of Psychology at the University of Auckland in New Zealand told our public roundtable on complainants' memory of child sexual abuse and the law about her experience in giving counterintuitive evidence in New Zealand courts. Dr Blackwell was the expert whose counterintuitive evidence was challenged in *DH v The Queen*<sup>659</sup> and *Kohai v The Queen*.<sup>660</sup> Dr Blackwell told the roundtable:

One of the things that I have been doing for about the last eight years or so, is giving what is called counter-intuitive evidence. What happens is that the Crown will give me the documents, I will read the file and I will prepare a brief of evidence that does have the narrative of what the case is about, but that is not for the jury; it's for the Court of Appeal to provide the basis, if you like, for what the evidence is about.

Then I will give some evidence to the jury about aspects of reporting patterns and delay, and it's made quite clear at the beginning that this evidence does not prove or disprove that offending has occurred; it's purely evidence that they can look at that might help them understand the proceedings. So I will talk about, if relevant to the case, delay; I will talk about incremental reporting, because often defence lawyers will suggest that if a child told more later it's necessarily the result of some coaching sort of situation; I will talk about denial when asked, and I will talk about retraction, if those happen to feature in the case; I will then talk about some of the reasons for delayed or non-reporting, which might involve the close relationship between the child and the offender. It might be grooming processes, although the Supreme Court has said that we can't talk about grooming processes with family members, that we can only talk about that with non-family members. We must use other terminology. I also talk about the availability of supportive protective parents, or caregivers, for the child to tell, and so on. So there will be a number of reasons that might have emerged in the case.

We might also talk about continued contact and affection with children and offenders, because that's often put up by defence counsel as a suggestion as to why this could not have in fact occurred, if the child has continued to have a close relationship. Often there might be cards or videos of affection that defence might want to present.

Sometimes it's suggested that the offending could not have occurred because someone was in the near facility or the next room and they didn't see it, so it could not have occurred. So we talk about the research about that. ...

Sometimes when a child has a previous history of sexual abuse by someone, it might be suggested that they are a child prone to making allegations, or it might be suggested that this child has been previously sexually abused, and that they are confusing that abuse with defence counsel's client. What they often bring to that is the eyewitness identification lineup research to suggest that the child has confused through what they call unconscious transference. It would be absolutely legitimate if the perpetrator was a stranger to the child and they'd only seen them once, but as we have talked about today, most frequently the offender is someone well known to the child and the offending has occurred on a frequent basis for a long time, so identity is not an issue.

Then we finish it by saying this doesn't prove anything and make the point, just in case jurors think that because reporting has been delayed that means the offender is guilty. We say, 'Look, timing doesn't really tell us anything at all, because just as an immediate complaint may be true, untrue or false, a delayed complaint may be true or untrue also'. So that's sort of the evidence we give.

We do not talk about the case or any of the players in the case at all. It's purely educative evidence. There was a lot of case law about it, a lot of resistance to it at the beginning. The High Court appeals and a Court of Appeal upheld it, and recently the Supreme Court, which is our highest court, has upheld that it is substantially useful evidence for a jury to hear.<sup>661</sup>

### **Effectiveness of expert evidence**

The rationale for sections 79(2) and 108C was to encourage the admission of expert opinion evidence about the behaviour of children to support the credibility of witnesses. The New Zealand Law Commission noted that the purpose of enabling an expert to express an opinion on a child complainant's behaviour was 'to restore a complainant's credibility from a debit balance because of jury misapprehension, back to a zero or neutral balance'.<sup>662</sup>

However, some participants in our private roundtables have told us that these provisions are not widely used at trial in Australian jurisdictions.

Some participants raised practical difficulties, telling us that appropriate expert witnesses are not readily available in certain jurisdictions, and it is more expensive to bring in expert witnesses from interstate.

Other participants raised tactical difficulties. Some participants told us that, in their experience, juries did not find the evidence helpful because it was too general, and the prosecutor could achieve as much as an expert in their closing address. Other participants said that, if the prosecution introduces an expert witness, the defence will counter with their own expert.

In their 2010 study, Goodman-Delahunty, Cossins and O'Brien examined whether expert opinion evidence about children's behavior and the impact of child sexual abuse, and judicial directions containing the same information, had any effect on outcomes in a simulated trial and jurors' perceptions of the complainant's credibility.<sup>663</sup>

The researchers found that misconceptions were substantially reduced by both expert evidence and judicial directions. Misconceptions in the control group, which did not receive expert evidence or judicial directions, decreased only slightly during the case. They did not find any direct effect of expert evidence or judicial directions on convictions. However, the results suggested that expert evidence and judicial directions indirectly influenced verdicts by enhancing the mock jurors' perceptions of the complainant's credibility and reducing their misconceptions about child sexual abuse, which in turn was related to a higher conviction rate.<sup>664</sup>

In a later presentation on their research, Goodman-Delahunty and Cossins suggested that expert opinion evidence appears to be underutilised in child sexual abuse cases due to:

- a lack of information about who qualifies as an expert on child sexual assault
- prosecutors' lack of time to organise an expert witness when prosecutors are assigned to trials shortly before trial
- a lack of information about the impact of such evidence at trial.<sup>665</sup>

In the Consultation Paper, we suggested expert evidence may be less effective where the expert is giving evidence about children generally rather than the complainant in particular. Where an expert has not personally assessed the complainant in preparing their report on child development and child sexual abuse behaviours, the weight that a jury gives to this evidence may be minimal.

For example, the literature review in the Complainants' Evidence Research states:

Broadly, there are two types of expert evidence that can be presented at trial: educative and specific. An expert giving educative evidence will explain the impact of sexual abuse on children, without expressing any explicit opinion as to whether the complainant in the case at hand was or was not sexually abused. Educative expert evidence testimony may address some of the misconceptions that jurors hold about child sexual abuse. In contrast, an expert giving specific evidence will often approach the task more diagnostically, interview the child victim, and then apply psychological knowledge about child sexual abuse to express an opinion about whether a particular complainant was sexually abused. Studies examining the effect of educative and specific testimony on jurors have shown that jurors are more strongly influenced by specific testimony, and that this influence is particularly potent when the demeanour or reactions of the child witness are congruent with the testimony of the expert ...

... the effectiveness of expert evidence may [also] depend on whether it is based on scientific or clinical evidence. Some studies suggest that expert evidence based on clinical expertise leads to significantly higher complainant credibility ratings and higher conviction rates than expert evidence based on scientific expertise.<sup>666</sup> [References omitted.]

## Particular judicial directions

### **Possible directions on child witnesses and children's responses to sexual abuse**

In the Consultation Paper, we suggested that a judicial direction containing educative information about children and the impact of child sexual assault may enhance justice for victims of child sexual abuse.

In New Zealand, under clause 49 of the *Evidence Regulations 2007* (NZ), judges may be required to give the following direction when a witness is a child under six years of age:

If, in a criminal proceeding tried with a jury in which a witness is a child under the age of 6 years, the Judge is of the opinion that the jury may be assisted by a direction about the evidence of very young children and how the jury should assess that evidence, the Judge may give the jury a direction to the following effect:

- (a) even very young children can accurately remember and report things that have happened to them in the past, but because of developmental differences, children may not report their memories in the same manner or to the same extent as an adult would;
- (b) this does not mean that a child witness is any more or less reliable than an adult witness;
- (c) one difference is that very young children typically say very little without some help to focus on the events in question;
- (d) another difference is that, depending on how they are questioned, very young children can be more open to suggestion than other children or adults;
- (e) the reliability of the evidence of very young children depends on the way they are questioned, and it is important, when deciding how much weight to give to their evidence, to distinguish between open questions aimed at obtaining answers from children in their own words from leading questions that may put words into their mouths.

The ALRC and NSW LRC stated in *Family violence: A national legal response* that there was a strong case for the use of jury directions which would ‘summarise a consensus of expert opinion drawn from the work of psychiatrists, psychologists and other experts on child behaviour’.<sup>667</sup> They recommended that governments should legislate to authorise jury directions about children’s abilities as witnesses and responses to sexual abuse.<sup>668</sup>

The National Child Sexual Assault Reform Committee also recommended that three mandatory judicial directions, summarising the research in this area and containing the same information that would be given by an expert witness, should be introduced into all Australian jurisdictions.<sup>669</sup> These directions (relating to sexual offence trials) are as follows:

- **Children’s abilities as witnesses:** This direction is based on clause 49 of the *Evidence Regulations 2007* (NZ), quoted above. It is in substantially the same terms except that it is proposed to apply where the complainant is under the age of 16 years rather than under the age of six years as applies in New Zealand.<sup>670</sup>
- **Very young children’s abilities as witnesses:** If the complainant is under the age of five years, the judge must give the jury the following instructions:

- a. although children under the age of 5 years typically report less detail than older children or adults, the information they recall can be just as accurate;
  - b. depending on how they are questioned, children under the age of 5 years can be more open to suggestion than older children, although research has shown they have difficulty remembering the suggestions put to them after a short period of time;
  - c. the reliability of the evidence of very young children depends on the way they are questioned. It is important, when deciding how much weight to give to a very young child's evidence, to distinguish between open-ended questions aimed at obtaining information, from leading questions that might put words into their mouths.<sup>671</sup>
- **Children's responses to sexual abuse:** If the complainant is under the age of 16 years, the judge must give the jury the following directions:
    - a. there is no one set of symptoms or behaviours that all sexually abused children display. Depending upon the individual child and their circumstances, some children may exhibit a number of symptoms whereas some children may exhibit none at all;
    - b. sexual abuse may not result in physical symptoms and physical evidence that can be detected by a medical examination;
    - c. very often victims of sexual abuse do not cry out for help, resist or escape from the offender;
    - d. they often delay their complaint of abuse for months or years and there may be a number of reasons why a child will delay their complaint, such as threats to themselves or their loved ones, or fear they will not be believed or they will be blamed. They may feel ashamed, embarrassed or responsible for the abuse. They might want to protect the abuser if it is someone they love or trust and they may not know that the abuse is wrong. They may not have the language to describe what has happened to them, particularly if they are very young;
    - e. some children may exhibit particular behaviours as a result of being sexually abused that are counterintuitive and may not appear to make sense to the adult layperson;
    - f. the behaviours that have been reported in the scientific literature include: delay in complaint for months or years; disturbed sleep patterns and/or nightmares; bedwetting; disturbed behavioural patterns; learning difficulties, fearfulness and general emotional upset; retraction of the complaint; sexualized behaviour; and ongoing contact and/or affection for the alleged offender;
    - g. because a child exhibits some or all of these particular behaviours, that does not necessarily mean that sexual abuse has occurred.<sup>672</sup>

### **Possible directions on inconsistencies in complainants' evidence**

As noted in section 31.3.1, the Victorian Government has proposed further reforms to jury directions. The Jury Directions and Other Acts Amendment Bill 2017, which is currently before the Victorian Parliament, if enacted, will introduce new directions to be given in sexual offence trials in relation to differences in the complainant's account.

The Victorian Department of Justice and Regulation Second Report states in relation to this area of reform:

Division 1 of Part 5 of the Jury Directions Act addresses common misconceptions about delay in complaint, or lack of complaint, in sexual offence trials. Another common misconception in sexual offence trials is that a 'real' victim would remember all the details of an offence and be consistent in how they describe that offence whenever they are asked to do so.

Research shows that people retain and recall memories differently and that a traumatic event may affect these processes. Research also shows that accounts of a sexual offence often contain differences (i.e. gaps or inconsistencies) and that differences may arise in both truthful and untruthful accounts.

The Bill will reflect this research in a 'corrective' direction that aims to assist jurors to approach a complainant's evidence neutrally, rather than with preconceived notions about 'real' victims.<sup>673</sup>

The Explanatory Memorandum to the Bill refers to some of the research relevant to memory and inconsistencies in the complainant's evidence, including the Complainants' Evidence Research. The Explanatory Memorandum states:

Research demonstrates that people make and recall memories differently, and that differences in accounts of an alleged sexual offence are common. For example, an August 2016 report (Powell, M., Westera, N., Goodman-Delahunty, J., and Pichler, A.S., 'An Evaluation of how Evidence is Elicited from Complainants of Child Sexual Abuse') published by the Royal Commission into Institutional Responses to Child Sexual Abuse found that in the sample study, defence counsel raised inconsistencies within the complainant's own evidence in more than 90% of cases.

Research further demonstrates that the normal variability of memory can be further exacerbated by the impact of trauma, such as that experienced by victims of sexual assault. However, these issues are not commonly understood, and instead, juries may be under the misconception that a true victim will always give a complete and consistent account of a sexual offence.

Research also indicates that both truthful and untruthful accounts may contain differences. For example, a 2006 study (Zajac, R., and Hayne, H., 'The Negative Effect of Cross-Examination Style Questioning on Children's Accuracy: Older Children are Not Immune') found that children changed over 40% of correct responses during cross-examination style questioning.<sup>674</sup>

The Victorian Department of Justice and Regulation Second Report provides a more detailed discussion of the research.<sup>675</sup> It also explains the need for the proposed directions as follows:

Differences in complainants' accounts can be vital to the accused's case, especially in 'word on word' cases. Accordingly, the proposed provisions would not limit defence counsel's ability to conduct a case based on highlighting any differences. The defence could continue to argue how the differences may affect the particular complainant's credibility and/or reliability, and could request relevant directions (e.g. on the potential unreliability of the complainant's evidence). The defence could also request standard directions about credibility and reliability, and differences or inconsistencies in evidence, in the normal way.

However, where there are differences, it is important that the jury deal with those differences on an informed basis, rather than based on a misconception about differences. Informing the jury about why there may be differences, and that differences are common, will not be unfair to the accused. It is in the community's interest in ensuring a fair trial that the issues are determined on a level playing field, rather than one where there is a real risk that an accused may derive an advantage based on a common misconception. The proposed direction aims to address this misconception, and its effect on the credibility and reliability of the complainant, so that trials are fair to the accused, the complainant and the community.<sup>676</sup>

Proposed section 54C in the Jury Directions and Other Acts Amendment Bill 2017 defines a difference in an account to include:

- a gap in the account
- an inconsistency in the account
- a difference between the account and another account.

Under proposed section 54D(1), the trial judge must give the new directions to the jury if, after hearing submissions from the parties, the judge considers that there is evidence in the trial that suggests a difference in the complainant's account of the offence charged that is relevant to the complainant's credibility or reliability.

Under proposed section 54D(2), the direction is to be as follows:

In giving a direction referred to in subsection (1), the trial judge must inform the jury that –

- (a) it is up to the jury to decide whether the offence charged, or any alternative offence, was committed; and
- (b) differences in a complainant’s account may be relevant to the jury’s assessment of the complainant’s credibility and reliability; and
- (c) experience shows that –
  - (i) people may not remember all the details of a sexual offence or may not describe a sexual offence in the same way each time; and
  - (ii) trauma may affect different people differently, including by affecting how they recall events; and
  - (iii) it is common for there to be differences in accounts of a sexual offence; and

### **Example**

People may describe a sexual offence differently at different times, to different people or in different contexts.

- (iv) both truthful and untruthful accounts of a sexual offence may contain differences; and
- (d) it is up to the jury to decide –
  - (i) whether or not any differences in the complainant’s account are important in assessing the complainant’s credibility and reliability; and
  - (ii) whether the jury believes all, some or none of the complainant’s evidence.

Proposed section 54D(3) will allow the trial judge to repeat the direction on differences at any time in the trial.

### **Current limits on judicial directions**

In the Consultation Paper, we noted that judges may comment on the evidence in a trial, and they must give the jury any necessary directions on the law. However, judges are not permitted to give directions in the nature of expert evidence about child development or behaviour.<sup>677</sup>

If judges are to give judicial directions of the kind discussed above, the directions are likely to need to be permitted or required by legislation to ensure that judges are able to give them.

The three cases we discuss below illustrate the difficulties.



## **NJB v R (2010) – Northern Territory**

*NJB v R*<sup>678</sup> involved a number of counts of sexual offences in a familial context. The alleged abuse occurred when the complainant was aged 10 and 11, and she was 11 years of age at trial. Her 12- and 14-year-old siblings, TC and JC, also gave evidence.

One of the grounds on which the appeal against conviction succeeded related to the directions given by the trial judge concerning the assessment of the evidence of children. They were challenged on the basis that they involved the judge impermissibly interfering with the function of the jury.

The court (Martin CJ, with Riley and Kelly JJ agreeing) stated that directions concerning the evidence of children were particularly important because the critical evidence in the trial was given by children – namely, the complainant and her siblings.<sup>679</sup>

Chief Justice Martin set out the relevant directions given by the trial judge at the start of the summing up as follows:

First, I am going to talk to you, in a general sense, about the weight which may be given to the evidence of children. Courts now recognise the following factors in relation to the evidence of children:

1. While children generally do not experience full cognitive development until about the age of 14 years, children, even children of tender years, can give reliable evidence if questions are tailored to their cognitive development.
2. From about the age of six onwards children do not have a less accurate memory than adults. However, recall is more likely to decline with time for children than for adults and children are likely to recount, when describing past events, in much less detail than adults.
3. Children do have the ability to distinguish fact and fantasy and the danger of children fabricating allegations without the encouragement of older persons is no different to that of adults. However, children are suggestible and on occasion like everyone else they do tell lies.
4. With younger children recall is less likely to be organised because of the level of their cognitive development and because of underdevelopment of concepts such as time, space and distance. The spontaneous collating and organisation of recall is a learned skill which improves as language skills, vocabulary and cognitive development improve.
5. Children may experience difficulty in supplying information at a particular time, or in a particular place, or in an unusual or formal situation. Stress and anxiety may inhibit the capacity of a child to supply information at a particular point in time.

So far as courts are concerned, the days when children were considered to be incapable of giving reliable evidence are long gone.<sup>680</sup>

Chief Justice Martin held that the directions had resulted in a miscarriage of justice. He stated:

The critical question is how the jury would have understood these remarks. If it is possible that the jury would have understood that they were required to assess the evidence of the children in accordance with what the trial Judge had said, the trial Judge would have impinged impermissibly upon the function of the jury as the sole arbiters of the facts.

The remarks in question were given at the outset of the summing up. They were expressed in firm and direct terms. Notwithstanding that his Honour told the jury that he was going to talk to the jury 'in a general sense about the weight which may be given to the evidence of children', and notwithstanding later directions that the weight to be given to the evidence of the children was a matter for the jury and the jury alone, the remarks presented the five numbered propositions as the incontrovertible view of the Court. The presentation of this view was not hedged with any qualification. Nor was it hedged with a direct or indirect statement or implication that it was a matter for the jury whether the jury agreed or disagreed with the five propositions. There was no hint given that it was within the province of the jury to reject any or all of the propositions as the jury saw fit.

In my view, the jury would have understood the five propositions as directions which the jury was required to apply in approaching the evidence of the children. At the least, there is a real possibility that the jury would have understood the propositions in that way.

In the context of the appellant's trial in which the evidence of the children was of critical importance, the remarks were particularly significant. The accused had denied on oath any improper conduct and the defence was faced with the task of persuading the jury that there was a doubt about the reliability of the evidence given by each of the children. While the trial Judge said that children are suggestible and, on occasion, 'like everyone else they do tell lies', nevertheless the overall impression created by the five propositions was supportive of the children's evidence and tended to explain why their evidence might be reliable notwithstanding the absence of detail and, in the case of TC, her loss of memory.

The third point of the direction was of particular importance. In substance, the trial Judge directed the jury that they were required to approach the evidence of the children from the starting point that while children are suggestible, the danger of children telling lies is no greater than the danger of adults telling lies. This direction possessed a strong tendency to undermine the submission made by counsel for the appellant that the complainant might lie to avoid embarrassment or to avoid getting into trouble, and do so without a full appreciation of the devastating consequences of making false allegations against the appellant. In the argument of the appellant, awareness of possible consequences was an important distinction going to the likelihood of the complainant

telling lies and counsel had invited the jury to use their experience of life in this regard. However, the effect of the direction by the trial Judge was to tell the jury that, regardless of their life experiences or views they might otherwise hold, they were obliged to approach the evidence of the children from the starting point that children are no more likely to tell lies than adults. In this way the trial Judge impermissibly directed the jury as to how they were to approach critical evidence in the trial.<sup>681</sup>

Chief Justice Martin made the following observations about the content of the trial judge's direction:

As I have reached the view that the trial Judge gave a direction as to how to approach the evidence which the jury would have felt obliged to follow, and did not merely comment as to how the jury might see fit to approach the evidence of the children, it is unnecessary to determine whether the trial Judge was correct in saying that the five propositions are now recognised by courts. Perhaps most of the propositions are generally recognised, but in the absence of evidence I doubt that it is appropriate to say that courts now recognise as incontrovertible that 'from about the age of six onwards children do not have a less accurate memory than adults'. *Couched in terms such as 'it is a matter for you, but based on your experience you might think ...', in an appropriate case and clearly advanced as comments, the five propositions may be helpful to a jury. But if such comments are made, they must be accompanied by clear and unequivocal directions that the jury is free to accept or reject the comments. Further, in my view it would be unwise to present the comments in words that convey an impression that the five propositions are now recognised or adopted by the courts as general statements of truth.*<sup>682</sup> [Emphasis added.]

### **CMG v R (2011) – Victoria**

In *CMG v R*,<sup>683</sup> the complainant was seven years of age at the time of the alleged offences and nine years of age at the time of trial. The accused was convicted of three of six counts of indecent assault and one count of sexual penetration of a child. He was acquitted of the other three counts of indecent assault.

The accused's appeal against the convictions was allowed by the Victorian Court of Appeal because of the trial judge's directions to the jury.

In the trial, counsel for the accused told the jury in his closing address that they should carefully scrutinise the complainant's evidence. He then said:

These matters in my submission are relevant to that particular scrutiny. The complainant is not an adult. She's not an adult witness who brings the maturity of life experience and intellect to respond and be aware of the events of life and the court room process including the giving of necessarily accurate and responsive answers as opposed to towing the line. The line being, this just happened.

Next, the complainant was a seven year old girl at the time of these allegations and [at the time of] ... her VATE interview. ... She was not able to be cross-examined at that point in time, that's just not the process we have. But she now presents as a nine, almost 10 year old girl, still a very young girl. Still a very young complainant.

Next, in my submission the complainant, the young child, may blend fantasy and reality. She's a young child. A young child may say things to appease, to please, to placate her mother and/or family that's upset, emotional and furious. Bring your common sense to these issues. We know ... of these things in my submission from our experience of life and our observations and interaction with young children. A young child is open to suggestions.

Next, the cognitive ... functioning of a child is more important to the testimony than with an adult witness because of developmental issues. In my submission, a child who has not reached her full adult intellectual capacity can – not necessarily, but can – be less reliable than an adult witness because the child does not have a full intellectual adult maturity.

Why? An example is, in my submission, the child does not ... appreciate the full consequences of lies and of telling lies and giving inaccurate statements as compared to an adult does appreciate the full consequences of lies and if the full consequences of telling lies is not appreciated, with respect, it is all too easy to make an allegation that is not based in fact.

Next, a young child, in my submission, can be more easily influenced by adult questioners, questions from relatives, close relatives such as mother, father, sister; and respond more to leading-type questions.<sup>684</sup>

The trial judge, during her summing up and directions to the jury, said that the prosecution case 'stands or falls on [the complainant's] evidence'; however:

Children are not inherently unreliable as witnesses. [Counsel for the appellant] put to you that they can be less reliable because they do not have the full intellectual capacity of adults and because they are children they do not appreciate the full consequence of telling lies. He also said the children are more easily influenced and respond to leading-type questions, that is, questions which suggest the answers. He also said that people do lie and some children, not all, lie habitually until their lies are exposed.

While it is true to say that children do not have the intellectual capacity of adults, I need to draw to your attention that the rest of those comments are common misconceptions about children as witnesses. Indeed, the Chief Justice of the Supreme Court of New South Wales said in a case in 2006, there is a substantial body of psychological research indicating that children, even very young children, give reliable evidence. Therefore I need to caution you against making any false assumptions about children's evidence generally or about [the complainant's] evidence in particular. Each child witness will have strengths and vulnerabilities that may potentially bear upon his or her ability to give evidence. The same may be said of adult witnesses.

Whether the strengths and vulnerabilities have any impact at all is a matter to be considered in the circumstances of each case, and that is what you should do here. Consider the particular context of [the complainant] as a person in the circumstances of this case. While you cannot ignore that she is a child and must take that into account, you should consider how she gave her evidence and what she said in the context of all of the evidence and not on the basis of misconceptions about children as witnesses. A study as long ago as 1993 found that children, even very young children, are able to remember and retrieve from their memory large amounts of information, especially when the events are personally experienced and highly meaningful. Other studies have reached conclusions which you may find of assistance to you in evaluating the arguments put forward by each side in this case.

First, any assumption that children have a greater or less a tendency to lie than adults has not been able to be proven, and there is no evidence that indicates that honesty of children is less than adults. Next, the published research suggests that children are capable of telling deliberate lies from the age of four. Next, young children may lie when they anticipate punishment or when they are threatened by someone not to disclose the truth.

Next, as they grow older, they may gain additional reasons for lying: to obtain a reward, to protect their self-esteem, to regulate the dynamics of their relationships with others and to conform to norms and conventions. And children aged nine to 10 years are not likely to report an incident they have been asked to keep secret, but are more likely to report under direct questioning than children aged five or six.

Some other things to consider are that the published literature indicates that by the age of five, most children's speech sounds a lot like that of adults. However, simply because a child sounds like an adult does not mean that she or he has an adult's cognitive development or command of language. By cognitive development, I mean the development of the brain and its intellectual and emotional functions. Cognitive and language development continues throughout childhood and into adulthood. For example, studies show that children do not understand questions put in the negative until around the age of 11 or 12, and children under 12 have problems when questions ask more than one thing at a time. You need to take these things into account when evaluating the arguments on [the complainant's] evidence.

I am not giving you this information to suggest that I think [the complainant] is a reliable and truthful witness. What I think has got absolutely nothing to do with your decision. Whether she is or is not truthful and reliable are questions for you to determine, but you should determine them taking care not to make any false assumptions about children's evidence generally or about [the complainant's] evidence in particular.<sup>685</sup>

The accused's counsel objected to this part of the summing up. The trial judge reviewed what she said, which she characterised as directions.

In allowing the appeal, the Victorian Court of Appeal (Harper JA, with Ashley and Weinberg JJA agreeing) quoted that part of counsel for the accused's closing address set out above and stated:

It was proper for the trial judge to refer in her charge to the jury to this portion of counsel's final address. As part of her summary of the defence case, it would also have been proper for her to point out that the gravamen of counsel's submission to the jury was that 'a child who has not reached her [or his] full adult intellectual capacity can – not necessarily, but can – be less reliable than an adult witness because the child does not have a full intellectual adult maturity [and] ... does not ... appreciate the full consequence of telling lies ... as compared to an adult does appreciate the full consequence of telling lies.'

The learned trial judge rightly perceived that the jury would probably have read into this segment of the final address that which counsel doubtless intended that they should: the message being that the complainant would not appreciate how important it was to give accurate evidence – or, if she had some understanding of the necessity to tell the truth, her grasp of the content of that necessity would be less than that of an adult. The complainant would be 'open to suggestions' by adults who were 'upset, emotional and furious' (although whether with the appellant, or the complainant, or both, is not clear). She may, in these circumstances, have sought to placate those angry adults. In order to achieve that goal, she would have been prepared to toe the adult line. A false account of the appellant's behaviour towards her would have been the result, because if the adults were to be placated a story had to be invented; and because a child does not have an adult's appreciation of 'the full consequences of lies and of telling lies and giving inaccurate statements', a child finds 'it all too easy to make an allegation that is not based in fact.'

Although it was within the province of a final address by counsel to make these submissions, as counsel repeatedly described them, the judge was entitled to conclude that the jury needed to be presented with a more nuanced picture. She was certainly entitled to point out to the jury that these statements by counsel were not evidence; and they were to be put to one side if the jury disagreed with them. She was, in addition, entitled to tell the jury that, as the Court of Appeal (England) emphasised in *R v Barker* the collective experience of the courts is that 'the age of a witness is not determinative of his or her ability to give truthful and accurate evidence'. In *R v Barker*, the Court of Appeal continued:

Like adults some children will provide truthful and accurate testimony, and some will not. However children are not miniature adults, but children, and to be treated and judged for what they are, not what they will, in years ahead, grow to be. Therefore, although due allowance must be made in the trial process for the fact that they are children with, for example, a shorter attention span than most adults, none of the characteristics of childhood, and none of the special measures which apply to the evidence of children, carry with them the implicit stigma that children should be

deemed in advance to be somehow less reliable than adults. The purpose of the trial process is to identify the evidence which is reliable and that which is not, whether it comes from an adult or a child. ... In a trial by jury, his or her credibility is to be assessed by the jury, taking into account every specific personal characteristic which may bear on the issue of credibility, along with the rest of the available evidence.

I do not put forward the passage quoted above from Barker as a template. At the same time, had the trial judge responded to counsel's address by charging the jury in terms such as those used by the Court of Appeal in that passage, no complaint could have been made.<sup>686</sup> [References omitted.]

After setting out that part of what the trial judge told the jury quoted above, counsel for the accused's objections and the trial judge's response to them, Harper JA continued:

Her Honour was either giving evidence, or she was charging the jury on the law. But a judge cannot give evidence. He or she may of course comment on such evidence as is placed before the jury, but only after ensuring that the jury are aware that they must disregard those comments if they do not find them helpful.

The judge herself categorised what she had said to the jury as directions of law. If so, they were binding on the jury. The very real danger, therefore, is that the jury understood (for example) that they were bound to accept that a study as long ago as 1993 found that children, even very young children, are able to remember and retrieve from their memory large amounts of information; or that there is no evidence that indicates that the honesty of children is less than that of adults. As Latham LJ said in D:

The judge is entitled to make comments as to the way evidence is to be approached particularly in areas where there is a danger of a jury coming to an unjustified conclusion without an appropriate warning. ... But any comment must be uncontroversial. It is no part of the judge's task to put before the jury [a relevant expert's] learning without [that expert] having been called as a witness.<sup>687</sup> [References omitted.]

Justice Harper referred to sections 79 and 108C of the *Evidence Act 2008* (Vic) but noted that no expert evidence was called in this case. He stated:

It was not within the limits of the judicial function for the judge to attempt to fill the gap. The comments of her Honour were not properly within the scope of directions of law, and they were controversial. They took the judge into the arena. This is prohibited territory.<sup>688</sup>

It is of interest in relation to other issues we are considering – particularly the availability of joint trials – that CMG was charged with offences against two complainants – one his niece and the other his wife's cousin's daughter – and the trials were heard separately.

When he was retried on the matters the subject of the appeal discussed above, he was convicted of only one of the three counts of indecent assault and he was acquitted of the count of sexual penetration of a child. He then appealed unsuccessfully against his convictions in relation to each complainant. His appeal against his sentence was successful.<sup>689</sup>

### **RGM v R (2012) – New South Wales**

*RGM v R*<sup>690</sup> involved an appeal from conviction on two counts of aggravated sexual intercourse. The circumstance of aggravation was the complainant's age, which was 14 at the time of the first count and 14 or 15 at the time of the second count. The accused was the complainant's stepfather.

One of the grounds of appeal was that the trial judge erred in his directions to the jury concerning the way in which the evidence of juveniles should be assessed. The relevant passage of the trial judge's remarks to the jury is set out in full in the New South Wales Court of Criminal Appeal's decision.<sup>691</sup> It included the following:

All witnesses have markedly different levels – especially children – of intellectual sophistication and that can impact upon their ability to give evidence and handle cross-examination. Young people often have different thought processes. They have a different sense of logic. What they think might be a very logical thing to do but may not be what you as an adult think of as a very logical thing to do.

I have heard children give evidence and say things and you are thinking – your adult mind is thinking, 'Well that doesn't make any sense', and then you get an answer and you think, 'Aah, that's why they said that, that's how they were thinking that through. It's a process different to the one I'm applying'. I mean you know it yourselves when someone says something and you think, 'Hang on a sec, I never thought of it like that', it's just another example of that, that not every mind works in the same way or follows the same process of logic and thought and especially with children, and then again it very much might depend upon their level of maturity.

I mean some girls, for instance, at fifteen might be as physically mature as they are ever going to be, but they might be fifteen going on thirty-five one minute and fifteen going on about ten the next. Boys would be even worse. They are very rarely fifteen going on thirty, they are usually fifteen, if they are lucky, going on fifteen, or fifteen going on about three. It does not change much until they get to about twenty-five, I think, but it just emphasises the fact that, as between children there is a huge range of abilities and even with the same child.

From one moment it can be a mature moment to a completely immature moment a little bit later. So level of maturity, level of understanding, they have a lower ability to focus and concentrate. They are often more easily distracted. They have different levels of knowledge, for instance, different levels of understanding, for instance, of sexual matters, especially. They can be very naïve to very worldly wise. They have significantly greater language issues.

...



The evidence of a young person should be assessed against the background that if the allegations are true, which is ultimately the question for you, but if they are true then it is necessary for that child or young person to effectively relive what they say occurred to them. That may well mean opening up old wounds, and you have to have it in the context that if these things did happen there may be degrees of wanting to forget it and put it behind you and move on. Obviously if it is lies, you do not have such a problem. If you are telling lies you are not being quite so personal about what you are discussing. So while ultimately it is for you at the end of the day to determine whether the allegations are true, you need to bear in mind that if in fact they are that may well have an impact on the way the evidence is given because it could involve, as I say, the opening of old wounds or of memories that have been avoided, I guess, not wanting to think about that sort of thing. So emotions or the demonstration of emotions are an important factor for you to look at, but again not everybody reacts emotionally the same way.

Here I think the reality is that [the complainant] was quite controlled. She was generally in control of her emotions when she gave her evidence, and you might recall when I read to you the statement of [the school teacher] that in that statement the school teacher ... says that, 'She's always known [the complainant] to be a child that didn't really show a lot of emotion'. So again that goes into the mix.<sup>692</sup>

After setting out in full the relevant passage of the trial judge's remarks to the jury, Fullerton J continued:

The complaint is not that his Honour's remarks breached the prohibition in s 165A of the *Evidence Act* although parts of the extract above are, in my view, capable of such a reading. ... The complaint is that the trial judge's commentary had the potential to deflect the jury from their task of assessing the complainant's credibility.

In my view that complaint is well founded. Despite defence counsel's failure to ask his Honour to make clear to the jury that his views about child witnesses were by way of comment only and that they were not obliged to assess the complainant's evidence by reference to them, the extent of his Honour's commentary and its content, coupled with the real risk that the jury might have been inclined to a view adverse to the accused because of it, satisfies me that leave should be granted to permit this ground of appeal to be argued.

A trial judge has a wide discretion to offer guidance to a jury as to how to approach the evidence of a child witness which should be tailored to meet the particular circumstances of the case and the issues that the jury are likely to encounter in their deliberations. Save only where a trial judge is satisfied that the evidence of a particular child may be unreliable in a particular respect, and that there is a need for the jury to exercise caution in assessing the evidence thereby invoking the exception in s 165A(2) of the *Evidence Act*, it is important that a trial judge refrain from suggesting an approach to the assessment

of a child's evidence in such a way that it has the appearance of a direction of law.<sup>693</sup>

Justice Fullerton then referred to *NJB v R* and *CMG v R*, discussed above.<sup>694</sup> Justice Fullerton referred to the Victorian Court of Appeal's reference in *CMG v R* to the passage from *R v Barker*<sup>695</sup> with approval. Justice Fullerton stated:

While their Honours did not endorse the extract as a template, they observed that had the trial judge responded to counsel's address by the inclusion of the substance of what the Court of Appeal in *Barker* observed, no complaint could have been made.<sup>696</sup>

In relation to the trial judge's remarks under consideration in this appeal, Fullerton J (with McClellan CJ at CL and Johnson J agreeing) held:

While in the present case his Honour's observations about children speaking and thinking differently from adults might have been classed as legitimate comment, I am satisfied they were overtaken by other observations sourcing from his Honour's personal experience and personal views about children such that there was a blurring of the essential distinction between a judicial direction and a comment. Some of his Honour's remarks could only have been understood as directions given the imperative language in which they were expressed. The most serious of these being the requirement that the jury were to assess the complainant's evidence against the background that if she was being truthful she might find difficulty giving her evidence because she was reliving the assaultive experience in the process. This direction had the effect of inviting the jury to find that defence counsel's submissions about her demeanour in the witness box were of no weight in undermining her credibility. Other observations were nothing more than his Honour's personal views about the complainant but which were again cast in terms that would have signalled to the jury in unmistakable terms that his Honour regarded her as a reliable witness. To describe her as someone who was in fact in control of her emotions while giving evidence (in effect despite her inner turmoil as a victim of the assaults) far exceeded the bounds of permissible comment in a case where the credibility of the complainant was a significant and contentious issue.<sup>697</sup>

Justice Fullerton also referred to the High Court's emphasis on the importance of maintaining the distinction between comment and direction in *Mahmood v State of Western Australia*.<sup>698</sup> In that case, Gleeson CJ, Gummow, Kirby and Kiefel JJ stated:

The distinction between a direction and a comment by a trial judge is referred to in *Azzopardi v The Queen*. It reflects the fundamental division of functions in a criminal trial between the judge and the jury. The distinction is important. Telling a jury that they may attach particular significance to a fact, or in this case suggesting that other evidence may be considered of greater weight, is comment. Because it is comment it may be ignored by the jury, a matter about which the jury should be told. A direction, on the other hand, may contain warnings about the care needed in assessing some evidence or the use to which it

may be put. A direction is something which the law requires the trial judge to give to the jury and which they must heed.<sup>699</sup> [References omitted.]

## When should judicial directions be given?

Many judges confine the giving of directions to the jury to the conclusion of the evidence unless legislation requires otherwise.

As discussed in relation to expert evidence, in their 2010 study, Goodman-Delahunty, Cossins and O'Brien examined whether expert evidence and judicial directions about children's behavior and the impact of child sexual abuse had any effect on outcomes in a simulated trial and jurors' perceptions of the complainant's credibility. In relation to judicial directions, they found that '(o)nly the judicial direction provided before the child testified effectively enhanced evaluations of the child complainant, compared with no judicial direction'.<sup>700</sup>

The authors observed that these results 'highlight the importance of the timing of the trial interventions and are consistent with previous research that has suggested that individuals are better able to recall and incorporate information that is provided first compared with information presented later in a sequence'.<sup>701</sup> In the Consultation Paper, we stated that this suggests that any judicial directions designed to provide information to jurors about child sexual abuse and child behaviour should be given to the jury before a complainant gives evidence in a child sexual abuse trial.

Early judicial directions may also be in the interests of the accused. In 2009, the VLRC, in its review of jury directions, recommended that the trial judge should have a discretionary power to determine the timing and frequency of the directions given to the jury.<sup>702</sup> In its report, the VLRC noted this recommendation had broad support and quoted the submission from the Criminal Bar Association of Victoria and Mr Benjamin Lindner, which stated:

In long, complex trials involving multiple accused it is sensible and conducive to a fair trial, that a judge directs the jury early in the trial as to the importance of separate trials and the meaning of hearsay ... Such directions should be repeated after counsel's addresses as part of the Charge. Thus, to ensure a fair trial, a judge might give a direction on certain matters of law and of evidence at convenient points in the trial to ensure fairness. In appropriate cases, a trial judge should give binding directions of law more than once; but always at the end with completeness.<sup>703</sup> [Reference omitted.]

A corollary of early jury directions is early identification of the issues in the trial. In 2014, the Lord Chief Justice of England and Wales asked Sir Brian Leveson, President of the Queen's Bench Division, to conduct a review of the efficiency of criminal proceedings in England and Wales (Leveson Review). The Leveson Review recommended that the defence should be required to identify the issues in the case immediately after the prosecution opening. Even where the defence opening was simply to put the prosecution to proof on all issues, the Leveson

Review considered that this should be explained to the jury. It stated that the benefits of this would include providing the judge with an opportunity to make directions at the beginning of the trial which alert the jury to what they should be looking out for while the evidence is being presented.<sup>704</sup>

The Leveson Review recommended that such a requirement be given legislative force, suggesting that those cases in which the jury would benefit most from the defence advocate's guidance are precisely those cases in which defence counsel may choose not to assist.<sup>705</sup>

In Victoria, the Weinberg Report considered issues relating to jury directions, including the timing of directions. In considering the appropriate time to give directions, the report stated:

Jurors generally process evidence as they hear it, rather than waiting until the end of the trial. This means that directions at the end of the trial require jurors to undo their previous processing of evidence. Expecting jurors to perform this task is unrealistic.<sup>706</sup> [Reference omitted.]

The Weinberg Report discussed whether there would be benefit in giving directions before hearing the evidence, noting that some psychological theories suggest that pre-instruction should maximise the jurors' ability to retain and apply instructions as they hear and process evidence. The Weinberg Report also indicated that empirical research had demonstrated mixed results as to jurors' ability to comprehend evidence.<sup>707</sup>

The Weinberg Report found no clear consensus as to whether directions given at the start of the trial are any more effective than those given at the conclusion of the evidence. However, the Weinberg Report noted that research had shown that repetition of jury directions has a beneficial effect on jury comprehension.<sup>708</sup> Noting that the specific circumstances of each trial will impact on the particular directions that should be given, it concluded that it may be useful for directions to be given in relation to the use of evidence when it is admitted and then again during concluding statements.<sup>709</sup>

In 2015, the Victorian Department of Justice and Regulation Report noted research about the importance of the timing of directions which suggested that directions may not be effective if not provided at the right time. It stated:

Research indicates that repetition of jury directions helps jury comprehension. The way in which directions are communicated to the jury has clear implications for juror comprehension. Ineffective communication techniques compound some of the other problems with jury directions we discuss below, such as their length and complexity. These problems can lead to juror disengagement, and concerns about the basis on which jurors are reaching their verdicts.<sup>710</sup> [Reference omitted.]

Part 3 of the *Jury Directions Act 2015* (Vic) establishes a scheme for the trial judge to work cooperatively with the prosecution and defence to establish which directions will be required after the closing arguments by both parties. However, it also includes specific provisions on the timing of particular jury directions.

The *Jury Directions Act* contains a general provision allowing the trial judge to give a direction (consistent with the Act) that the trial judge considers necessary at any time before the close of the evidence.<sup>711</sup> The *Jury Directions Act* also contains provisions regulating the timing of particular directions. For example, as discussed in section 31.3.1, the trial judge must give the direction in relation to delay in complaint (if a direction is required) as soon as is practicable and before any evidence is adduced in the trial. The judge may repeat the direction at any time in the trial.<sup>712</sup>

Similarly, in criminal proceedings in which self-defence or duress in the context of family violence may be an issue, section 58(1) allows the defence to request the judge to direct the jury on various aspects of family violence. These include that self-defence or duress is, or is likely to be, an issue in the trial; and, as a matter of law, evidence of family violence may be relevant in determining whether the accused acted in self-defence or under duress.<sup>713</sup> Similar provisions about when directions should be made also apply.<sup>714</sup> The Explanatory Memorandum to the *Jury Directions Bill 2015* (Vic) stated that the purpose of requiring directions to be given as soon as is practicable is to ensure that ‘any misconceptions jurors may have in relation to family violence are addressed at an early stage’.<sup>715</sup>

## Providing educational material to juries

In the Consultation Paper, we suggested that there may be methods – other than or in addition to expert evidence and judicial directions – that might help to inform and educate juries. For example, a standard video tutorial played to jurors before a child sexual abuse trial could be considered.<sup>716</sup> This tutorial could provide the sort of information that an expert witness might give. It is not clear whether this would be more or less effective than relevant directions given by the trial judge.

## 31.6 What we were told in submissions and Case Study 46

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A number of interested parties addressed the issue of judicial directions and how better to inform or assist juries in their submissions in response to the Consultation Paper. In addition, some witnesses were asked about these issues in the public hearing in Case Study 46.

### 31.6.1 Survivor advocacy and support groups

In its submission in response to the Consultation Paper, the Victim Support Service South Australia expressed support for:

- providing jurors in child sexual abuse cases with specialised knowledge about child development and the impact of child abuse on children, particularly for jurors whose formal education did not extend beyond high school and for men
- compulsory training for magistrates and judges regarding sexual offences and understanding myths and misconceptions, as members of the judiciary may be affected by their own biases, gendered views or ignorance of how victims of crime respond to their experiences, particularly in offences of violence against women and children
- South Australia adopting either or both:
  - sections 79(2) and 108C of the Uniform Evidence Act
  - the mandatory judicial directions recommended by the National Child Sexual Assault Reform Committee (which we outlined in section 31.5.4).<sup>717</sup>

Sisters Inside submitted that:

It is crucial that, like police and prosecutors, judges and juries are well-informed about the possible long-term behavioural consequences of child sexual abuse – particularly in the case of historical abuse – such as criminalisation, mental health and substance abuse issues.<sup>718</sup>

In relation to the options discussed in the Consultation Paper, including codifying directions, education and training for legal professionals including judges and improving information for jurors, Sisters Inside submitted that, while ‘these options may be an improvement on the existing situation, they would continue to rely on judges and other legal practitioners addressing their (often deep-set) assumptions’.<sup>719</sup> Sisters Inside instead expressed support for a video for jurors, stating:

The briefly mentioned option of a standard video tutorial played to jurors before a child sexual abuse trial appears a particularly worthwhile reform to consider, since it would reduce the risk of inaccurate assumptions (verbally or non-verbally) subtly influencing judicial directions.<sup>720</sup>

Protect All Children Today (PACT) submitted that jurors need a basic overview of the likely responses to child sexual abuse. However, PACT suggests that there are too many differences in reactions to fully educate jurors on the likely impact of abuse.<sup>721</sup>

PACT expressed support for providing feedback to legal practitioners and the judiciary as the most effective form of education and training. PACT stated:

PACT firmly believe the most effective education and training for lawyers is verbatim feedback directly from the children and young people who have interacted with the criminal justice system. Initiatives such as the Post Evidence Feedback Surveys provide information on how they [sic] child has seen their interaction with Police, Prosecutions, Defence, Judiciary, giving evidence and their overall court experience.<sup>722</sup>

While PACT provides this sort of feedback in Queensland, it also stated that it understands several other states have implemented processes to obtain feedback from children and young people, so this should be used to inform future reforms and education for the judiciary.<sup>723</sup>

In its submission in response to the Consultation Paper, the Federation of Community Legal Centres in Victoria commented on its engagement with the Victorian law reform process in relation to sexual offences and jury directions. It expressed some reservations that codification in Victoria has 'gone too far' and has resulted in 'over-pruning' of jury directions in sexual assault trials, affecting both adult and child victims.<sup>724</sup>

The Federation of Community Legal Centres submitted that:

clear and explicit guidance should be provided to juries, legal officers and police to ensure that, as far as possible, victim-blaming attitudes and rape myths are not influencing investigation, prosecution and decision-making processes in the criminal justice system.<sup>725</sup>

Its submission suggests that there might be tension between simplification of directions and the need to direct jurors adequately about the offences. The Federation of Community Legal Centres also submitted that placing the onus on counsel to request relevant directions means that ongoing education about sexual assault is needed for counsel.<sup>726</sup> It expressed support for substantial induction and professional development training to be provided to judicial officers presiding in sexual assault cases, including appeals, in relation to the social context of sexual assault and its impact on victims and survivors, including in relation to how sexual assault may affect complainants in giving their evidence. The Federation of Community Legal Centres also expressed support for encouraging specialisation in sexual assault matters for counsel, police and the judiciary.<sup>727</sup>

The Federation of Community Legal Centres expressed strong support for recommendations 41 to 43 of the Victorian Law Reform Commission's *Jury directions final report* in relation to the provision of assistance to juries via an Outline of Charges and a Jury Guide. It submitted that much could be learned from the use of pre-trial education about the social realities of sexual offending and decision flowcharts in overseas jurisdictions. It also expressed support for the greater use of expert witnesses in sexual offence cases.<sup>728</sup>

In its submission in response to the Consultation Paper, the Victorian Aboriginal Legal Service (VALS) submitted that:

a culturally educated justice system – across all levels – is necessary to ensure greater access and cultural safety for Aboriginal and Torres Strait Islander people within all aspects of the criminal justice system.<sup>729</sup>

VALS recommended that all areas of the justice system undergo annual cultural training by local Aboriginal community providers and also ensure that the physical apparatus of the justice system is made culturally safe.<sup>730</sup>

### 31.6.2 Victims of Crime Commissioners

In his submission, the Victims of Crime Commissioner for the Australian Capital Territory, Mr John Hinchey, expressed support for:

- judicial directions and warnings being regularly updated in line with evidence to counter myths and ensure that complainants, as well as the accused, are treated fairly
- abolishing or reforming the Markuleski direction
- mandatory training for judges in relation to child witnesses and child and adolescent sexual abuse
- greater use of expert evidence, with greater emphasis on experts who know the particular child or case
- the ALRC and NSW LRC's recommendation in *Family violence: A national legal response* that directions, authorised by legislation, should address children's abilities as witnesses and responses to sexual abuse, summarising a consensus of expert opinion
- the National Child Sexual Assault Reform Committee's recommended three mandatory judicial directions
- giving directions at the beginning of the trial, or when the issue is first raised, and just before the jury deliberation.<sup>731</sup>

The Commissioner for Victims' Rights for South Australia, Mr Michael O'Connell APM, expressed support for exploring codification of judicial directions.<sup>732</sup> In relation to training and continuing legal education, Mr O'Connell submitted that:

Sensitivity training on victim related issues should be an essential element of criminal justice, legal studies and law courses in tertiary colleges and universities. Suitable training and ongoing education on victims' rights, for example, should be provided for all those working in the criminal justice system.<sup>733</sup>



### 31.6.3 Governments

In its submission in response to the Consultation Paper, the New South Wales Government stated:

These issues were considered in 2012 by the NSWLRC in Report 136: *Jury Directions*. The NSWLRC made recommendations regarding jury directions and expert evidence in child sexual abuse matters at recommendation 5.5. In particular, the NSWLRC recommended commissioning further research on the issue of juror and public misconceptions concerning the reliability of the evidence of children and their responses to sexual abuse. The Jury Reasoning Research and consultation paper explore these issues.

The NSW Government is currently considering the recommendations of the NSWLRC report, and will consider the research and any recommendations of the Royal Commission in that context.<sup>734</sup>

Mr Paul McKnight, Executive Director of Strategy and Policy in the New South Wales Department of Justice, told the public hearing that, at this stage, the timing of the New South Wales Government's response to the NSW LRC's report on jury directions is unknown and that the additional research it recommended and research conducted by the Royal Commission should be considered in responding to the report.<sup>735</sup>

In relation to whether New South Wales might adopt a jury guide such as that being trialled in Victoria, Mr McKnight said that currently some guidance is given to jurors by the Office of the Sheriff, and the NSW LRC report discusses further work in that area.<sup>736</sup>

In its submission in response to the Consultation Paper, the Victorian Government discussed the reform process reflected in the *Jury Directions Act 2013* (Vic) and the *Jury Directions Act 2015* (Vic) and submitted that the reforms have been well received by stakeholders. In relation to the extent of codification under the *Jury Directions Act 2015* (Vic), the Victorian Government stated:

the Jury Directions Act only reforms specific jury directions that are creating problems in Victorian courts (such as the Kilby/Crofts and Longman directions). It does not codify common law directions that are working effectively. Accordingly, while additional provisions on specific directions are likely to be added in future, the Jury Directions Act will not fully codify jury directions in Victoria. Complete codification of jury directions would be a substantial undertaking and it is not clear that there would be any significant benefit from such an expansive approach.<sup>737</sup>

The Victorian Government outlined directions in relation to consent in sexual offences, which address some common misconceptions, and stated that the reform process is ongoing and there may be further reform in future to directions such as those on the evidence of child witnesses and victims and in relation to general misconceptions in sexual offence cases.<sup>738</sup>

In relation to improving jurors' understanding of child sexual abuse, the Victorian Government submitted that combining a range of methods might be most effective, stating:

Whilst the use of expert evidence may be useful in particular cases to help juries understand the nature of sexual offending, it can be costly and difficult to obtain, particularly in regional areas. On the other hand, jury directions reform has a broader application and can be as effective as evidence from an expert witness.<sup>739</sup>

The Victorian Government also provided the following information about its trial of a Jury Guide:

Victoria is also trialling the use of a general Jury Guide. The Jury Guide is a short booklet given to jurors at the start of a trial that contains information relevant to criminal trials. It is designed to provide juries with practical guidance and support, and aims to:

- Reinforce important information on criminal trials (e.g. by reminding jurors not to conduct their own investigations).
- Complement the oral directions given by trial judges at the start of trials.
- Provide practical guidance to jurors on how to conduct their deliberations.

The guide was developed by an expert Advisory Group that advises on jury directions reforms. The Advisory Group is chaired by the Department of Justice and Regulation and includes judges from the Court of Appeal, Supreme Court and County Court, and representatives from Victoria Legal Aid, the Office of Public Prosecutions, the Criminal Bar Association and academics. The Advisory Group developed the Guide in recognition of research which demonstrates that many jurors feel that they would be assisted by written information about the trial process.

The guide will be evaluated after a 12 month trial. If the guide does prove useful, future consideration could be given to educational materials on specific issues such as sexual abuse.<sup>740</sup>

Mr Greg Byrne, Special Counsel for Criminal Law Review in the Department of Justice and Regulation in Victoria, gave evidence in the public hearing in Case Study 46.

Mr Byrne told the public hearing that he chairs the Jury Directions Advisory Group that has been involved in developing the reforms in Victoria.<sup>741</sup>

Mr Byrne gave evidence that:

The feedback from [members of the advisory group] ... has been very positive in terms of shortening directions, getting them more focused on the issues that are of assistance to the jury and making them simpler and clearer for the jury to try to promote comprehension of the issues the jury must determine.<sup>742</sup>

In response to a question as to whether there are any mechanisms in place to keep the legislation under review so that it does not reflect a particular understanding at a particular time which might become out of date, Mr Byrne told the public hearing that the advisory group continues to meet and is a forum where any problems with particular directions can be raised.<sup>743</sup>

Mr Byrne outlined the strategies used to provide sufficient flexibility in the reforms as follows:

There were several different models that were considered following the Victorian Law Reform Commission's report on jury directions. From memory, that report recommended codification of almost all jury directions, which would be a substantial undertaking and would take a long time to complete, and we were also concerned that that was unnecessary in many instances.

So the Jury Directions Act adopts a number of different strategies. It doesn't simply codify an area of jury directions that it deals with. In some areas, yes, there is complete codification. In other areas, it will remove some common law requirements and then leave the common law to fill out the rest of the requirements. So in a sense it's relieving the judge of certain obligations or directions that no longer appear to be justified in a trial.

So we have used a range of strategies to try to provide sufficient flexibility, and it really depends on an assessment of the kind of topic we're dealing with as to what level of intervention seems most appropriate.<sup>744</sup>

In response to questions about the Jury Guide, Mr Byrne told the public hearing that there is no indication yet as to its effectiveness. He said that surveys were being conducted of juries that receive the guide and a control sample of juries that do not receive the guide.<sup>745</sup> In response to a question whether information might be given to jurors to correct misconceptions about child sexual abuse through the Jury Guide, Mr Byrne said:

Yes, possibly the jury guide or by some other means, given that the jury guide is intended to be of application to all trials if possible, but there may be some supplementary material that is given that is relevant to specific types of cases.

So in the Jury Directions Act we've already taken some steps to address some common myths and misconceptions that arise in sexual offence cases, for instance in relation to delay and the relevance of delay, and we have others under consideration, as to whether other directions or other materials could be provided to the jury that would address other common misconceptions.<sup>746</sup>

Mr Byrne said that the advisory group had considered the delay and credibility directions in detail based on the best available social science research about misconceptions and about the language in which directions should be given to improve jurors' understanding and that the advisory group would be the mechanism to seek agreement on any further directions or material for the Jury Guide.<sup>747</sup>

We note that the Jury Directions and Other Acts Amendment Bill 2017 which is currently before the Victorian Parliament, if enacted, will amend the *Criminal Procedure Act 2009* (Vic) to provide legislative authority for the use of the Jury Guide.

### 31.6.4 Directors of Public Prosecutions

#### New South Wales Office of the Director of Public Prosecutions

In its submission in response to the Consultation Paper, the New South Wales Office of the Director of Public Prosecutions (ODPP) stated that, ‘while the law in NSW in relation to the key directions in child sexual assault matters is adequate, we support the codification of all jury directions in a manner similar to the Victorian Act’.<sup>748</sup> The New South Wales ODPP identified advantages of codification as follows:

The advantage of codifying jury directions in one Act of Parliament is that it would simplify and clarify the law. There are too many directions in NSW and the interplay between them is complex. As noted in the Weinberg Report, the jury in NSW is often burdened with prolix and multiple directions. Brevity and clarity would be the product of legislation. There can be significant discrepancies as between various judicial officers in terms of the tenor and application of the directions. Whilst there will inevitably be this quality in the criminal justice process, a clear legislative framework would provide for greater consistency across the cases we prosecute. There would also be a reduction in the risk of a trial miscarrying due to an erroneous direction.<sup>749</sup>

The New South Wales ODPP stated that, as is the case in Victoria, any codification in New South Wales should cover the field of jury directions and not be limited to child sexual assault contexts.<sup>750</sup>

In relation to training for judges and lawyers, the New South Wales ODPP expressed its strong support for social-science-based education about the dynamics of child sexual offending and reporting forming part of ongoing judicial and practitioner training. It stated:

In our view, this type of training would be very valuable in that it has the potential to undermine misconceptions and to raise awareness about the unique issues surrounding child sexual abuse. Practitioners would be less inclined to highlight relevant evidence or cross examine on false bases. Judges would be more inclined to disallow irrelevant and misleading cross examination. Juries would not be misled by evidence that is not ascribed its true meaning.<sup>751</sup>

In relation to methods that would be most effective for improving jurors' understanding of child sexual abuse, the New South Wales ODPP agreed that there is a place for expert evidence as permitted by sections 79 and 108C of the *Evidence Act 1995* (NSW) but stated:

the cost to the criminal justice system of relying on experts to give evidence about which there exists a consensus in mainstream academic thinking is unwarranted. In such areas, the formulation of an acceptable jury direction is preferred. The ODPP supports the use of judicial directions in this area as a preferable course to reliance on an expert giving evidence in each trial. It supports the ALRC and NSW LRC position stated at page 480 of the Consultation Paper that there is a 'strong case for use of jury directions which would "summarise a consensus of expert opinion drawn from the work of psychiatrists, psychologists and other experts on child behaviour"'. Work is therefore needed on identifying and formulating appropriate judicial directions about child development and behaviour as it applies to cases involving child sexual abuse. The New Zealand model provides a sound basis for considering this issue.<sup>752</sup>

The New South Wales ODPP agreed that directions should be given at the times that maximise their usefulness to the jury, including, for example, before a child complainant gives evidence and during summing up.<sup>753</sup>

The New South Wales ODPP expressed some caution in relation to providing training material to jurors as follows:

On the issue of the provision of training material (for example DVDs) to jurors, while the ODPP is generally supportive of any innovation in this area which brings about a reduction in jury misconceptions about the dynamics of child sexual abuse, significant caution would need to be exercised in developing training materials to ensure that they were accurate, fair and balanced. Moreover, the circumstances of a jury viewing the material would need to be carefully considered and monitored. Research and consultation would be needed to ensure any potential pitfalls were identified and avoided.<sup>754</sup>

The New South Wales ODPP expressed support for the Victorian approach in relation to the Markuleski direction – that is, that it should generally be avoided. The New South Wales ODPP submitted that legislation is warranted in New South Wales to strictly limit the circumstances in which the Markuleski direction is given.<sup>755</sup>

## Victorian Director of Public Prosecutions

In his submission in response to the Consultation Paper, the Victorian DPP stated that the adoption of schemes to reform the law of jury directions, similar to that in Victoria, in other Australian jurisdictions would be very beneficial.<sup>756</sup> In relation to the effectiveness of the Victorian reforms and possible future reforms, the Victorian DPP submitted:

Although there is not yet a great volume of meaningful statistics as to the outcome of JDA [Jury Directions Act]-regulated trials, because of the transitional effect, early indications are that the Jury Directions reforms have had a substantial beneficial effect in reducing jury direction complexity, and a consequent reduction in misdirection-related grounds of appeal being successful.

The work of the Jury Directions Advisory Group is ongoing, and further amendments to the JDA scheme are expected in the future.<sup>757</sup>

The Victorian DPP submitted that it can be difficult in practice to present juries with expert evidence to improve their understanding of child sexual abuse, referring to the Victorian Court of Appeal's decision in *CMG v The Queen*.<sup>758</sup> The Victorian DPP stated:

Challenges such as availability of suitably qualified and experienced experts (who are few in number and in high demand), cost of expert evidence and time (with particularly short timeframes for child complainants) are such that it is impractical to call such evidence in many cases.<sup>759</sup>

The Victorian DPP expressed support for codified directions summarising expert opinion given the difficulties he identified with expert evidence.<sup>760</sup>

In relation to the Markuleski direction, the Victorian DPP expressed support for legislative abolition of the direction but suggested that it may be appropriate for counsel to make related comments, depending on the evidence in the trial.<sup>761</sup>

## Tasmanian Director of Public Prosecutions

In his submission in response to the Consultation Paper, the Tasmanian DPP stated that he does not believe there is a particular need to codify jury directions. He suggested that codification would risk uncertainty in the short term in circumstances where no directions that are routinely given in Tasmania in sexual assault trials require amendment or correction.<sup>762</sup>

The Tasmanian DPP indicated that the current provisions for expert evidence are sufficient in that they permit opinion evidence about the behaviour of children who have been victims of sexual abuse to be admitted and the prosecution can decide when such evidence is warranted and its scope. He stated that the provision also allows the evidence to be tested.<sup>763</sup>

He expressed opposition to the use of a video to assist the jury as follows:

To play a video to the jury which may or may not be applicable to the evidence in the case which they are considering would be inappropriate and unnecessary. In my view, as far as is possible, trials involving sexual allegations against children should not be the subject of

special rules and procedures. If such a video were to be played to the jury when the allegations involve sexual crimes against children, why would one not be played when the allegations involve family violence – to explain why the victim of family violence might stay in an abusive relationship, for example? Similarly, why would a video explaining how someone with an intellectual disability might behave having been sexually abused not be appropriate? Where required, such explanations are best left [sic] dealt with by leading expert evidence.<sup>764</sup>

## Director of Public Prosecutions for the Australian Capital Territory

In his submission in response to the Consultation Paper, the DPP for the Australian Capital Territory submitted that the Australian Capital Territory has pioneered the use of expert evidence in child sexual offence prosecutions. He stated:

In child sexual offence trials where there has been a delay in reporting, prosecutors regularly call paediatric medical experts with many years of experience dealing with victims of child sexual abuse. Their evidence typically covers –

- Delay (studies that show delay is the norm);
- Reasons for delay; and
- Typical responses by victims to child sexual abuse.

Such evidence forms an exception to the credibility rule (s.108C) and, when led at trial, has the dual benefit of –

- providing evidence that can be used by the jury to properly and fairly assess the complainant's evidence, not only about the offending but also about their response to and disclosure of the abuse; and
- educating the jury more broadly about these matters by dispelling commonly-held myths about child sexual abuse.<sup>765</sup>

The DPP for the Australian Capital Territory submitted that the 'use of such evidence should be encouraged across all jurisdictions in Australia'.<sup>766</sup>

The DPP for the Australian Capital Territory also discussed possible reforms to current judicial directions. He referred to many commonly held myths about child sexual offences revealed in research and submitted that:

in allegations of sexual offending, it is important to instruct juries to leave aside any preconceptions about how victims of sexual abuse are 'likely' or 'expected' to act.<sup>767</sup>

The DPP for the Australian Capital Territory suggested amendments to some directions as follows:

- if a direction is warranted in relation to delay causing forensic disadvantage, the judge should add that it is common for victims of child sexual abuse not to complain until later<sup>768</sup>
- if a Crofts direction is warranted, the judge should add that it is common for victims of child sexual abuse never to disclose the abuse or to disclose it after significant passage of time<sup>769</sup>
- if a Murray direction is warranted, the judge should add that sexual offences are committed in private and it is not unusual for a case to rely on only one witness – the complainant – and there is nothing inherently weak in a word-on-word case.<sup>770</sup>

The DPP for the Australian Capital Territory submitted that these changes would provide more accurate context for the directions.<sup>771</sup>

### 31.6.5 Private Bar, legal bodies and representative groups

#### Private Bar

In the public hearing in Case Study 46, four members of the private Bar gave evidence about judicial directions:

- Mr Tim Game SC, who is chair of the Criminal Law Committee of the Law Council of Australia and co-chair of the Criminal Law Committee of the New South Wales Bar Association
- Mr Peter Morrissey SC, who was until the week before the public hearing in Case Study 46 chair of the Criminal Bar Association of the Victorian Bar
- Mr Arthur Moses SC, who is an executive member of the Law Council of Australia and was nominated by the Law Council of Australia for the purposes of the public hearing in Case Study 46
- Mr Stephen Odgers SC, who is a member of the Criminal Law Committee of the Law Council of Australia and co-chair of the Criminal Law Committee of the New South Wales Bar Association.

Mr Game and Mr Morrissey gave evidence concurrently on 29 November 2016.

In response to a question as to his view of the Victorian reforms in the *Jury Directions Act 2013* (Vic) and *Jury Directions Act 2015* (Vic), Mr Morrissey told the public hearing that, at a high level, it has a disadvantage in that it means that Victoria is now very different from other states, but it is viewed very favourably within Victoria.<sup>772</sup> He said that the model is ‘being embraced happily’ and identified the following benefits of it:



- It leads to shorter and less controversial directions.
- Requiring the defence to articulate its required directions has meant that practitioners turn their minds to the issues earlier.
- Requiring the judge to give certain requested directions unless there are good reasons not to works well and requires the judge to articulate the reasoning process.
- The forensic disadvantage warnings are now short and work well, while other directions on delay are being worked through.<sup>773</sup>

In response to a question as to whether more directions are being given earlier in the trial, Mr Morrissey said that it was uneven across County Court judges and that the more confident and experienced judges are intervening with appropriately timed warnings.<sup>774</sup>

In response to a request for his opinion on criticisms of jury directions and the approach Victoria has adopted, Mr Game referred to the New South Wales Law Reform Commission's report (for which he was one of the commissioners). He told the public hearing that he thinks that jury directions are far too complicated, and bench books are problematic because the directions must depend upon the facts of the case.<sup>775</sup> Mr Game said that some directions and warnings are the price the common law required to be paid for allowing a trial to proceed – for example, a Longman warning allows historical child sexual abuse cases to proceed – so the discipline of the warning should not be removed.<sup>776</sup>

Mr Moses and Mr Odgers gave evidence concurrently on 2 December 2016.

In response to a question as to his opinion of the Victorian approach, with a degree of codification overseen by an advisory committee to develop standard directions, Mr Moses told the public hearing that he could not see a principled opposition to such a process.<sup>777</sup>

Mr Odgers told the public hearing that he would be opposed to such a process of codification because the law should adapt and be able to deal with the circumstances that arise in particular trials. He said that judges have primary responsibility for the bench books in New South Wales and there would be no harm in expanding the people involved in assisting to develop that material.<sup>778</sup>

Mr Odgers said that the whole area of judicial directions is complicated and that the debate has moved on from directions to address the dangers of unreliability to directions to address myths and inform juries other than via expert evidence. Mr Odgers said that the ALRC should be given a reference to consider such directions, which might require legislation or implementation through bench books.<sup>779</sup> Mr Moses agreed in principle with this approach but noted the importance of the wording of any directions and suggested that the matter should be closely examined by the ALRC.<sup>780</sup>

## Legal bodies and representative groups

### Law Council of Australia

In its submission in response to the Consultation Paper, the Law Council of Australia stated its agreement with the propositions in the Consultation Paper that New South Wales and Victoria have arrived at a position in relation to corroboration, delay and reliability that is consistent with the social science research and that it may be appropriate for other states and territories that have not yet arrived at similar positions in relation to these judicial directions to legislate in respect of them.<sup>781</sup>

However, the Law Council of Australia also submitted that Victoria's codification of the law in the *Jury Directions Act 2015* (Vic) has significantly reduced uniformity in the Uniform Evidence Act jurisdictions and that the ALRC should be asked to consider changes to Parts 4.4 and 4.5 of the Uniform Evidence Act.<sup>782</sup>

The Law Council of Australia stated that it does not support codification and that all topics that might require direction cannot be anticipated in advance. It suggested that, if concerns arise with common law directions that are not consistent with the latest expert knowledge, legislation can be introduced to modify them.<sup>783</sup>

In relation to abolishing or reforming particular judicial directions, the Law Council of Australia submitted that this should be a matter for the ALRC. It also submitted that it would not support the abolition of the Markuleski direction, which it stated ensures that a jury is not misled by a direction that they should consider each count separately and that different verdicts may be reached on different counts.<sup>784</sup>

### Bar Association of Queensland

In its submission in response to the Consultation Paper, the Bar Association of Queensland submitted that:

the law with respect to judicial warnings given in trials involving sexual offences is the product of lengthy and exhaustive litigation and consideration by our highest courts of the issues which go to the heart of ensuring the fairness of those trials. The question as to whether particular judicial directions should be abolished or reformed would need to be answered by an assessment in respect of each.<sup>785</sup>

It referred to the purpose of the Markuleski and Longman directions. It expressed its support for the discretion vested in the trial judge and cautioned against limiting the directions open to the trial judge.<sup>786</sup>

### **Law Society of New South Wales**

In its submission in response to the Consultation Paper, the Law Society of New South Wales noted the NSW LRC's report on jury directions and submitted that:

given the complexity of jury directions in this area, these questions should be referred to the ALRC for a full review. The Law Society notes the importance of an interdisciplinary approach, including involvement from both legal and psychology experts to resolve these issues.<sup>787</sup>

### **Legal Aid NSW**

In its submission in response to the Consultation Paper, Legal Aid NSW noted that the NSW LRC 'firmly rejected' a proposal for codification of judicial directions. Legal Aid NSW stated its agreement with the NSW LRC that the law in this area should not be codified. It submitted that any review of the lack of uniformity between jurisdictions in relation to jury directions should be referred to the ALRC.<sup>788</sup>

Legal Aid NSW also stated its agreement with the Law Council of Australia that the Markuleski direction should not be abolished.<sup>789</sup>

### **Victoria Legal Aid**

In its submission in response to the Consultation Paper, Victoria Legal Aid (VLA) noted:

extensive jury direction reforms in Victoria were designed to simplify and assist juries to undertake their deliberations more easily. Significant reforms around complex sexual offence directions have already sought to eliminate outdated or confusing directions that operate unfairly for victims in light of what we now know about the nature of sexual assault (for example around delay and reporting).<sup>790</sup> [Reference omitted.]

## **31.7 Discussion and conclusions**

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At least in some states and territories, we consider that judicial directions and warnings continue to create difficulties in child sexual abuse trials and that some directions and warnings continue to reflect judges' assumptions that have been discredited by social science research.

We also consider that juries may continue to be affected by myths and misconceptions about how 'real' victims of child sexual abuse will behave.

The question is how best to address these problems.

### 31.7.1 Codifying judicial directions

As discussed in sections 31.5.2 and 31.6, the Victorian exercise in codifying judicial directions appears to have been a success. It appears to have the support of the courts, the Victorian DPP<sup>791</sup> and the private Bar.<sup>792</sup>

A confidential submission in response to the Consultation Paper noted that many members of the judiciary in Victoria supported the reform of judicial directions, particularly their simplification. We agree that any significant codification or simplification of judicial directions, if it is to be successful, is likely to require significant contributions from the judiciary, both in developing the reforms and in ensuring their effective implementation.

We recognise that the Victorian legislation is not a complete codification of judicial directions. Such an exercise may not be possible given the variety of directions that might be required depending on the evidence in the particular trial.

It is also important to distinguish between form and substance in codifying judicial directions. Focusing on form, codification can provide transparency and clarity in what directions are required. It allows for clear rules to be established as to the obligation of the parties – prosecution and defence – to seek directions and the trial judge’s obligations to give directions in circumstances where they have not been sought by a party. It can also make provision for when directions are required to be given.

As the Victorian example shows, codification can also affect the substance of the directions given. Codification may include requirements for, or prohibitions on, certain directions or directions given in certain forms. The exercise of attempting to codify a particular direction is likely to focus attention on its terms and provide an opportunity for identifying not just whether it can be simplified but also whether or not it is accurate.

Accuracy should raise questions both of what is known about the issue the subject of the direction in the social science research and, given what is known in the research, what would be fair to say by way of direction in a trial, considering not just the interests of the accused but also the prosecution (representing the community) and the complainant.

We consider it likely that codification would affect the substance of directions in relation to child sexual abuse trials and sexual offences trials more generally. The history of judicial directions and warnings discussed in section 31.3.1 suggests that parliaments may not share the views of the High Court about what is the appropriate content of directions relating to sexual offences. It seems inevitable – and desirable – that any codification of the content of these directions would focus attention of the accuracy, adequacy and fairness of the directions.

Codification, including codification that affects the substance of directions, can also remove pressure from trial judges to err on the side of caution by giving directions that may not be needed, to protect against the risk of putting the parties through a retrial if any convictions are overturned on appeal.

We also recognise that codification is not without risk. We note the Federation of Community Legal Centres' reservations that jury directions in Victoria may have been 'over-pruned' to the disadvantage of victims.<sup>793</sup>

It seems likely that any process of codification and simplification should be kept under review so that the accuracy, adequacy and fairness of the directions is reassessed and any particular directions are adjusted as required on an ongoing basis. It appears that the Jury Directions Advisory Group in Victoria is well suited to performing this task in relation to the Victorian provisions, with representation from the government, judiciary, prosecution and defence.

We appreciate that, while Victoria has proceeded with codification of judicial directions, the QLRC in 2009 and the NSW LRC in 2012 each recommended against codification.<sup>794</sup>

The QLRC supported continued refinement of and reliance on the Queensland Supreme and District Court Benchbook.<sup>795</sup> In relation to codification, it stated:

On balance the Commission remains unconvinced that this is an area of law in which comprehensive and detailed legislation and regulations are likely to prove beneficial in the long run in Queensland. The Commission is satisfied that the problems surrounding the content and delivery of jury directions and warnings are significant enough to warrant active steps to reform them but that this should be done by a series of other approaches outlined later in this Report rather than by codification.<sup>796</sup>

The NSW LRC stated:

The principal advantage of the existing common law framework is its flexibility to meet the demands of the individual case and to respond to new, unforeseen issues that may arise in future cases. The use of a system of suggested directions that can be updated promptly, without the need for legislation, can assist judges to keep pace with appellate decisions and legislative changes in the criminal laws. In turn this provides a means of ensuring greater consistency and accuracy in the provision and content of directions without detracting from the flexibility that is needed for adjusting the directions to the individual case.<sup>797</sup>

The NSW LRC concluded:

We are not convinced that there is a good case for the adoption of a single, comprehensive statutory scheme in place of the existing framework for jury directions. In particular, we do not think that such an approach would, in practice, be any simpler in its application or

result in worthwhile improvement in trial practice. On the contrary, there is the risk that this area of the law, which has developed over many years and is generally familiar to judges and counsel, could become unsettled, leading to increased complexity and uncertainty arising out of the necessity for courts to interpret and apply new legislation.

On a more fundamental level, there is an inherent potential for inflexibility in the introduction of a statutory scheme or codification that seeks to anticipate the issues on which a jury will need instruction. It is our view that the adoption of such a scheme could pose a risk to the fairness of the trial process if it detracts in any way from the ability of the trial judge to assess the needs of the particular case and to tailor the directions to the jury to accommodate those needs. A trial judge is in the best position to understand the dynamics of any particular trial and to devise directions that meet the demands of that trial. ...

Our conclusion, which accords with the approach favoured by the QLRC, is that the best course is to retain the existing approach that encourages the use of suggested directions contained in the Bench Book, as developed by the Bench Book Committee. This approach will preserve for judges the discretion to tailor their directions to the real issues in the individual case without the shackles of a codified or mandatory set of statutory directions.<sup>798</sup> [Reference omitted.]

The QLRC recommended amendments to the *Criminal Code* (Qld) in relation to the parties' obligations to request or object to directions and warnings and the obligation of the trial judge to give directions.<sup>799</sup>

It seems to us that what is missing from the processes supported by the QLRC and NSW LRC is scrutiny of the content of directions being applied from outside the legal profession and a clear path for transmission of up-to-date knowledge from social science research to ensure that the directions required by appellate courts are accurate.

We consider that there is merit in codification of judicial directions as implemented in Victoria. The codification has now been in operation for some years – it is four years since the *Jury Directions Act 2013* commenced and two years since the *Jury Directions Act 2015* commenced – without significant criticism and with the support and endorsement of the judiciary and experienced practitioners. We recognise that this reform extends considerably beyond child sexual abuse trials and, indeed, trials for sexual offences generally. We will not make a recommendation in favour of codification, but we consider that other states and territories should observe Victoria's experience with interest and should reconsider codification now that Victoria has established a precedent from which other jurisdictions could develop their own reforms.

#### **Recommendation**

64. State and territory governments should consider or reconsider the desirability of partial codification of judicial directions now that Victoria has established a precedent from which other jurisdictions could develop their own reforms.

### 31.7.2 Abolishing or reforming particular judicial directions

Following consideration of the issues discussed in section 31.3.1, we are satisfied that no state or territory should retain the common law directions or warnings arising from *Kilby*, *Murray*, *Longman*, *Crofts*, *Crampton* or *Doggett*.

Although the NSW LRC concluded that judicial directions should not be codified, it stated that:

This approach does not foreclose the possibility of the parliament, in appropriate cases, enacting legislation that requires the giving of specific directions or precludes their use, or defines the content of what may permissibly be said. Instances of this already exist, for example in the *Evidence Act 1995* (NSW).<sup>800</sup> [Reference omitted.]

The examples it gave included the directions particularly relevant to sexual assault and child sexual abuse offences, such as the *Evidence Act 1995* (NSW), sections 20, 116, 165, 165A and 165B (see also the *Criminal Procedure Act 1986* (NSW), sections 161, 294, 294AA, 306X, 306ZI).<sup>801</sup>

Similarly, although it also decided against codification, the QLRC recommended legislation in relation to particular directions. As discussed in section 31.5.2, Queensland still retains the common law Longman direction. The QLRC recommended as follows:

The *Evidence Act 1977* (Qld) should be amended by the insertion of new provisions that state that:

- (1) if the court, on application by a party, is satisfied that the defendant has suffered a significant forensic disadvantage because of the consequences of delay in prosecuting a charge (including any delay in reporting the alleged offence), the court must inform the jury of the nature of that disadvantage and the need to take that disadvantage into account when considering the evidence;
- (2) significant forensic disadvantage is not established by the mere fact of delay alone;
- (3) warnings given in accordance with these provisions should not use the expressions 'dangerous or unsafe to convict' or 'scrutinise with great care';
- (4) the trial judge may refuse to give a warning or explanation if there are good reasons for doing so; and
- (5) warnings about the disadvantages suffered by reason of delay in prosecution (including any delay in reporting the alleged offence) may only be given in accordance with these new provisions.<sup>802</sup>

The QLRC also recommended, in relation to directions about unreliable evidence generally, that section 632 of the *Criminal Code* (Qld) should be amended to prevent the use of expressions such as ‘scrutinise with great care’, ‘dangerous to convict’ or ‘unsafe to convict’.<sup>803</sup>

In relation to Western Australia, we agree with the comment made by McClure P (with Buss and Mazza JJA agreeing) in 2014 in *Anderson v The State of Western Australia* that:

given the now proven magnitude of past sexual offending against children and the scepticism which allowed it to flourish, the time may have arrived to reassess the rationale for or terms of the warnings given in child sexual abuse trials.<sup>804</sup>

As we have made plain, in our view ‘the time’ has arrived. We believe that Western Australia should conduct a review of its judicial directions and warnings that are relevant to child sexual abuse trials.

We are satisfied that each state and territory should ensure that it has the following provisions in relation to judicial directions and warnings:

- **Delay and credibility:** Legislation should provide that:
  - there is no requirement for a direction or warning that delay affects the complainant’s credibility
  - the judge must not direct, warn or suggest to the jury that delay affects the complainant’s credibility unless the direction, warning or suggestion is requested by the accused and is warranted on the evidence in the particular circumstances of the trial
  - in giving any direction, warning or comment, the judge must not use expressions such as ‘dangerous or unsafe to convict’ or ‘scrutinise with great care’.
- **Delay and forensic disadvantage:** Legislation should provide that:
  - there is no requirement for a direction or warning as to forensic disadvantage to the accused
  - the judge must not direct, warn or suggest to the jury that delay has caused forensic disadvantage to the accused unless the direction, warning or suggestion is requested by the accused and there is evidence that the accused has suffered significant forensic disadvantage
  - the mere fact of delay is not sufficient to establish forensic disadvantage
  - in giving any direction, warning or comment, the judge should inform the jury of the nature of the forensic disadvantage suffered by the accused
  - in giving any direction, warning or comment, the judge must not use expressions such as ‘dangerous or unsafe to convict’ or ‘scrutinise with great care’.



- **Uncorroborated evidence:** Legislation should provide that the judge must not direct, warn or suggest to the jury that it is ‘dangerous or unsafe to convict’ on the uncorroborated evidence of the complainant or that the uncorroborated evidence of the complainant should be ‘scrutinised with great care’.
- **Children’s evidence:** Legislation should provide that:
  - the judge must not direct, warn or suggest to the jury that children as a class are unreliable witnesses
  - the judge must not direct, warn or suggest to the jury that it would be ‘dangerous or unsafe to convict’ on the uncorroborated evidence of a child or that the uncorroborated evidence of a child should be ‘scrutinised with great care’
  - the judge must not give a direction or warning about, or comment on, the reliability of a child’s evidence solely on account of the age of the child.

The current New South Wales and Victorian provisions discussed in section 31.3.1 provide precedents for consideration.

In relation to the Markuleski direction, we consider that the arguments against the direction are considerably more persuasive than the arguments in favour of it. We also note the legislation currently before the Victorian Parliament that, if enacted, will prohibit the Markuleski direction in Victoria. New South Wales, Queensland and any other states or territories in which Markuleski directions are required should consider introducing legislation to abolish any requirement for such directions.

### Recommendations

65. Each state and territory government should review its legislation and introduce any amending legislation necessary to ensure that it has the following provisions in relation to judicial directions and warnings:
  - a. **Delay and credibility:** Legislation should provide that:
    - i. there is no requirement for a direction or warning that delay affects the complainant’s credibility
    - ii. the judge must not direct, warn or suggest to the jury that delay affects the complainant’s credibility unless the direction, warning or suggestion is requested by the accused and is warranted on the evidence in the particular circumstances of the trial
    - iii. in giving any direction, warning or comment, the judge must not use expressions such as ‘dangerous or unsafe to convict’ or ‘scrutinise with great care’.

- b. **Delay and forensic disadvantage:** Legislation should provide that:
  - i. there is no requirement for a direction or warning as to forensic disadvantage to the accused
  - ii. the judge must not direct, warn or suggest to the jury that delay has caused forensic disadvantage to the accused unless the direction, warning or suggestion is requested by the accused and there is evidence that the accused has suffered significant forensic disadvantage
  - iii. the mere fact of delay is not sufficient to establish forensic disadvantage
  - iv. in giving any direction, warning or comment, the judge should inform the jury of the nature of the forensic disadvantage suffered by the accused
  - v. in giving any direction, warning or comment, the judge must not use expressions such as 'dangerous or unsafe to convict' or 'scrutinise with great care'.
- c. **Uncorroborated evidence:** Legislation should provide that the judge must not direct, warn or suggest to the jury that it is 'dangerous or unsafe to convict' on the uncorroborated evidence of the complainant or that the uncorroborated evidence of the complainant should be 'scrutinised with great care'.
- d. **Children's evidence:** Legislation should provide that:
  - i. the judge must not direct, warn or suggest to the jury that children as a class are unreliable witnesses
  - ii. the judge must not direct, warn or suggest to the jury that it would be 'dangerous or unsafe to convict' on the uncorroborated evidence of a child or that the uncorroborated evidence of a child should be 'scrutinised with great care'
  - iii. the judge must not give a direction or warning about, or comment on, the reliability of a child's evidence solely on account of the age of the child.

66. The New South Wales Government, the Queensland Government and the government of any other state or territory in which Markuleski directions are required should consider introducing legislation to abolish any requirement for such directions.

### 31.7.3 Improving information for judges and legal practitioners

There was widespread support in submissions for increased training and education for all those involved in child sexual abuse trials, including trial and appellate judges and legal practitioners.

Identifying the most effective means by which to provide increased training and education is the challenge.

An important benefit of introducing witness intermediaries, which we recommend in Chapter 30, is their role in educating judges and legal practitioners in the context of the particular trial and particular witness.

We also note the submission of PACT and the benefits it has identified in providing direct feedback to legal practitioners and the judiciary as follows:

PACT firmly believe the most effective education and training for lawyers is verbatim feedback directly from the children and young people who have interacted with the criminal justice system. Initiatives such as the Post Evidence Feedback Surveys provide information on how they child has seen their interaction with Police, Prosecutions, Defence, Judiciary, giving evidence and their overall court experience.<sup>805</sup>

While PACT provides this sort of feedback in Queensland, states and territories that do not have processes to obtain feedback from children involved in child sexual abuse trials as complainants or witnesses and to convey this feedback to the judiciary and legal practitioners should consider introducing processes such as that used by PACT.

Any measures to improve information for jurors, which we discuss below, should also be of assistance to the judiciary and legal practitioners.

The other area in which better information, or training and education, might be particularly useful is in assisting the judiciary and legal practitioners to understand and keep up to date with current social science research that is relevant to understanding child sexual abuse.

The Memory Research we commissioned and published provides up-to-date information about some relevant issues. The Memory Research is intended to contribute to the development of guidance for judges, magistrates and the legal profession, including through bench books and legal education.

There are a number of existing bodies that should provide significant leadership in ensuring that the relevant information and training is made available to the judiciary and potentially the broader legal profession. In particular, the following bodies already perform important roles in educating the judiciary and profession:

- the Australasian Institute of Judicial Administration
- the National Judicial College of Australia
- the Judicial Commission of New South Wales
- the Judicial College of Victoria.

Governments should ensure that these bodies are adequately funded to provide this leadership in making the relevant information and training available in the most effective forms to the judiciary and, where relevant, the broader legal profession.

We also consider that state and territory governments should support and encourage the judiciary, public prosecutors, public defenders, legal aid and the private Bar to implement regular training and education programs for the judiciary and legal profession in relation to understanding child sexual abuse and current social science research in relation to child sexual abuse.

### **Recommendations**

67. State and territory governments should support and encourage the judiciary, public prosecutors, public defenders, legal aid and the private Bar to implement regular training and education programs for the judiciary and legal profession in relation to understanding child sexual abuse and current social science research in relation to child sexual abuse.

68. Relevant Australian governments should ensure that bodies such as:

- a. the Australasian Institute of Judicial Administration
- b. the National Judicial College of Australia
- c. the Judicial Commission of New South Wales
- d. the Judicial College of Victoria

are adequately funded to provide leadership in making relevant information and training available in the most effective forms to the judiciary and, where relevant, the broader legal profession so that they understand and keep up to date with current social science research that is relevant to understanding child sexual abuse.

## 31.7.4 Improving information for jurors

### Expert evidence

Experiences of the value of expert evidence in child sexual abuse trials appear to differ widely across jurisdictions. We particularly note the use of expert evidence in the Australian Capital Territory and the benefits of this evidence that were identified by the DPP for the Australian Capital Territory.<sup>806</sup> We also note the limitations on the use and benefits of expert evidence identified by the New South Wales ODPP<sup>807</sup> and the Victorian DPP.<sup>808</sup>

Given issues such as cost, the difficulty in identifying suitable and qualified experts, and some uncertainty as to the extent to which expert evidence assists the jury, we do not consider that expert evidence is likely to be used in many, let alone most, child sexual abuse trials in Australian jurisdictions.

However, we see no reason why it should not be an available option in all jurisdictions in those trials where the prosecution considers that it might be useful and the issues of cost and the like can be overcome.

We are satisfied that provisions such as those in sections 79(2) and 108C of the Uniform Evidence Act make appropriate provision for the use of expert evidence.

In any state or territory where these provisions or their equivalent are not available, the relevant government should introduce legislation to allow for expert evidence in relation to the development and behaviour of children generally and the development and behaviour of children who have been victims of child sexual abuse offences.

#### **Recommendation**

69. In any state or territory where provisions such as those in sections 79(2) and 108C of the Uniform Evidence Act or their equivalent are not available, the relevant government should introduce legislation to allow for expert evidence in relation to the development and behaviour of children generally and the development and behaviour of children who have been victims of child sexual abuse offences.

### Judicial directions on child witnesses and child sexual abuse

We consider that judicial directions containing educative information about children and the impact of child sexual abuse would enhance justice for victims of child sexual abuse.

In *CMG v R*,<sup>809</sup> counsel for the accused had made submissions raising at least the possibility of the complainant being immature, very young, at risk of blending fantasy and reality, open to suggestions, at risk of being less reliable, and more easily influenced by adults; and not appreciating the full consequences of telling lies and more readily making false allegations.<sup>810</sup> In those circumstances, a trial judge may be concerned to ensure that juries are told that the research does not support these concerns in relation to children generally.

However, it is clear from *CMG v R* and the other cases we discussed in section 31.5.4 that it will be difficult for trial judges to assist juries by providing information about what is known from the social science research without specific legislative authority to do so.

Some interested parties submitted or gave evidence that the ALRC should be given a reference to consider any directions addressing myths or providing information other than via expert evidence.

As we noted in section 31.5.4, the ALRC has already recommended that such directions be authorised by legislation. The ALRC and NSW LRC stated in *Family violence: A national legal response* that there was a strong case for the use of jury directions which would ‘summarise a consensus of expert opinion drawn from the work of psychiatrists, psychologists and other experts on child behaviour’.<sup>811</sup> They recommended that governments should legislate to authorise jury directions about children’s abilities as witnesses and responses to sexual abuse.<sup>812</sup>

In its *Jury directions* report, the NSW LRC noted the recommendations made by the ALRC and NSW LRC in *Family violence: A national legal response* and stated that there is a case for developing a standard approach to judicial directions or comment on these matters.<sup>813</sup> It expressed the view that:

[These matters] are best dealt with on a national level, and in the light of empirical research. Research in Australia and overseas, as detailed above, shows that the public maintain misconceptions about children’s evidence that can be helpfully and properly addressed by expert evidence or by judicial directions. However, there would be a benefit in further study of this question on a national basis.<sup>814</sup>

The NSW LRC recommended as follows:

- (1) The NSW Government should ask the Standing Council on Law and Justice to consider the issue of the evidence of child sexual assault victims and their response to sexual abuse in the light of this report and the report of the NSW and Australian Law Reform Commissions on Family Violence, with a view to:
  - (a) commissioning further research on the issue of juror and public misconceptions concerning the reliability of the evidence of children and their response to sexual abuse; and

- (b) amending the uniform Evidence Acts to facilitate the reception of expert evidence concerning the reliability of the evidence of children and their response to sexual abuse, and/or clarifying the extent to which a judicial direction could be given in this respect.
- (2) The Criminal Trial Courts Bench Book should include a suggested direction concerning those aspects of childhood development and response to sexual abuse that may be relevant for an assessment of the reliability of the evidence of child sexual abuse victims.<sup>815</sup>

We are concerned that, in spite of these various recommendations, very little seems to have been done, apart from the new directions the Victorian Government has proposed be given in sexual offence trials in relation to inconsistencies in the complainant's account which we discussed in section 31.5.4.

The National Child Sexual Assault Reform Committee's recommended mandatory judicial directions, which we set out in section 31.5.4 above, have been available for consideration since 2010.<sup>816</sup>

These recommended directions, and the Victorian Government's proposed directions on inconsistencies in the complainant's account, appear to us to be balanced and quite uncontroversial.

However, we would not limit the third direction recommended by the National Child Sexual Assault Reform Committee in relation to children's responses to sexual abuse to those trials where the complainant is under the age of 16 years. The relevant age should be the age at which the abuse is alleged to have occurred and not the age of the complainant at trial – we know only too well that many victims and survivors will be adults before they are able to disclose their abuse. It seems to us that this direction should be given, at least at the request of the prosecution, in any trials involving child sexual abuse offences, including offences where the child was 16 or 17 years of age at the time of the alleged offending conduct and the offender is alleged to have been in a position of authority.

We are satisfied that directions such as these should be settled and authorised – and, indeed, required, at least if requested by the prosecution – by legislation as a priority. We do not consider that more research is needed. Of course, such directions should be kept under review and amended from time to time to take account of up-to-date expert knowledge and opinion.

We consider that governments should lead a process to consult the prosecution, defence, judiciary and academics with relevant expertise in relation to the directions, with a view to settling them and introducing legislation as soon as possible to authorise and require the directions to be given.

The National Child Sexual Assault Reform Committee's recommended mandatory judicial directions and the Victorian Government's proposed directions on inconsistencies in the complainant's account should be the starting point for consultation, subject to the removal of the limitation in the third direction recommended by the National Child Sexual Assault Reform Committee in relation to children's responses to sexual abuse so that it can apply regardless of the complainant's age at trial.

### **Recommendation**

70. Each state and territory government should lead a process to consult the prosecution, defence, judiciary and academics with relevant expertise in relation to judicial directions containing educative information about children and the impact of child sexual abuse, with a view to settling standard directions and introducing legislation as soon as possible to authorise and require the directions to be given. The National Child Sexual Assault Reform Committee's recommended mandatory judicial directions and the Victorian Government's proposed directions on inconsistencies in the complainant's account should be the starting point for the consultation process, subject to the removal of the limitation in the third direction recommended by the National Child Sexual Assault Reform Committee in relation to children's responses to sexual abuse so that it can apply regardless of the complainant's age at trial.

## **The timing of giving judicial directions**

In section 31.5.4, we discussed the reports that informed the Victorian reforms in relation to the timing of jury directions, and the approach adopted in the *Jury Directions Act*. There is considerable merit in allowing the trial judge to give directions at any time before the close of evidence at the discretion of the judge and requiring some directions to be given at particular times – generally earlier than might otherwise occur – in the trial. This approach is adopted in relation to evidence given using special measures, and research indicates that it would be of assistance to juries if used more generally.

This approach to the timing of giving directions might also assist juries by encouraging the parties to clearly identify the issues early in the trial. The parties will need to do this so that they can assist the judge to identify appropriate directions. There may also be a benefit in helping juries to maintain a more consistent focus on the main issues.

Both the NSW LRC<sup>817</sup> and QLRC<sup>818</sup> made recommendations designed to ensure the issues are identified for the jury from the outset of the trial. Among other measures, the QLRC recommended that:



- the jury should be informed as early as is practicable of the issues that it will have to decide, the issues that have been admitted or are not in dispute, and the overall context in which the issues arise<sup>819</sup>
- the *Criminal Code* (Qld) should be amended to allow the judge to address the jury at any time on:
  - the issues that have arisen or are expected to arise
  - the relevance of any admissions, directions or matters determined before the trial commenced
  - any other matter relevant to the jury in performing its functions and understanding the trial process<sup>820</sup>
- the *Criminal Code* (Qld) should be amended to allow the trial judge to order that the jury be given copies of relevant documents and other material to help the jury understand the issues or evidence in the trial.<sup>821</sup>

In advance of any more general codification of judicial directions, state and territory governments (other than the Victorian Government) should work with the judiciary to identify whether any legislation is required to permit trial judges to assist juries by giving relevant directions earlier in the trial (in addition to repeating them as required at the end of the trial) or to otherwise assist juries by providing them with more information about the issues in the trial. If legislation is required, state and territory governments should introduce the necessary legislation.

### **Recommendation**

71. In advance of any more general codification of judicial directions, each state and territory government should work with the judiciary to identify whether any legislation is required to permit trial judges to assist juries by giving relevant directions earlier in the trial or to otherwise assist juries by providing them with more information about the issues in the trial. If legislation is required, state and territory governments should introduce the necessary legislation.

## **Providing educational material to juries**

We note that the Victorian Government was unable to give any indication yet as to the effectiveness of the jury guide it is currently trialling. The outcomes of the Victorian trial should be of interest to all states and territories.

We also note the evidence given by representatives of the New South Wales Government about the information currently provided to jurors or prospective jurors in that state. In its *Jury directions* report, the NSW LRC referred to brochures, a handbook and a DVD. It referred to the provision of more information on the Office of the Sheriff's website and to reforms in progress to standardise induction procedures and simplify documents relating to jury duty.<sup>822</sup> The NSW LRC stated:

we understand that provision of the Juror Handbook to jurors after empanelment does not always occur since some judges do not authorise its use in their courts. The reason for that reluctance is not clear to us as the handbook is, on our assessment, accurate and informative.

In our view, much can be achieved at the orientation stage in preparing jurors for the task ahead through the provision of information concerning the trial process and their responsibilities. The information provided by the Office of the Sheriff potentially plays an important role in this respect. So too does the provision of advice by the judge following empanelment, a subject that is covered by a suggested direction contained in the *Criminal Trial Courts Bench Book* ('Bench Book').

We support the continuing refinement of the information that is provided to jurors during the orientation process, and are of the view that the jury handbook should be routinely provided to jurors and be available for reference during the trial.<sup>823</sup> [Reference omitted.]

The material in Victoria and New South Wales is general and is not directed at material that is specifically relevant to child sexual abuse trials.

We note that the views of interested parties were mixed as to the benefits or otherwise of providing video or other material to the jury, particularly in relation to material about child sexual abuse.

At this stage, we consider that providing legislative authority for the trial judge to give judicial directions on child witnesses and child sexual abuse is preferable to developing additional educational materials to assist juries. Further, ensuring that legislation permits the use of expert evidence in appropriate cases enables the jury to be assisted by evidence that is particularly relevant to the particular circumstances in the relevant trial.

## 32 Delays and case management

### 32.1 Introduction

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Many survivors have told us in private sessions of their experiences in participating in criminal trials. In a number of our public hearings, we have also heard evidence about the experiences of victims and their families and survivors in court processes. A number of submissions to *Issues Paper No 8 – Experiences of police and prosecution responses* (Issues Paper 8) also told us of personal and professional experiences of prosecution responses during the trial stage of the prosecution.

We have heard of both positive and negative experiences. Regardless of whether the overall experience was positive or negative, many of those from whom we have heard have raised concerns about delays. Even where the prosecution ultimately results in a successful outcome for the complainant, a number of complainants have told us of the distress they and those close to them suffered, sometimes for years, while the prosecution took its course.

For example, in Case Study 38 we considered the prosecution of Philip Doyle, who was ultimately convicted of 38 child sexual abuse charges against five complainants. We heard evidence from Mr Mark Lawrence, one of the complainants, who said:

The total length of time of the criminal proceedings also took its toll on me. It took 10 years from my initial report to police for Doyle to be charged. It then took three years for Doyle to be convicted, and another two years for Doyle's appeals to be dismissed. This is a total period of 15 years. This prolonged my stress and frustration ... The criminal process also had a financial impact on me. I used to own a mechanical workshop in New South Wales which I had to close for months at a time due to all the court hearings. By the time Doyle was finally imprisoned, I was owing tens of thousands in rental arrears. By the time the High Court appeal was over, I had lost my business.<sup>824</sup>

A number of factors may contribute to the time it takes to complete a prosecution. These include some of the issues discussed in Chapter 20, including lack of continuity in the prosecution team; and late charge negotiations and guilty pleas. Approaches that may assist to address delay include the early allocation of prosecutors and case management processes within the courts.

Every state and territory has a different court structure and different procedural rules for dealing with criminal proceedings. The structures and rules affect not only child sexual abuse prosecutions but also all other criminal matters. While child sexual abuse matters are often given priority in the criminal justice system, including by the courts, we appreciate that the system must operate as effectively as possible to deal with all criminal proceedings.

As we observed in the Consultation Paper, it is probably unrealistic to think that we could recommend particular structures or processes that would be effective in eight states and territories, each with its own different system. However, there seem to be common themes and elements that might contribute to reducing delay and creating more efficient court processes and case management. In the Consultation Paper, we suggested that these warranted further consideration.

Delays might increase if court processes and case management do not become more efficient or if resources are not increased for the courts, prosecution and defence or both. We have been told that the Royal Commission and particularly our public hearings have encouraged more survivors to come forward and report to police. We have also referred matters to the police and are aware that some of these have resulted in prosecutions.

It is also likely that the recommendations we make in this report, if implemented, will encourage more victims and survivors to seek justice through the criminal justice system. While some of these recommendations might also have the effect of achieving more efficient prosecution responses, we must be alive to the possibility that the courts, prosecution and defence will face increased demands in responding to child sexual abuse.

It would reflect well on the criminal justice system that more victims and survivors are willing to engage with it in seeking justice. It will be important that the criminal justice system does not fail or discourage those who wish to seek justice by not keeping up with demand.

In the Consultation Paper, we discussed some possible options to address delays in prosecutions and we sought submissions on those options, and any other options, to address delay.

## 32.2 The extent and impact of delay

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In most Australian jurisdictions, courts publish data on backlogs of criminal matters, usually expressed as the number of matters that are yet to be finalised with a life greater than 12 and 24 months. An upward trend in these numbers serves as an indication either that the number of prosecutions initiated in the court outstrips the capacity of the court to dispose of those matters or that the average duration of criminal trials is increasing, or in many cases both. However, these statistics do not give any indication of the length of delays in the court system.

To illustrate the length of delays, the Consultation Paper outlined data from New South Wales and Victoria. We have now included updated data, where available.

In New South Wales, the Bureau of Crime Statistics and Research (BOCSAR) tracks delay for all matters finalised in the District Court. It records the median number of days between the date of arrest and the committal hearing in the Local Court and between the committal hearing and the outcome.

BOCSAR statistics show a significant upward trend in delays for matters finalised by trial in recent years, with median delays from committal to outcome recording steady increases from 2010 as follows:

- 2010: 226 days
- 2011: 234 days

- 2012: 243 days
- 2013: 288.5 days
- 2014: 328 days
- 2015: 348 days
- 2016: 378 days.<sup>825</sup>

Given that matters in New South Wales currently spend approximately 230 days in the Local Court before the committal process is completed, this suggests that a typical complainant in a District Court matter can expect a wait of more than 18 months from the charging of the accused until there is an outcome. The District Court's 2015 annual report stated that the registration of criminal trials rose by 16.5 per cent in that year. Despite an increase in trial finalisations of 13 per cent during 2015, there were 2,014 pending trials at the end of 2015 compared with 1,716 in 2014 and 1,019 in 2011.<sup>826</sup>

In Victoria, the Criminal Division of the County Court provides updates on the indicative time to trial from the initial directions hearing to the commencement of a trial for matters in Melbourne. The initial directions hearing occurs on the next sitting day after an accused is committed for trial, or later the same day if this is requested and is possible. As at January 2017, the time to trial was eight months for all trials in which the defendant was in custody. For other matters, the time to trial ranged from nine months for a matter with an estimated duration of five days to 10 months for a trial with an estimate of 15 days.<sup>827</sup> Comparable data is not published for regional areas.

Some submissions in response to the Consultation Paper gave an indication of the delays in other jurisdictions:

- In Queensland, Protect All Children Today (PACT) stated that 18 months to two years was a typical time frame in child-related matters between arrest and the prerecording of evidence.<sup>828</sup>
- In the Australian Capital Territory, ACT Policing stated that, at the time of writing (September and October 2016), the waiting time for a Supreme Court trial in the Australian Capital Territory was between 18 months and two years. ACT Policing submitted that this wait could be extremely difficult for victims and in some instances detrimental to their health. It also stated that some detainees cited section 22(2)(c) of the *Human Rights Act 2004* (ACT), which confers a right to be tried without unreasonable delay, when applying for bail.<sup>829</sup>

The research report *The impact of delayed reporting on the prosecution and outcomes of child sexual abuse cases* (Delayed Reporting Research) analysed 20 years of data from New South Wales and South Australia. The researchers' analyses show that from 1994 to 2014:

- in the New South Wales higher courts, the average time from committal to finalisation for sexual offences was 9.9 months, with a median time of eight months<sup>830</sup>
- in the South Australian higher courts, the average time from first appearance to finalisation was 5.8 months, with a median of four months.<sup>831</sup>

As these periods of delay reflect 20 years of data, they may understate the current time frames.

We understand that the issue of delay may be less significant in smaller jurisdictions, although they may be subject to greater variability, as courts in these jurisdictions may be less able to absorb the impact of a small number of unusually long trials.

The data discussed above shows that delays are significant in Australia's two largest jurisdictions. There are reasons to fear that, without change, it may get worse. As noted by the Victorian County Court in its 2012–2013 annual report, it is probable that more prosecutions of historical child sexual abuse matters will emerge as a direct result of the work of this Royal Commission.<sup>832</sup> The 2014–2015 annual report of the Victorian Office of the Director of Public Prosecutions (ODPP) records that the Victorian Director of Public Prosecutions (DPP) also expects that the work of this Royal Commission will result in an increase in historical sex offence cases being referred to his office for prosecution.<sup>833</sup>

According to data recorded by the Australian Bureau of Statistics, the number of sexual assault reports in 2015 was the highest in six years.<sup>834</sup> Support workers and advocates have suggested that, rather than indicating an upward trend in sexual violence, this may be attributable to increased reporting by victims following decades of under-reporting. The Chief Executive of the Sexual Assault Support Service Tasmania, Ms Jill Maxwell, was reported as saying that increased public discussion of sexual and family violence through forums such as this Royal Commission appears to have increased victims' confidence in police.<sup>835</sup>

Given the increased public awareness of child sexual abuse in institutional contexts arising from media coverage of our ongoing work as well as any reforms that governments may adopt based on our recommendations, it seems likely that Australian jurisdictions will experience an increase rather than a decrease in reports of historical child sexual abuse.

In 2013, the Victorian County Court noted that the criminal trials that arise from such reports are likely to be legally complex and that the current resources of the court were unlikely to match the community demand for speedy disposition of such cases.<sup>836</sup> Some of the recommendations we make in this report, if adopted, should reduce some of the legal complexity of these cases, but it is likely they will continue to be complex cases for the courts.

Sexual offence matters already make up a significant proportion of court workloads in Australia. In the Victorian County Court, they made up 23 per cent of criminal initiations in the court and 40 per cent of trials during the period 2014–2015.<sup>837</sup> Of the sex offence matters initiated during this period, 31 per cent involved a child complainant or witness.<sup>838</sup>

Similarly, in the District Court of New South Wales, sexual assault trials made up approximately 25 per cent of criminal trial registrations in 2015, with 62 per cent of these involving child sexual assault.<sup>839</sup> The number of sexual assault trials registered increased from 434 in 2013 and 472 in 2014 to 549 in 2015. Of the 549 trials registered in 2015, 341 trials involved child sexual assault compared to 252 in 2013 and 291 in 2014.<sup>840</sup>

For the Victorian ODPP, 20 per cent of new matters prosecuted in 2014–15 were sexual offences,<sup>841</sup> and we have heard anecdotal evidence that prosecution agencies in other jurisdictions face similar percentages of sexual offence matters.

Under these circumstances, even a moderate increase in reports of child sexual abuse is likely to test court systems and prosecution and public defence agencies. Unless governments are proactive about reducing delays in the criminal justice system, there may be significant consequences for the administration of justice in those jurisdictions where delays are already significant.

In sexual assault cases, including child sexual abuse cases, a lengthy delay between charge and trial can contribute to complainant attrition – where prosecutions are discontinued based on the victim’s wishes.<sup>842</sup> As noted in Chapter 20, the prosecution guidelines in some jurisdictions state that requests from the complainant to discontinue a sex offence prosecution are to be accorded significant weight. Even in the absence of such guidance, the nature of many sex offence prosecutions means that there will often be no reasonable prospect of securing a conviction where the complainant is unwilling to give evidence.

A review of recent annual reports published by the New South Wales ODPP shows that the wishes of the victim were the primary reason why it discontinued proceedings, with some 25 to 36 per cent of matters discontinued after committal for that reason.<sup>843</sup> While it is unclear what proportion of those discontinuances were attributable to delays, it is likely to have been a factor in some of those matters.

Delays in the court system can have a negative impact on a victim’s recovery from crimes.<sup>844</sup> Many victims may not have a realistic understanding of how long the prosecution process takes, and they may take the perceived unresponsiveness of the system personally.<sup>845</sup>

Delays can have a ‘rollercoaster effect’ on complainants: they prepare, under significant stress, for a hearing, only to have the trial adjourned, and they then have to prepare again for the new date.<sup>846</sup> The criminal justice process may also be counter to the counselling the complainant is receiving, which may involve putting the abuse behind them, while preparing for a trial requires the complainant to remember the abuse in great detail.<sup>847</sup>

The impact of delays may be amplified for young complainants:

[There is] a need to see the accused convicted and to thereby receive validation. However this need is at odds with their worst fear that the accused will be exonerated and they will be named a liar. In addition, there is the wish to put the abuse behind them so they can move on with their lives and yet again, until trial, the children must constantly recall details in order to ‘remember’ as much about [their] sexual abuse experience as possible for their appearance in court. The longer the period between reporting and trial, the longer the child must live with such immense inner conflict.<sup>848</sup>

Delays affect not only the complainants but also their families. In Case Study 38, we heard evidence of the difficulties faced by families in a number of cases when children disclosed abuse and their parents were told not to discuss the matter with them for fear of contaminating the child's evidence.<sup>849</sup> These difficulties are exacerbated by delays in bringing a matter to trial, as it extends the period when parents may not be allowed to discuss with their children incredibly traumatic experiences that they, reasonably, fear will do their children long-term harm if not addressed.

In Case Study 38, we also examined the prosecution of CDV – a teacher at an independent school in Perth. In 2009 he was charged with 18 child sexual offences against five complainants, including CDX. He was convicted in June 2010 of 13 counts and was sentenced to imprisonment for five years with a non-parole period of three years. He appealed the conviction and sentence in September 2010. The Western Australian Court of Appeal set aside the convictions for six counts, including those relating to CDX, in December 2011. After a retrial in August 2012, CDV was again convicted on these six counts and the original sentence was not altered.

For CDX, this was a period of almost three years from reporting to outcome. During Case Study 38, we heard evidence from CDW, CDX's mother:

The sexual abuse suffered by [CDX] and the entire legal process has had a dreadful impact on our family. We were unable to discuss aspects of the police investigation and criminal proceedings for fear of corrupting [CDX]'s evidence or jeopardising the case. This was very isolating and destructive for our family relationships at a time when we were most vulnerable and in need of support. I have also suffered deep depression and terrible bouts of guilt for failing to act more decisively on my initial concerns and suspicions. The whole ordeal has put enormous strain on my marriage.

The first trial was scheduled in the middle of [CDX]'s university exams because the DPP misplaced the availabilities we provided when the trial was scheduled. [CDX] was stressed and found it difficult to study which caused further trauma in his life. The re-trial exacerbated the damage and shattered my faith in the legal system.<sup>850</sup>

In Case Study 12, CDX gave the following evidence under the pseudonym WP:

It was such a tough time leading up to the first trial because I was confronting something that was hidden for such a long time. Having to be so detailed about the abuse and honest in front of a lot of people in an open courtroom was very intimidating. Then to find out there was going to be an appeal was heartbreaking.

When I had to give evidence at the second trial, it just brought up everything again – all the hurt and bad memories. By that stage, I was ready to leave those terrible facts behind me and move on, but I had to bring it all up again. I almost couldn't go through with it again.<sup>851</sup>



The Delayed Reporting Research provides a number of case studies which illustrate the extent and impact of delays in prosecutions. For example:

- Case study 5 in the Delayed Reporting Research involved a case listed in the New South Wales District Court. The two male complainants of child sexual offences were required to attend court on a Tuesday. Legal argument about trial severance was expected but could not be heard on the day, as no judge was available. They were told to return the next day, and then again on the next day, due to the lack of a judge. On the third day, a judge was allocated, legal argument was heard and the trials were separated, with one complainant's trial commencing that afternoon and the other listed seven months later. Both trials resulted in hung juries and the prosecutions were discontinued, as neither complainant wished to continue.<sup>852</sup>
- Case study 3 in the Delayed Reporting Research involved delays in a summary matter. Charges of indecent assault of a 16-year-old complainant were prosecuted in the New South Wales Local Court. The report to police was made in September 2013, and the accused was arrested one month later. The first mention at court was one month after the arrest and the first day of the hearing was six months after that, but the complainant did not commence giving evidence. The second day of the hearing was a further six months after the first day of the hearing. While the complainant completed her evidence in chief on that day, the matter was adjourned for a further six months before she could be cross-examined, as the defendant was reported to be unwell. The cause of the delays was simply that those were the first available court dates.<sup>853</sup> This represents an 18-month period from the first mention in court to the most stressful part of criminal proceedings for complainants: the cross-examination. The complainant's evidence was not completed until six months after she started giving evidence, or 12 months after the first day of the hearing.

Some submissions in response to the Consultation Paper and some witnesses who gave evidence in the public hearing in Case Study 46 commented on the impact of delays on complainants.

People with Disability Australia (PWDA) expressed support for our consideration of the impact of delays on complainants:

PWDA is pleased that the Royal Commission is giving due weight to the issue of prosecutorial delays, given that they have such severe impacts on victims, and can lead to significant problems of complainant attrition. It is also important to note that many victims take a long time to disclose, and substantial wait times for trial can be particularly trying.<sup>854</sup>

Victoria Legal Aid (VLA) stated that in September 2014 it had conducted a review of its funding of criminal appeals against sentence to the Victorian Supreme Court of Appeal. It submitted that consultations with victims identified a common theme of system delay as an additional and often unrecognised trauma to victims and their families:

Whilst delay can be taken into account in reducing sentence for offenders, victims did not feel that delay was taken into account in terms of the impact it has on them and their families. Our review highlighted the need for criminal justice stakeholders to work together more effectively to ensure victims are appropriately informed and included in appeal processes, in recognition of their rights under the *Victims Charter Act 2006* (Vic) and the *Sentencing Act 1991* (Vic).<sup>855</sup>

Other submissions highlighted how the uncertainty arising from delays, which the complainant has little control over, may exacerbate the stress of participating in the criminal trial process.<sup>856</sup> We have been told that survivors are often left in a heightened state of arousal during the police and prosecution process, and that the wait can be more distressing for victims than knowing the outcome, even if the outcome is not what they were hoping for.<sup>857</sup>

Mr Craig Hughes-Cashmore, representing the Survivors & Mates Support Network (SAMSN), told the public hearing in Case Study 46:

the delays for victims are a huge issue. It is incredibly stressful. I can't recollect one instance where I've seen a trial start on the day that it was first mooted. That never happens, to my knowledge. They are always put off, for various reasons, and many times, for years and years at a time. I mean, people have talked about months, but I've seen years. I've seen up to six years. I've seen such delays brought about that have enabled the defence to come up with whole new strategies around actually stopping that trial going ahead – for instance, the health of the perpetrator or alleged perpetrator.<sup>858</sup>

During the public hearing in Case Study 46 we also heard from FAA, a complainant in a trial which took place in April 2016 – more than 18 months after the committal hearing in August 2014 and more than four years after the matter was initially reported to police:<sup>859</sup>

Going through the criminal justice system was extremely difficult and traumatic. One of the hardest parts I struggled with was that it was a long process that took four years of my life. There were many adjournments and postponements, which were not explained to me properly. I felt that this caused me great anxiety and lots of stress as I was preparing myself for court dates and they kept getting postponed.<sup>860</sup>

He described the impact of the process on his work life:

I believe that my anxiety and stress resulted in me losing jobs. At the time, I told my boss that I was required to give evidence in court. At first he was supportive, but as the court dates approached, I was getting more anxious and stressed and he could see that. I think this ultimately affected my performance and gave him a reason to let me go.<sup>861</sup>

He also described the impact of the process on his family life:

I turned to alcohol to cope with the long, drawn-out court process and the disappointment of the trial. The court process affected my relationship with my family. As I mentioned earlier, I became anxious and stressed thinking about the proceedings to the point that my wife didn't want to hear about it anymore.<sup>862</sup>

On delays in general, FAA stated:

There should be more consideration to ensuring that the criminal process is not drawn out. It is really traumatic having to recall the abuse, but it does not help reduce the trauma when it takes four years from providing a statement to go to trial.<sup>863</sup>

The evidence provided by FAA highlights many of the ways in which delays in the criminal trial process affect the lives of complainants. These include practical consequences for complainants, such as time taken away from work or study. Mr Hughes-Cashmore told the public hearing:

I think it's hugely difficult for survivors, particularly when, for instance, they might be brought from interstate, if they are living interstate from where the abuse has happened, they are sitting around in hotel rooms for days at a time, being told every day, 'We're going to have a courtroom tomorrow; we're going to have a judge tomorrow; it will start tomorrow.' They are not sleeping, and then at the end of that week they're told, 'Actually, this isn't going to happen' and they get sent back interstate and that costs them their holiday leave entitlements and can have impacts on their working life, can have impacts on their family life. It's a huge issue.<sup>864</sup>

The joint submission in response to the Consultation Paper from SAMSN and Sydney Law School described the effect of delays and repeated preparation for the hearing on complainants:

Each time, child witnesses and adult survivors need to prepare for the hearing, 'gear themselves up', and remember and be ready to recount traumatic experiences in stressful circumstances, only to be let down by the system. This takes a heavy toll and has resulted in mental distress, suicidal thoughts and withdrawal from the process.<sup>865</sup>

Some submissions also commented on the potential for the impact of delays to be amplified for young complainants. The submission by PACT set out feedback they had received from child complainants, including 'It's hard trying to remember when giving evidence because it's been so long' and 'Scary and emotional – long delays'.<sup>866</sup>

We heard during the public hearing in Case Study 46 that very young child victims are particularly vulnerable to the adverse impacts of lengthy delays at court.<sup>867</sup> While the time between an initial report to police and an outcome at trial, typically measured in years, is onerous for adult complainants, for young complainants they can represent a significant proportion of their lives spent in the shadow of a criminal prosecution. Ms Joanne Bryant, representing PACT, told the public hearing 'it's a very long time and a long proportion in a child's life where they are in limbo, essentially, waiting for the court process to happen'.<sup>868</sup>

Similarly, we have heard that delays can have greater impacts on people with disability.

PWDA submitted:

For some, this may be because their memory may become less clear with time. For others, the impacts of waiting can exacerbate the psychosocial disability (arising from mental illness) which frequently attends trauma. It is also important to note that many people with disability face ongoing discrimination in other facets of their lives, and dealing with multiple legal matters is both common and may exhaust their resources.<sup>869</sup>

We have also been told that court delays affect not only victims of crime whose matters are currently before the courts but may also have an impact on future victims and witnesses.

Mr Michael O’Connell APM, the South Australian Commissioner for Victims’ Rights, submitted:

Court delays also undermine public confidence in the system’s ability to deliver timely justice – thus the common expression, justice delay [sic] is justice denied. People might be reluctant to report crime and be witnesses at trials if they assume the delay (hence the personal toll) will be too great.<sup>870</sup>

Some of the measures we discussed and recommended in Chapter 30 are designed to address the delays between reporting and giving evidence. However, even with such measures, the time taken to complete a prosecution is likely to continue to be a significant source of distress for complainants. It is likely to cause some complainants to withdraw before the prosecution is concluded.

Jurisdictions experiencing significant delays may already be close to the limits of what many complainants can bear without withdrawing from prosecutions. As we suggested in the Consultation Paper, it may be particularly important in these jurisdictions to consider any measures that might at least stop the delays from getting worse.

## 32.3 Causes of delay

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### 32.3.1 Identifying the causes of delay

The issue of delays in criminal courts has long been a concern of Australian governments. Public agencies have conducted reviews of the causes of delays and possible solutions over the past few decades. Many of those reviews have been conducted in New South Wales, where concerns about court delays emerged earlier than in other jurisdictions.

A paper by the New South Wales Parliamentary Library Research Services notes that, as early as 1976, the New South Wales Law Reform Commission (NSW LRC), in a working paper it prepared on the courts, identified management problems contributing to delays.<sup>871</sup> The first major review

of the issue in New South Wales was undertaken in 1988 and 1989, when widespread criticism of court delays prompted the government to commission Coopers & Lybrand to conduct an independent review of the New South Wales court system.<sup>872</sup>

This review found:

There is no single cause, or even group of causes, that can be identified as representing the main problem. This complicates the task of remedying the present situation, because it requires coordinated and integrated action.<sup>873</sup>

While it might not be possible to identify a single primary cause of court delays, it may be possible to divide the causes of delay into two broad categories:

There are system delays – the inability of the court to provide an early date for every case as soon as it is ready for trial; and there are party delays – the failure by the parties to the litigation to get the case ready for trial as soon as reasonably possible.<sup>874</sup>

In 2007, the Australian Institute of Criminology (AIC) produced a report on court delays which focused on causes of delay which contribute to criminal trials not proceeding on the day they are initially listed, because, when a trial does not proceed as scheduled, it contributes to both ‘system’ and ‘party’ delays.<sup>875</sup>

The AIC report considered court data from all Australian jurisdictions for the months of April and May 2006. It found that more than half of all listed trials did not proceed on the day of listing, with actual figures ranging between 61 and 86 per cent.<sup>876</sup>

The most common reasons for a matter not proceeding on the listed date were:

- late finalisations, where the accused entered a plea or guilty or the prosecutor discontinued the prosecution shortly before or on the day of the trial
- an adjournment sought by one of the parties
- the matter not being reached by the court.<sup>877</sup>

### 32.3.2 Immediate causes of delay

#### Late finalisations

The AIC report found that late finalisations accounted for more than half of all matters that did not proceed, with late changes to a plea of guilty accounting for up to 89 per cent of matters finalised on the trial day.<sup>878</sup>

We discuss the value of guilty pleas to the criminal justice system in section 32.5.4, recognising that they can result in the efficient resolution of a matter without the community bearing the cost of a trial. However, late guilty pleas can contribute to inefficiencies, as judicial and courtroom resources allocated for the trial may be wasted.

While it may be possible for listing officers to replace a matter resolved by a late guilty plea with another trial, court time will be lost if another trial cannot be listed on short notice. Most court services staff who provided input into the AIC report nominated periods in excess of three weeks as sufficient time to arrange a replacement trial, with the reality being that many gaps in the listing schedule created by late finalisations remain.<sup>879</sup>

The resource implications of late guilty pleas extend beyond the courtroom and judicial resources allocated for the trial. For the courts, where a plea of guilty is entered or a prosecution is withdrawn after a trial date has been set, the matter would already have been:

- mentioned on multiple occasions
- the subject of committal proceedings or equivalent proceedings in jurisdictions that have abolished committals
- arraigned in the trial court
- listed for trial.

It is not uncommon for guilty pleas to be entered on the day of the trial. In these matters, a jury may already have been empanelled.<sup>880</sup>

For those working in the criminal justice system, including police, prosecutors and legal aid lawyers, late guilty pleas may represent significant wastage, as already limited resources are likely to have been expended in preparing for a trial that does not eventuate.

The AIC report found that one of the most common reasons cited for the prevalence of late guilty pleas was last-minute charge negotiations between the defence and prosecution. The second most common reason was the reluctance of some defendants to enter a plea of guilty until the last minute.<sup>881</sup>

While they account for a far smaller proportion of matters that do not proceed on their listed trial date, late withdrawals by the prosecution have the same resource implications as late guilty pleas.

We discussed discontinuances by the prosecution in Chapter 20. Two common reasons why prosecutions may be withdrawn late in the proceedings are weaknesses in the prosecution evidence being identified that were not identified earlier and the victim no longer being willing to participate in the prosecution.

## Adjournments by a party

In addition to matters that were finalised late in the proceedings, the AIC report found that approximately one in five matters that did not proceed on the listed dates were adjourned and re-listed for trial.

Adjournments fell into two broad categories:

- adjournments resulting from the inability of one of the parties to proceed on the day of the listing
- adjournments resulting from the court's inability to proceed as scheduled.<sup>882</sup>

The most consistent finding as to the reasons for adjournments were the availability – effectively the unavailability – of a key participant on the trial day, including the defendant, a prosecution witness or counsel for the defence or prosecution.<sup>883</sup> Another reason for adjournments was the lack of preparedness of parties, including counsel not having adequate time to prepare a matter or the late identification of issues of fact that required further investigation.<sup>884</sup>

The AIC report stated that adjournments may also be sought by a party where preliminary hearings relating to the admissibility of evidence were required before the trial could proceed. Late applications for such procedures often result in the adjournment of the trial until the preliminary hearings have been completed.<sup>885</sup>

## Matters not reached by the court

Some matters are adjourned and re-listed due to the court's inability to proceed with the matter as scheduled. Sometimes, this may be caused by the court's inability to provide services that are necessary for a particular trial, such as interpreting services or closed circuit television (CCTV), or the unexpected absence of court personnel.<sup>886</sup>

Some matters may not be reached due to over-listing by the court. In the interests of efficiency, courts often list a number of matters to commence on the same day on the pragmatic assumption that many matters will be discontinued or resolved by a plea of guilty shortly before or on the day of the trial. This is known as 'over-listing'. On occasions where the necessary number of matters are not resolved before trial, some listed matters may be not reached, leading to an adjournment.

However, over-listing may not be efficient. The AIC report assessed listing practices using data provided by the District Court of Queensland and stated:

For the six week period between March and May 2006, there was an average of six trial judges available for 27 sitting days per week. An average of 26 trials were listed for a total of 75 sitting days per week. Each week the court was over-listed by a factor of 2.8.

... only 14 percent of listed matters in the Queensland District Court proceeded to trial (equivalent to an average of four trials per week). Each week 10 sitting days were utilised for the four trials that actually proceeded. This means that although engaged in a practice of over-listing, which sees almost three times the number of sitting days scheduled than are available, the court sits for only an average of one third of the time it has allocated.<sup>887</sup>

The AIC report suggested that the practice of over-listing matters for efficiency while minimising the number of matters not reached was an inexact science that requires complex calculations.<sup>888</sup>

### 32.3.3 Underlying causes

The overwhelming majority of those who were consulted for the AIC report noted that the number of matters that fail to proceed was at unacceptably high levels, with both guilty pleas and withdrawals entered far later than desirable and adjournments requested more often than necessary.<sup>889</sup>

There are a number of reasons for the occurrence of late finalisations, adjournments and matters not being reached. These include:

- **Late allocation of counsel:** It is difficult for publicly funded prosecution and defence agencies to retain a sufficient number of full-time practitioners with the experience necessary to thoroughly assess a brief. This means senior counsel are not involved until shortly before the trial, contributing to late negotiations and the late identification of issues.<sup>890</sup>
- **Prosecution case and charge uncertainty:** As a result of the late allocation of counsel, it is not uncommon for the prosecution case or the charges on the indictment to be modified close to the trial date. Such changes make it difficult for the defence to assess their client's position and act as a disincentive to early charge negotiations.<sup>891</sup>
- **Limited communication between the parties:** Cases are most likely to proceed without delay where both the Crown and the defence have communicated about the facts and the evidence surrounding the case.<sup>892</sup>
- **Failure by the parties to narrow the issues in dispute as early as possible:** Failure to identify the real points of contention increases the time required to prepare for a trial, the likelihood of delays or adjournments in order to resolve pre-trial arguments, and the duration of the trial itself.<sup>893</sup>



- **Trial uncertainty:** The high probability that a matter will not proceed on its listed date acts as a disincentive to the parties to devote resources to preparation, contributing to late negotiations and the late identification of issues requiring pre-trial determinations.<sup>894</sup> This in turn creates further uncertainty as well as contributing to practices such as over-listing.

This suggests that there are a number of causes of delay which interact with each other in complex, circular and sometimes self-perpetuating ways. Given these interactions, it is possible that seeking to address a number of these issues at the same time may lead to more favourable results.

## 32.4 Examples of current approaches

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In the Consultation Paper, we outlined a number of recent reforms and different approaches of which we were then aware which had been adopted in some states and territories in order to improve the efficiency of trials and to reduce delays. We received additional information in submissions in response to the Consultation Paper and in evidence in the public hearing in Case Study 46.

### 32.4.1 New South Wales

#### Mandatory pre-trial disclosure

In New South Wales, Division 3 of Part 3 of the *Criminal Procedure Act 1986* (NSW) contains provisions, introduced in 2009 and amended in 2013, that set out procedures for mandatory pre-trial disclosure by the prosecution and defence as well as powers for the court to order pre-trial hearings and pre-trial conferences.

The measures were a result of the work of the Trial Efficiency Working Group, which was established to identify the causes of the unnecessary length of criminal trials and to evaluate possible solutions. The working group identified a number of issues that contributed to delays, but of particular relevance here are the late identification of the issues to be determined at trial and the late appointment of prosecutors.<sup>895</sup>

The working group recommended amendments to the *Criminal Procedure Act 1986* (NSW) to provide for a level of disclosure between the parties as well as the ability of the court to order pre-trial hearings and pre-trial conferences. These recommendations were designed to ensure issues were identified early and narrowed between the prosecution and the defence so that they did not prevent the trial from proceeding when it was set down to start or cause delays during the conduct of the trial.

Defence disclosure requirements were initially limited but were expanded in 2013 following a review of the provisions in 2012 which found that, while case management was adhered to in the Supreme Court, compliance was much lower in the District Court.<sup>896</sup> They now include a requirement to disclose to the prosecution any legal defences to be relied upon and points of law the defence intends to raise; and the facts, matters or circumstances included in the prosecution's disclosure which will be disputed at trial.

At a pre-trial hearing, courts may make rulings necessary for the efficient conduct of a trial, including but not limited to rulings on questions of law and the admissibility of evidence as well as orders that a pre-trial conference be held. The purpose of a pre-trial conference is to determine whether the parties are able to reach agreement regarding the evidence to be admitted at trial. Within seven days of a pre-trial conference, the prosecutor and the defence must file a pre-trial conference form with the court which indicates the areas of agreement and disagreement between the parties. Parties cannot object to the admission of evidence indicated on a pre-trial conference form as not being in dispute without the leave of the court.

In its submission in response to the Consultation Paper, the New South Wales ODPP stated that, at the time of writing the submission in September and October 2016, while there has been compliance with the provisions, the quality and extent of responses by the defence has been variable.<sup>897</sup>

## New Prosecution Model and Burwood Pilot

Very few issues can be definitely identified and resolved until the Crown prosecutor who is to conduct the prosecution is appointed and has considered the file. This is why the Trial Efficiency Working Group identified the late appointment of prosecutors as a contributor to delays.<sup>898</sup>

The New South Wales ODPP submitted that it is currently trialling a number of initiatives as part of developing a 'New Prosecution Model' which aims to increase the prospects of allocating prosecutors early in proceedings and achieving continuity of representation:

Under the model, a category of matters have been identified as requiring priority attention during the prosecution process. These matters are referred to as Priority Matters and include cases involving sexual offences committed against a victim who is currently under 16 years of age. These matters are allocated to an experienced lawyer and a Witness Assistance Service (WAS) officer at a very early stage. A Crown Prosecutor or Trial Advocate and instructing lawyer are also briefed at the committal stage, with the expectation they will remain in the matter until completion. Early and ongoing victim contact is also required. An internal evaluation of this initiative is currently being undertaken. It is anticipated the model will be expanded to include matters in which other particularly vulnerable victims are identified.<sup>899</sup>

While the initiative is at an early stage, we understand from our private roundtable consultations that it is considered to be working well.

The New Prosecution Model also includes an initiative known as the Burwood Pilot, which commenced in March 2016. The New South Wales ODPP stated that the Burwood Pilot is intended to develop a model for handling prosecutions more effectively and efficiently:

The Burwood Pilot involves a small team of lawyers and administrative staff who have carriage of committals and summary prosecutions listed at the Burwood Local Court. The lawyers are aligned with police Local Area Commands to establish better working relationships with investigators in order to improve the quality of police briefs of evidence.

Crown Prosecutors are briefed at committal stage in matters with vulnerable victims, and in matters identified as unlikely to result in a guilty plea. ODPP statistics reflect that child sexual abuse matters are more likely to proceed to trial.

The team is tasked with streamlining procedures, focusing on plea negotiations, victim contact and continuity of lawyers. The Pilot will be assessed in 2017 by an external agency with a view to implementing further change across the Office.<sup>900</sup>

## Rolling List Court

We are also aware of the trial of a 'Rolling List Court' (RLC) in the New South Wales District Court in the Downing Centre, Sydney. The RLC involves two permanent teams, each made up of a Crown prosecutor and DPP solicitor, and a public defender and legal aid solicitor. Each team runs trials on alternating fortnights before a permanently assigned judge; while one team is in court running a trial or sentence hearing, the other team prepares other matters.<sup>901</sup> The Crown prosecutor and public defender enter into discussions soon after committal in order to negotiate a plea or to narrow the issues to be determined at trial, and matters are not listed for trial until these discussions have taken place.<sup>902</sup>

The perceived advantages of the model are the early briefing of the Crown prosecutor and public defender, the ongoing relationship between the parties, and the ability of the 'out-of-court' team to focus on preparing and negotiating for the next fortnight of trials.<sup>903</sup>

We understand that the system draws from the experience in regional courts, where prosecutors, defence and judges interact more closely due to geographic necessity, leading to a greater tendency for communication and early identification of issues.

A preliminary evaluation of the RLC conducted by BOCSAR suggests that the earlier involvement of senior prosecution and defence counsel, continuity, and judicial case management can reduce court delays.

Under the RLC, matters which meet all of the following criteria are entered into a ballot to be assigned at random to the RLC or to the control group:

- the accused is represented by in-house Legal Aid NSW committal solicitors
- all charges are prosecuted by the DPP
- there are no co-accused (unless the co-accused is in another jurisdiction or their charges have been finalised)
- there are no issues of the defendant's fitness to stand trial
- the estimated trial length is two weeks or less
- a trial date has not yet been set
- the committal for trial was less than eight weeks prior to referral.

The preliminary evaluation by BOCSAR considered 110 matters that had been entered into the ballot as at 30 April 2016. Of those, 51 matters had been allocated to the RLC and 59 to the control group. Ultimately, BOCSAR will seek to evaluate whether the RLC has led to:

- shorter trials
- reduced time between committal for trial and trial start date
- an increase in the proportion of cases committed for trial that are finalised on a plea of guilty
- earlier guilty pleas.<sup>904</sup>

As it was too early to evaluate most of those measures, the preliminary evaluation focused on a comparison between the RLC and the control group of:

- the percentage of guilty pleas
- the percentage of guilty pleas before trial listing
- the percentage of matters finalised.<sup>905</sup>

By the end of the observation period, 64.7 per cent of matters allocated to the RLC had been finalised by way of sentence, withdrawal by the prosecution or dismissal compared with 37.3 per cent of control group matters.<sup>906</sup> A further 19.6 per cent of RLC matters were awaiting sentence, with only 15.7 per cent awaiting trial or in the process of being tried. By comparison, 44.1 per cent of control group matters were awaiting trial or were being tried.<sup>907</sup>

A higher proportion of RLC matters were resolved by way of guilty pleas, at 62.8 per cent compared with 40.7 per cent of control group matters.<sup>908</sup> Of particular note was the timing of those pleas: 17.7 per cent of RLC matters were resolved by guilty plea within three months of the ballot compared with 5.1 per cent of control matters. In 52.9 per cent of RLC matters,

guilty pleas were entered before a trial was listed or commenced compared with 17 per cent of control matters.<sup>909</sup> Almost one in four control group matters resulted in a guilty plea on the day of the trial or after the trial had begun compared with just one in 10 RLC matters.<sup>910</sup>

BOCSAR concluded that early results were promising and stated:

The fact that these results were obtained in a randomised trial (commonly known as the ‘gold standard’ in research designs) gives unqualified assurance the results are genuine and not the result of extraneous factors or selection bias.

If the increase in the proportion of cases ending in an early plea were able to be replicated across all District Criminal Courts, the result would be a substantial reduction in the number of trials required to be held. Indeed, even limited expansion of the RLC would be expected to significantly reduce the overall demand for criminal trial court time.<sup>911</sup>

In its 2015–16 annual report, the New South Wales ODPP stated that:

The initiative has resulted in more pleas of guilty at an earlier stage and the trials that do go ahead are shorter in length. By avoiding late pleas of guilty and longer trials, this provides better outcomes and certainty for victims of crime and a more efficient use of resources for all parties.<sup>912</sup>

The annual report also stated that the RLC highlights the desirability of the early briefing of the Crown prosecutor who will run the trial.<sup>913</sup>

## Specialist judges and child sexual offence evidence pilot

In August 2015, the New South Wales Government appointed two specialist judges to the District Court to hear child sexual assault cases throughout New South Wales. The New South Wales Attorney General told the Legislative Assembly that the two specialist judges underwent extensive training for their new roles.<sup>914</sup> In answering a question on notice in relation to judges in the New South Wales District Court, the Attorney General made reference to the new specialist justices for child sexual assault and referred to the Attorney General’s media release dated 5 August 2015.<sup>915</sup> The media release says that the appointment of the two specialist judges ‘will make access to justice faster and easier for victims of child sexual assault’.<sup>916</sup>

In November 2015, the New South Wales Government introduced legislation to provide for a child sexual offence evidence pilot scheme to operate in the Downing Centre District Court and in the Newcastle District Court for three years from 31 March 2016 until 31 March 2019. The pilot scheme provides for prerecorded evidence and children’s champions or witness intermediaries to be used by child witnesses in child sexual abuse cases. We discussed these reforms in Chapter 30.

District Court Criminal Practice Note 11 provides for the operation of the pilot scheme in the Downing Centre District Court.<sup>917</sup> It makes provision for all matters to which the pilot scheme applies to be listed for arraignment and case management at a Sexual Assault Pilot List call-over within 14 days of committal. The Crown prosecutor or trial advocate and the defence counsel who intends to appear at trial for the accused are expected to attend that call-over. Meeting the court's expectation effectively requires early allocation of the prosecutor for trial and encourages early identification of issues between the prosecution and the defence.

At call-over the court will set a timetable for prosecution and defence disclosures and set a time for the prerecorded evidence hearing, as well as fixing a trial date for the balance of the trial. It is expected that counsel for the prosecution and defence will be briefed and available for the prerecorded hearing within approximately two months of committal and that counsel appearing at the prerecorded hearing will continue as counsel in the ultimate trial.<sup>918</sup>

While the purpose of the New South Wales pilot is not to reduce delay per se – although a purpose was to reduce delay for the complainant in completing their evidence – the pilot effectively requires the adoption of a number of measures which are likely to reduce delay. In particular, it requires the early appointment of counsel, early identification of the issues and judicial case management.

In the public hearing in Case Study 46, the New South Wales DPP described the child sexual offence evidence pilot as 'a form of case management in that it's bringing forward decision-making and getting judicial involvement early'.<sup>919</sup> The prerecording of evidence requires both the earlier involvement of counsel and the early identification of issues, as 'the cross-examination of the complainant will almost inevitably define the issues in the ultimate trial'.<sup>920</sup>

## District Court case management

Child sexual abuse matters that do not involve witnesses who are children at the time of trial will continue to receive some degree of priority in the sexual assault case list in the District Court. Under District Court Criminal Practice Note 6, sexual assault matters should be listed for trial within four months of the committal wherever possible and in no case later than six months from committal.<sup>921</sup> The longer period of six months is said to allow for country areas where the court sits on a circuit basis. If there are more trials listed in a week than can be accommodated, the practice note provides for priority to be given to sexual assault matters, subject to cases where an accused is in custody on another charge.<sup>922</sup> The practice note also encourages practitioners to notify the court as soon as possible if the accused intends to plead guilty so that the trial can be vacated.<sup>923</sup>

District Court Criminal Practice Note 6 was issued by the former Chief Judge in April 2007. The data on delays in New South Wales, discussed in section 32.2, suggests that these time frames of four to six months from committal to trial are unlikely to be met, despite the priority given to sexual assault matters, including child sexual abuse.

In its submission in response to the Consultation Paper, the New South Wales ODPP suggested that the New South Wales District Court was introducing further case management for lengthier trials and all circuit court trials:

On 25 July 2016 the District Court introduced Practice Note 12, the purpose of which is to reduce delays in proceedings on indictment with an estimated duration of four weeks or more by enabling the Court to order the parties to attend one or more readiness hearings. Practice Note 13 commences in the District Court on 1 December 2016, the purpose of which is to reduce delays in criminal trials in circuit sittings by having mandatory case management telephone call overs in all circuit matters at least 3 weeks out from the listed trial date.<sup>924</sup>

## Other measures in the District Court

In its submission in response to the Consultation Paper, the New South Wales Government outlined a number of additional steps that had been taken in order to address the backlog in the District Court of New South Wales. Measures introduced in 2015 included the establishment of a working group chaired by the Chief Judge of the District Court to address the increase in the court's workload; and the use of special call-overs in regional areas to identify pending matters that may be suitable for early resolution or trials.<sup>925</sup> The special call-overs used very senior prosecution and defence representatives to review matters in an attempt to encourage appropriate guilty pleas and removed 118 trial matters from pending trial lists.<sup>926</sup>

In addition, the District Court sat through the mid-year vacation in 2015 at the Sydney District Court, Sydney West Trial Court and selected regional courts.<sup>927</sup>

The New South Wales Government's submission also outlined additional resources allocated to support the District Court. In December 2015, the New South Wales Government announced a \$20 million package which included:

- the appointment of two additional judges (in addition to the two specialist judges discussed above)
- additional sitting weeks in Western Sydney and regional courts through to June 2016
- the appointment of two new public defenders
- additional resources for the ODPP and Legal Aid NSW to allow for earlier intervention in criminal cases (including initial plea discussions to identify early guilty pleas)
- the continued use of special call-overs in regional areas to identify pending matters that may be suitable for earlier plea or trials.<sup>928</sup>

The 2016–17 New South Wales state budget also included a further \$39 million funding package comprising the following additional initiatives to support the District Court:

- the appointment of three additional judges to the District Court
- the appointment of two new public defenders
- providing additional resources for the ODPP and Legal Aid NSW for further case management initiatives, including the continuation of the RLC.<sup>929</sup>

The New South Wales Government submission also stated that the Department of Justice was conducting a statutory review of the pre-trial disclosure scheme in the *Criminal Procedure Act 1986* (NSW) in order to assess its effectiveness in reducing delay in trial matters in the District Court. The review will also consider ways in which pre-trial disclosure and case management can be used to increase efficiency in trials and encourage appropriate pleas of guilty.<sup>930</sup>

On 9 May 2017, the New South Wales Government announced a number of proposed reforms to the criminal justice system. The reforms include measures which appear to implement the key elements of the 'blueprint for change' proposed by the NSW LRC in its Report 141, *Encouraging appropriate early guilty pleas*. We discuss the NSW LRC report in section 32.5.

Under the proposals, in indictable matters the NSW Police Force will be required to provide a simplified brief of evidence early in proceedings. The brief of evidence will contain material which:

- forms the basis of the prosecution case
- is relevant to the accused
- affects the strength of the prosecution case.

The material will not need to be provided in an admissible form. This process is intended to facilitate the earlier determination of charges by the prosecution and allow the defence to make an informed decision about an early guilty plea.<sup>931</sup>

A senior prosecutor will review the brief of evidence as soon as it is served and certify the charges that will proceed. This charge certification process will replace committal hearings in the Local Court. It is intended to ensure that the defendant is charged with the most appropriate offences as early as possible while saving time in the Local Court.<sup>932</sup>

Senior legal representatives from the prosecution and defence will be engaged earlier in proceedings. They will be required to participate in mandatory criminal case conferences which are intended to maximise the opportunities for early guilty pleas and facilitate the narrowing of the issues to be dealt with at trial. Senior legal representatives for both sides will be responsible for matters from start to finish, which is intended to facilitate improved and more consistent case management.<sup>933</sup>

The reforms also include a scheme of statutory sentence discounts to encourage early guilty pleas. Maximum discounts on sentence will be:



- 25 per cent for guilty pleas entered in the Local Court
- 10 per cent for pleas entered in a higher court before the commencement of the trial
- 5 per cent for pleas entered on the day of the trial or after the trial commences.<sup>934</sup>

### 32.4.2 Victoria

Victorian legislation includes provisions intended to identify and address certain issues before the commencement of a criminal trial. The *Criminal Procedure Act 2009* (Vic) requires a party to a proceeding to notify the other party and the court if it intends to raise, whether before or during the trial, an issue related to:

- an issue of law or procedure that arises or is anticipated to arise in the trial, including an issue as to the admissibility of evidence
- an issue of fact or mixed law and fact that may be determined lawfully by a judge alone without a jury, including an issue as to the admissibility of evidence
- an application for an order that may be made in relation to the trial under any legislation or common law, including an application to quash a charge in the indictment
- any other issue with respect to the trial.

The court may hear and decide any of these issues before the trial, and it may do so by considering written submissions with the agreement of the parties.<sup>935</sup>

The *Criminal Procedure Act 2009* (Vic) also includes significant pre-trial disclosure requirements. At least 28 days before the trial date, the DPP must serve on the accused a summary of the prosecution opening that outlines the manner in which the prosecution will put the case against the accused and the acts, facts, matters and circumstances being relied on to support a finding of guilt.<sup>936</sup>

At least 14 days before the trial date the defence must serve on the prosecution a response which identifies the acts, facts, matters and circumstances with which issue is taken and the basis on which issue is taken.<sup>937</sup>

The *Criminal Procedure Act 2009* (Vic) also includes a provision intended to encourage early guilty pleas. Section 207 allows a court to indicate to the accused whether, if the accused pleads guilty, the court would or would not be likely to impose on the accused a sentence of imprisonment that commences immediately. If the court indicates that it would not impose a sentence of imprisonment and the accused enters a plea of guilty at the earliest opportunity, the court is bound by that indication.

In its submission in response to the Consultation Paper, the Victorian Government outlined the operation of specialist sex offence lists in Victorian courts as follows:

The Children's, Magistrates' and County Courts each manage sexual offence cases in Victoria through specialist sexual offences lists, serviced by specialist sexual offence prosecutors who operate from the Melbourne Prosecutions Unit – however, this is not available outside of Melbourne. The impact on delay of this specialist approach is difficult to quantify given the other factors involved – for example, the short statutory timeframes for the listing of sexual offence cases. Nonetheless, time to trial for criminal offences generally (not just sexual offences) has been reducing over recent years in the County Court.<sup>938</sup>

The County Court of Victoria has stated that it uses process and case management to ensure that the trauma experienced by complainants in sex offences matters is minimised by reducing delays.<sup>939</sup>

The County Court Criminal Division Practice Note PNCR 1-2015 includes specific elements which are aimed at maximising the efficient management of sexual offence trials. In almost all cases where a matter is to proceed as a trial, a standard timetable is set at the initial directions hearing which is expected to be complied with.<sup>940</sup>

Further, at an initial directions hearing for a sex offence matter, both parties must be able to answer any questions relating to pre-trial issues such as whether the competency or cognitive impairment of the complainant is in issue, whether there will be an application for trial severance or whether any evidence sought to be relied upon by the prosecution will be objected to by the defence.<sup>941</sup>

The County Court is also using technology to reduce delay by recording evidence in a format which allows it to be played in any re-trial, avoiding the cost and inconvenience of having witnesses attend court a second time.<sup>942</sup> This is used for all trials, and not just for sex offence trials.

The Victorian Office of Public Prosecutions (OPP) has also operated a specialist prosecution unit – the Specialist Sex Offences Unit – since 2007 to provide a specialised approach to prosecuting all indictable sex offences. In 2011, an evaluation found that it:

- was recognised by all stakeholders as a significant reform which had made a real difference to the experience of victims and the quality of sexual assault prosecutions
- supported significant training and advice to police and other government-based victim support services.<sup>943</sup>

In his submission in response to the Consultation Paper, the Victorian DPP confirmed that the unit has recently been reduced in size. It no longer includes Crown prosecutors but only specialist solicitors. Sexual offences are now handled by all OPP staff, with the most complex matters being referred to solicitors within the Special Sex Offences Unit. Solicitors in the unit also review files that are prepared outside the unit.<sup>944</sup>

The Victorian DPP's submission suggests that staff wellbeing was a factor in the decision to change the Specialist Sex Offences Unit:

It is believed that this approach will not only spread the load of these challenging types of cases to adequately experienced lawyers, and allow more lawyers to share in the work, but also provide variety of types of cases to a wider band of lawyers. Management at the OPP have adopted the view that there are possible risks to the health of staff in lengthy periods of specialisation without relief. The possibility of vicarious trauma and resultant health problems are issues that I am very concerned to address.<sup>945</sup>

### 32.4.3 Western Australia

In the Supreme Court of Western Australia, there is a Voluntary Criminal Case Conferencing (VCCC) process which is offered before committal and may occur at any time after committal and before trial. If the parties agree to participate, a conference is held by a facilitator who has previously held judicial office.

The Western Australian Supreme Court's procedure provides a protocol for VCCC.<sup>946</sup> The purpose of a VCCC conference is stated as follows:

The purpose of a VCCC conference is to reach agreement, where possible, in respect of any aspects of the criminal trial process. It may include discussion about:

- (a) the strength of the prosecution case;
- (b) whether the current charge reflects the evidence in the prosecution brief;
- (c) the real matters in issue;
- (d) whether agreement may be reached about matters which are not in issue; and
- (e) any matters relevant to case management.<sup>947</sup>

The protocol also includes the following provisions:

In every case in which the State DPP is involved, he will ensure that prior to the conference the Court has the complete prosecution brief, the indictment (if any), a transcript of any interview between the accused and the police (if any) and the accused's prior criminal record (if any), so that these documents can be provided to the facilitator/s. This material should be provided to the Court no later than five (5) business days prior to the date on which the VCCC is to occur.

In order to facilitate the process of VCCC, the parties are also encouraged to take the following additional steps:

- (a) the prosecution should serve on the accused and bring along to the conference a list of facts forming part of its case that it hopes or expects are not seriously in issue; and
- (b) the accused should serve on the prosecution and bring along to the conference a list of any formal admissions that he or she may be prepared to make.<sup>948</sup>

Nothing said at the conference is binding, but the conference is intended to be a means by which the parties can reach an agreement in relation to identifying the issues for the trial, resolving evidentiary issues and making admissions. Discussions akin to charge negotiations may also occur.<sup>949</sup>

A VCCC conference, where used, should encourage early allocation of the brief for the prosecution and defence, early identification and narrowing of the issues and early guilty pleas.

#### 32.4.4 Australian Capital Territory

In his submission in response to the Consultation Paper, the DPP for the Australian Capital Territory stated that the Australian Capital Territory has been very successful in reducing delays, with an increase in the rate of accused persons pleading guilty to sexual offences. He attributed this, in part, to:

- paper committals
- a streamlined trial listing process
- the use of police evidence in chief interviews and pre-trial hearings in child sex offence matters.<sup>950</sup>

The DPP for the Australian Capital Territory also outlined the specialist sex offence unit within the Australian Capital Territory ODPP. The unit coordinates the prosecution of sexual offence matters, but the conduct of sexual offence matters are spread throughout the Australian Capital Territory ODPP. The DPP for the Australian Capital Territory stated:

My office has had a specialist sexual offence unit since early in my tenure as Director. The unit's role is to coordinate the prosecution of sexual offence matters within the office. This includes establishing early contact with complainants, monitoring charges, and preparing or at least overseeing committal documentation. Due to the number of sexual offence prosecutions, the conduct of such matters is spread throughout the office. All trials are conducted in house – that is counsel and instructing solicitors are employed by me. Very occasionally a matter might be briefed to the private bar but the instructor remains within my office. This, and the small size of the jurisdiction ensures that senior lawyers in my Office can retain oversight of the prosecution of sexual offences in the office.<sup>951</sup>

### 32.4.5 South Australia

In November 2016, the South Australian Government introduced a Bill, which is currently before the South Australian Parliament, that, if passed, will make significant reforms to criminal procedure in South Australia. The reforms are designed to improve criminal court efficiencies and encourage early appropriate guilty pleas.

The Summary Procedure (Indictable Offences) Amendment Bill 2016 will introduce a system of tiered disclosure and charge determination by the DPP for matters commenced by South Australia Police (SAPOL) which are to be subsequently prosecuted by the DPP. In introducing the Bill, the Attorney-General stated:

Both of these concepts [tiered disclosure and charge determination] were considered in detail, and recommended by the NSW Law Reform Commission in its report ‘Encouraging appropriate early guilty pleas’ tabled in the NSW Parliament in June 2015. The Commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse suggested, in its Consultation Paper on Criminal Justice released in September 2016, that the approach recommended by the NSW Law Reform Commission is a model that governments might consider to encourage early and appropriate guilty pleas.<sup>952</sup>

We discuss the recommendations of the NSW LRC in section 32.5.4.

Under the Bill, there will be a pre-committal phase, where SAPOL will lay a ‘holding charge’ and inform the Magistrates Court at the first hearing of the time required to prepare a preliminary brief. The court will adjourn the matter for an appropriate amount of time which will allow for the preparation of the brief, and four additional weeks will be given to allow the DPP to consider the brief and make a charge determination.<sup>953</sup>

The preliminary brief will contain the key evidence available to prove the elements of the offence alleged to have been committed. It may include evidence that is not in an admissible form but which is reliable and sufficient for the prosecution and defence to understand what evidence exists and is capable of being provided should the matter proceed to a trial. The brief will also be provided to the defendant before the committal proceedings and as soon as practicable after it has been provided to the prosecution.<sup>954</sup>

If the defendant does not enter a plea at the committal following the charge determination, the Magistrates Court will adjourn to enable provision of the committal brief, which will include further evidence which was either not provided in the preliminary brief or was provided but not in an admissible form. Once the committal brief has been provided, the defendant will be required to indicate whether they will plead guilty or not guilty.<sup>955</sup>

The process is intended to ensure that the charges reflect the criminal culpability of the defendant and to reduce the number of matters where charges are withdrawn or amended later in proceedings, which in turn will reduce incentives for the defendant to delay a guilty plea in the expectation that charges may change at a later stage.<sup>956</sup>

The Bill also includes disclosure requirements for the prosecution and defence,<sup>957</sup> similar to those applying in New South Wales that we discussed in section 32.4.1.

The Bill also provides for a tiered system of sentence discounts, ranging from a maximum discount of 40 per cent for pleas entered within four weeks of the first court appearance to a minimum discount of 10 per cent. The court will be required to take into account the timing of charge negotiations when applying the relevant discount. The Bill also provides that, where the defendant has been found guilty following a trial, there will be a 10 per cent discount where the court is satisfied that the defendant complied with all statutory or court ordered pre-trial disclosure and procedures and has otherwise conducted their case in a cooperative and expeditious manner.<sup>958</sup>

## 32.5 Options to address delay

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### 32.5.1 Possible options to address delay

As discussed in section 32.3, there is rarely just one issue that causes delay in the criminal justice system. Rather, many factors interact with each other, and a number of aspects of the system may need to change in order to bring about a reduction in delay.

The discussion in section 32.3 suggests that efforts to address delays in the criminal justice system should focus on:

- reducing late charge negotiations by adopting measures to encourage earlier charge negotiations
- reducing the reluctance of defendants to enter a plea earlier in proceedings
- reducing the late withdrawal of prosecutions by ensuring any weaknesses in the evidence or the reluctance of victims to participate are identified early
- reducing the late identification of issues in the case, particularly those that must be resolved by pre-trial hearings, by adopting measures to encourage early identification of the issues
- reducing inefficiencies in the courts' listing practices.

In the Consultation Paper, we discussed the following possible options to address delay:

- specialist courts and prosecution units
- early allocation of prosecutors
- early guilty pleas
- committal hearings
- case management and early identification of the issues
- trial listing practices.

### 32.5.2 Specialist courts and prosecution units

#### Literature review on specialist prosecution units and courts

A number of survivors and other stakeholders have suggested to us that there should be specialist courts to determine child sexual abuse matters. In order to obtain a better understanding of the evidence for specialist courts and specialist prosecution units, we commissioned Professor Patrick Parkinson AM of the University of Sydney to conduct a review of the literature.

We published the literature review, *Specialist prosecution units and courts: A review of the literature*, in March 2016. The literature review identifies the potential benefits of using specialist prosecution units and courts to deal with child sexual abuse cases. It considers what can be learned about the advantages and disadvantages of specialist courts generally, particularly from family violence courts.<sup>959</sup>

The literature review found that the improvements associated with specialist units were often modest or difficult to quantify, and there was a paucity of both research and real-world institutions to examine, particularly in relation to child sexual offence courts.<sup>960</sup> Also, as successful specialist court models generally involved multidisciplinary and multi-agency collaboration, it was difficult to identify the exact factors that drove the success or failure of such approaches.<sup>961</sup>

The literature review found no available literature on courts dealing exclusively with child sexual abuse matters, although literature on courts dealing with sexual offences were identified in New York and South Africa.<sup>962</sup> The research also evaluated literature on courts specialising in family violence, which were more common.

The literature demonstrates that South African sexual offences courts have been positively evaluated on numerous occasions and are currently being re-established due to evidence of significantly worsened outcomes following their abolition during the 2000s.<sup>963</sup> The South African courts involved magistrates being rotated through the courts one week out of every six, with model guidelines dictating that prosecutors should remain with a case until its conclusion and be selected based on their ability to interact with complainants and relevant experience,<sup>964</sup> although they did not necessarily have specialist training before commencing to work in the courts.<sup>965</sup>

The introduction of the South African sexual offences courts was reported to have led to improvements in conviction rates, finalisation time<sup>966</sup> and complainant satisfaction.<sup>967</sup> In particular, complainants identified prosecutors providing them with emotional support and a sense that they were genuinely advocating their cause as factors which contributed to their satisfaction with the system.<sup>968</sup>

A persistent theme of the benefits of specialist prosecutors, including the positively evaluated Victorian Specialist Sex Offences Unit, is having the same prosecutorial team allocated to handle a matter throughout the proceedings, especially if a prosecutor works closely with the investigators to build the case at the front end.<sup>969</sup> In South Africa, the most positive results were recorded in one sexual offences court where the same prosecutor handled the matter from the time of first appearance to its conclusion, leading to the prosecutor having an intimate knowledge of the case. This facilitated a proper relationship with the complainant at an early stage.<sup>970</sup>

Of specialist courts in general, the literature review found that the real benefits were efficiencies arising from both expertise and resourcing.<sup>971</sup> The literature review also noted that the success of specialist courts depended on being part of a larger response to the targeted offending, including a multidisciplinary and multi-agency approach.<sup>972</sup> This makes it difficult to evaluate what makes a specialist court successful and also raises questions as to whether the same improvements could be achieved in a generalist court.

The most significant concern raised in the available literature on specialist courts and prosecution units is the burnout of judges and prosecutors. This concern may be magnified in the context of child sexual abuse matters, and we have heard from Australian prosecutors with significant experience in child sex matters that burnout is a very real problem. Also, a specialist court for child sex offence matters might experience difficulties in attracting the best judges and prosecutors, whether due to the confronting nature of the work or a reluctance to work in such a narrow field.<sup>973</sup>

In the Consultation Paper, we suggested that compartmentalising a category of cases risks creating a separate class of law, to the detriment of both child sex offence and general criminal cases. We have heard that a larger proportion of matters in regional courts are related to child sex offences when compared with metropolitan courts, with the result that judges sitting in regional courts often become experts in areas of law relevant to these matters, including tendency and coincidence. It would be to the detriment of the criminal justice system in general for such expertise to be restricted to a certain class of matters.

Other problems include the inefficient allocation of resources. In South Africa, the number of court hours in the sexual offences courts was often low,<sup>974</sup> although, given the volume of sex offence matters currently before Australian courts, that scenario is unlikely here. Conversely, given the present demands on the courts in Australia's larger jurisdictions, greater efficiencies might be achieved if all judges remained generalists.



## Current approaches in Australian jurisdictions

We outlined current specialist approaches in New South Wales, Victoria and the Australian Capital Territory in section 32.4.

In its submission in response to the Consultation Paper, the New South Wales ODPP referred to the specialist prosecuting units which operated in the ODPP in the late 1980s. The child sexual assault unit was created in 1989 and was disbanded in 1996, primarily due to health concerns for staff.<sup>975</sup> It referred to the statement given by Mr John Pickering SC in Case Study 15, where we examined Swimming Australia and the Queensland and New South Wales ODPPs.

Mr Pickering gave the following evidence about the specialist prosecutions units:

the ODPP did have a specialist unit for child sexual assault matters until 1996. The decision to disband the unit was made for a number of reasons: all specialist units were disbanded as it was considered that the Office's speciality was criminal law. In addition statistics showed that in relation to the Child Witness Unit the majority of prosecutions for child sexual assault were taking place in Sydney West and rural and metropolitan areas. The Office did not have the resources to concentrate the required number of staff and to provide an outreach service. Instead training was and still is, provided to all staff so that they could conduct these prosecutions.

Another issue that was considered in the abolition of the unit was the effect of vicarious trauma on staff who were continually prosecuting these types of matters. Concern was raised about burn out on staff and staff were being lost (and still are) due to stress related to these types of prosecutions. Few prosecutors were volunteering to join the unit for this reason. The Assistant Solicitor (Legal) and the Sexual Assault Liaison Officer provided instead, a central point for consultation, advice, training, policy development and interagency liaison and consultation.<sup>976</sup>

Mr Pickering's statement suggests that, even without the specialist units, prosecution staff are still being lost due to the stress related to child sexual assault prosecutions.<sup>977</sup>

The New South Wales ODPP submission also referred to the evidence given by Mr Lloyd Babb SC, the New South Wales DPP, during the public hearing in Case Study 15. Mr Babb made the following observations in relation to staff wellbeing and specialisation:

The other issue that I would have to deal with, as the leader of the organisation, is adequately looking after the mental wellbeing of staff that deal with this sort of work as a continual practice. It is very draining, very draining work. It is emotionally upsetting. There is some benefit in doing a variety of work and not doing only child sexual assault prosecutions to the lawyers who are doing the matters. But that could be overcome with sufficient resources. There could be a term, a reasonable term, and really good mental health checks and assistance in relation to a specialist unit. But at the moment, it's not

something that is on my or the executive board's plans for re-implementing ... I think one of the real difficulties with a specialist court and specialist prosecutors is getting people to volunteer for the work and to stay in that line of work, because there is burn-out. Also, there needs to be some recognition of the difficulties of prosecuting this work.<sup>978</sup>

Mr Babb also identified the potential difficulties in attracting judges and prosecutors to work in a specialist field. He told the public hearing:

If you look at my organisation, the barristers who attain the rank of senior counsel and are recognised for their work are very rarely the prosecutors who are prosecuting child sexual assault trials day in and day out. There is a perception, rightly or wrongly, that if you are prosecuting murder trials and doing appeals, you have a better chance of career progression and attaining the rank of senior counsel. We have to deal with those sorts of issues, as well as the emotional toll, to make it a desirable area for prosecutors to work in. And similarly for judges. For it to be an attractive area for a judge to work in, there would have to be some recognition of the work and not just the grind and emotional trauma of dealing with these terrible offences day in and day out.<sup>979</sup>

The New South Wales ODPP submission also discussed the resource implications of creating a specialist court as follows:

while a specialist jurisdiction would divert work from the District and Local Courts, it should not be assumed that resourcing the specialist court simply requires diversion of equivalent resources. This is because a specialist court would demand a higher level of prosecutorial resourcing to account for continuity of representation and lighter workloads to ameliorate the likely impact of vicarious trauma. Also, it could not be assumed that the demands on prosecution resources in the District Court would decrease to a level that corresponds with the work that is diverted, as the District Court may simply continue listing other matters to fill the gap.<sup>980</sup>

The New South Wales ODPP submission noted that, by way of a guide, it was given additional funding of \$5.6 million over four years for additional legal and administrative staff to meet the workload generated by the two additional judges in the child sexual offence evidence pilot.<sup>981</sup>

The Victorian Government submitted that the impact on delay of specialist sex offence lists in Victorian courts is difficult to quantify given the other factors involved and noted that delay has been reducing over recent years in the County Court for trials of all criminal offences, not just sexual offences.<sup>982</sup>

The recent reduction in the size and role of the Specialist Sex Offences Unit within the Victorian OPP, at least in part because of a concern for staff wellbeing,<sup>983</sup> suggests that, while specialisation has benefits, it can also create real difficulties.

The specialist sex offence unit within the Australian Capital Territory ODPP has a coordination role and does not conduct all sexual offence prosecutions.<sup>984</sup>

In his submission in response to the Consultation Paper, the Tasmanian DPP submitted that it was not possible to have specialised prosecuting units in his jurisdiction, as the small size of the ODPP required senior counsel to have the flexibility of conducting a wide range of serious prosecutions. He also submitted that exposure to a wide variety of matters greatly improved the skills of counsel, making them more effective at conducting sexual assault cases.<sup>985</sup>

Both the DPP for the Australian Capital Territory and the Tasmanian DPP submitted that, due to the small size of their respective jurisdictions, a specialist court would not be practical, although the DPP for the Australian Capital Territory noted that sex offence proceedings were given priority for trial dates in the ACT Supreme Court.<sup>986</sup>

## Other submissions in response to the Consultation Paper

Submissions in response to the Consultation Paper discussed both specialisation within the criminal justice system generally and specialist courts and prosecution units for child sexual abuse offences.

A number of submissions expressed support for specialisation within the criminal justice system generally.

Dr Robyn Holder and Ms Suzanne Whiting submitted that, in their experience, victims whose matters were dealt with by specialist police and specialist prosecutors generally reported higher levels of satisfaction and inclusion than victims of general offences managed by general duties police and prosecutors.<sup>987</sup> Dr Holder and Ms Whiting suggested a number of reasons for this:

First is that there is usually some policy and procedural requirement for the officer or prosecutor to provide continuous and ongoing contact with the victim and to keep them informed. Second, the specialist is trained and sensitized to the particular offence and its impact on victims. Many specialists adopt a trauma-informed approach to their work that does not compromise their impartiality and dedication to the objective collection of evidence. In our view a third and critical aspect of specialisation is that the challenges of investigation, evidence collection, witness preparation, and in-court advocacy for complex cases require a particular character for investigators and prosecutors. They develop and deepen their experience and practice in actively pursuing cases, supporting victims and, at the same time, maintain clear-eyes about the requirements for building a case. Within the specialist team environment, individual specialists have ready access to the expertise and experience of their peers but also to the expertise and experience of victim specialists with whom their organisation is in partnership. This collaboration is particularly important for high impact personal offences that are challenging to prosecute.<sup>988</sup>

Dr Holder and Ms Whiting indicated strong support for specialisation in the criminal justice system's response to certain classes of offences:

we are strongly of the view that there should be specialisation in all offences involving child victims, victims of sexual offences, victims of family violence, and related victims of crimes which resulted in the death of the primary victim. A key ingredient of specialisation in the judicial process from our experience with victims is Practice Direction that places tight timeframes on the processing of matters.<sup>989</sup>

In their joint submission in response to the Consultation Paper, SAMSN and Sydney Law School also indicated support for some specialisation of the judiciary within the general criminal justice system:

Some specialisation of judges, as is occurring for the current pilot witness intermediary program in New South Wales, is likely to be helpful in maximising the particular knowledge, experience and skill that are needed in managing these matters.<sup>990</sup>

In its submission, PACT expressed qualified support for specialist courts while recognising the challenges of specialisation:

We support the introduction of specialist courts and prosecutions to address sexual assault offences but again believe this could pose a resourcing issue for the Queensland Government and also likely to have a high turn-over rate of staff due to the confronting nature of offences against children which may cause burnout.<sup>991</sup>

The Law Society of New South Wales opposed the creation of specialist courts and prosecutors on the grounds that they were not practical, efficient, equitable or desirable, citing reasons discussed in the Consultation Paper.<sup>992</sup>

Several submissions to the Consultation Paper raised concerns regarding the burnout and wellbeing of specialist prosecutors and judges.<sup>993</sup>

In her submission in response to the Consultation Paper, Professor Annie Cossins advocated strongly for specialist courts and prosecutors. She included a discussion of a study tour of the New York Sex Offenses Courts which she participated in in 2010, including case studies in relation to the Erie and Queens Sex Offenses Courts.<sup>994</sup>

Professor Cossins took issue with the concerns in relation to specialist courts and prosecution units that we identified in the Consultation Paper as follows:

- **Burnout of judges:** Professor Cossins submitted that in other professions, such as specialist police officers and counsellors who specialise in victims of sexual assault, such concerns were mitigated via counselling.<sup>995</sup> Citing a study into the management of vicarious trauma in counsellors, she submitted:

Since there is exceptionally good evidence to show that professional debriefing works for these professionals, why would it not work for prosecutors and judges? In other words, burnout is a justification with no basis to it for not considering the efficacy of specialist courts ...<sup>996</sup>

- **Difficulties in attracting the best judges and prosecutors:** Professor Cossins submitted that the Consultation Paper did not provide any evidence that a specialist sex offences court would have difficulties attracting the best personnel and that it was more likely that judges and prosecutors who were committed to this area of the law would be keen to specialise. In support of specialisation, she noted that a former member of the Specialist Sex Offences Unit in the Victorian OPP had served as the Deputy DPP in the Northern Territory and highlighted the considerable expertise of the judges who were recently appointed as specialist judges in the New South Wales District Court.<sup>997</sup>
- **Compartmentalising a certain category of cases:** Professor Cossins criticised the suggestion that the creation of specialist courts could result in a compartmentalisation of the law, with detrimental effects on the criminal justice system as a whole, on a number of grounds. She observed that it was difficult to see how a separate class of law would be created given that a specialist court would be expected to operate under the same rules of evidence and procedure that apply in criminal trials generally. She also suggested that in some ways a separate class of law in relation to child sex abuse matters already existed and that this has arisen not from court specialisation but from other factors within the trial process.<sup>998</sup>
- **Detriment in restricting expertise to a certain class of matters:** Professor Cossins referred to the statements in the Consultation Paper to the effect that regional courts may deal with a larger proportion of child sex offences and judges sitting in regional courts therefore become experts in areas of law such as tendency and coincidence evidence; and it would be to the detriment of the criminal justice system in general for such expertise to be restricted to a certain class of matter.<sup>999</sup> Professor Cossins observed that ‘the Royal Commission did not point to any particular detriment that is presently being experienced within the criminal justice system as a result of this already existing level of expertise’.<sup>1000</sup>

Professor Cossins also stated that:

The other problem with the Commission’s argument is that it assumes that judges who would not be sitting in a specialist sex offences court are not as intellectually capable when it comes to dealing with complex evidentiary issues. Guided by arguments from counsel, I think it is doubtful that the current group of District Court judges in NSW, for example, would not have this capacity.<sup>1001</sup>

Professor Cossins suggested that the rotation of specialist judges through the specialist court and general courts would ensure that expertise was spread throughout the general courts.<sup>1002</sup>

- **Greater efficiencies might be achieved if all judges remain generalists:** Professor Cossins referred to the suggestion in the Consultation Paper that, given the demands on the courts in Australia's larger jurisdictions, greater efficiencies might be achieved if all judges remained generalists. Professor Cossins submitted that the Royal Commission did not provide any evidence that efficiencies increase with generalist as opposed to specialist judges.<sup>1003</sup> Professor Cossins submitted that a specialist court with specialist judges and prosecutors would develop a particular expertise in identifying cases where an early plea of guilty could be entered and that this would improve efficiency.<sup>1004</sup>
- **Lack of support for specialist courts:** Professor Cossins submitted that the Royal Commission should consider what is necessary for victims of institutional child sexual abuse, irrespective of whether much support had been expressed for the options. She cited the support for specialist courts expressed by the National Child Sexual Assault Reform Committee (NCSARC), the Criminal Justice and Sexual Offences Taskforce and the Joint Select Committee on Sentencing of Child Sexual Assault Offenders in New South Wales.<sup>1005</sup> Professor Cossins submitted:

Neither Parkinson nor the Royal Commission engaged in an analysis of specialist courts, in terms of a needs-based approach to establishing sex offences courts which has been undertaken in overseas jurisdictions and is based on a close examination of a particular jurisdiction's existing laws and procedures.

Nor has an analysis been undertaken of the complex roles that courts are involved in from pre-trial hearings to sentencing to the monitoring of offenders post-sentence. In other words, courts do much more than merely hear and decide on the guilt or otherwise of a particular defendant.<sup>1006</sup>

## Discussion

Although Professor Cossins strongly took issue with the discussion of specialist courts and prosecution units in the Consultation Paper, it is not clear to us that the differences between that discussion and her views are as great as she suggested.

Professor Cossins' conclusion in relation to her discussion of the 2010 study tour of the New York Sex Offences Courts was as follows:

Each Australian jurisdiction has different challenges in relation to the investigation, prosecution and management of sex offenders due to their different population sizes, geography, and the number and type of remote communities in each state and territory. For some, it will not be viable, financially, to establish a separate, stand-alone sex offences court. Nonetheless, the above procedures and processes may still be relevant for establishing something less formal such as a sex offences list for the more efficient and timely management of sex offences cases, in order to improve disposition times, increase guilty plea rates and victim satisfaction with the criminal justice system.<sup>1007</sup>

As we sought to demonstrate in the Consultation Paper, we consider that it is important to focus on what benefits have been identified in specialist court and prosecution unit models – and what disadvantages have been identified in these models – rather than simply assuming that a specialist court is required. As we noted in the Consultation Paper, measures such as using separate lists for managing sex offences and appointing specialist judges may ensure that the benefits of specialisation are obtained without some of the disadvantages.<sup>1008</sup>

We remain satisfied that there are disadvantages to specialist courts and prosecution units.

We consider that burnout is a broader risk than simply the risk of vicarious trauma. Repetitious and stressful work in a single area of the law for a protracted period of time can result in burnout in a more general sense. The study Professor Cossins cites makes this distinction between vicarious trauma and burnout.<sup>1009</sup>

It is also not clear that it can be assumed that the experiences of specialist judges or prosecutors will be comparable to the experiences of specialist counsellors in terms of burnout and trauma. The actual experiences of the ODPPs that have operated specialist units – with professional counselling provided – suggests that burnout and trauma remain a real risk for prosecution staff.

The County Court of Victoria also highlighted the effect of sexual offence trials on judges and their staff in its most recent annual report:

The impact of this work on judges and their staff cannot be underestimated. A key priority for the Division is to ensure that judges and staff are exposed to a range of work so that the potential for vicarious trauma is minimised. To this end, the Division has implemented a new system in the allocation of trials to ensure there is a more balanced distribution of work across the judges of the Division.<sup>1010</sup>

As to attracting the best judges and prosecutors, we note that specialist judges appointed in the New South Wales District Court were appointed as judges of that court, and not as judges in a specialist court. Clearly, they are not the only judges who preside over child sexual abuse trials in the District Court, and many District Court judges will continue to preside in these trials. The appointment of the two specialist judges appears to us to provide an example of how to achieve some of the benefits of specialisation without establishing specialist courts or prosecution units.

We remain concerned that compartmentalising a certain category of cases creates the risk of creating a separate class of law, to the detriment of both child sex offence and general criminal cases. Crimes of child sexual abuse are not, and should not be seen to be, ‘lesser’ or ‘less serious’ crimes that are diverted from the jurisdiction of the criminal courts generally. Inevitably, if they are taken out of the mainstream courts, decisions in these matters will not be as influential with the mainstream courts, and it cannot be assumed that law and practice of the generalist and specialist courts will develop in the same way. Indeed, if the specialist courts are doing exactly what the generalists courts are doing, then the obvious question is: why have them at all?

We also remain concerned about the detrimental effect of restricting expertise to a certain class of matters – whether the specialist matters or the non-specialist matters. As we observed in the Consultation Paper, we have heard that a larger proportion of matters in regional courts are related to child sexual offences when compared with metropolitan courts, with the result that judges sitting in regional courts often become experts in areas of law such as tendency and coincidence evidence.

Professor Cossins stated that ‘the Royal Commission did not point to any particular detriment that is presently being experienced within the criminal justice system as a result of this already existing level of expertise’.<sup>1011</sup> We do not consider there is such a detriment because the detriment does not arise, absent specialist courts. The detriment we identified is the detriment of restricting available expertise, whether by restricting it only to the specialist matters or by excluding it from the specialist matters. This is not a matter of intellectual capacity, as Professor Cossins suggests. Rather, it is a matter of experience and expertise and the opportunity to develop and apply them.

In terms of efficiencies, while specialist courts and prosecution units might achieve efficiencies in handling the matters in the specialist jurisdiction,<sup>1012</sup> specialisation also brings with it the risk of inefficient management of judicial resources more broadly.<sup>1013</sup>

The literature review notes that specialist courts that met the South African blueprint were a costly and demanding undertaking and that many courts did not meet the blueprint requirements.<sup>1014</sup> Questions remained as to whether positive outcomes observed in specialist courts may have been the result of a disproportionate expenditure of resources:

Evaluations that have indicated, for example, a reduction in processing times for cases have not taken account of whether the specialist court has had resources that, on a per case basis, were greater than the resources devoted to this category of case before the specialist court was introduced.<sup>1015</sup>

The additional resources required to support a specialist jurisdiction were also noted by the New South Wales DPP.<sup>1016</sup>

When the focus is on a particular problem – institutional child sexual abuse prosecutions or child sexual abuse prosecutions generally – there may be a risk that the functioning of the criminal justice system as a whole will be either disregarded or not properly understood.

In most if not all Australian jurisdictions, specialist courts or prosecution units for these types of crimes are unlikely to be viable. Some jurisdictions are too small to support specialist courts and prosecution units, both in terms of the number of cases and the size of the local judiciary and legal profession. Others – including New South Wales – are too large geographically to support specialist courts and prosecution units throughout the state while maintaining criminal justice responses to other categories of crime.



We note Professor Cossins' suggestion that we may have heard limited support for specialist courts in our work to date because of a limited understanding of specialist courts outside of academic circles and because practitioners were likely to 'favour what they know rather than what they don't know'.<sup>1017</sup>

However, we have heard from New South Wales, Victoria and the Australian Capital Territory about the degrees to which they have adopted specialisation in their prosecution responses, the strengths and weaknesses they have experienced in these responses and the limited degrees to which they now operate, if at all. We have also heard from New South Wales and Victoria about the specialist responses they pursue in their courts.

We remain of the view that specialist courts and prosecution units are likely to remain an impractical response to child sexual abuse prosecutions in Australia. However, some of the benefits of specialist responses can be obtained through appointing judges with additional expertise and training in child sexual abuse matters and adopting particular lists to case manage child sexual abuse matters.

A number of the benefits that may be identified as flowing from specialist courts and prosecution units are addressed in other chapters of this report. For example, in 2010 the NCSARC recommended the establishment of a Child Sex Offences Court in each Australian jurisdiction,<sup>1018</sup> with its features identified as including:

- continuity of the prosecutor – which we have addressed in Chapter 20 and in this chapter
- a child witness service – which we have addressed in Chapter 20
- the use of intermediaries for child complainants – which we have addressed in Chapter 30
- prerecording of children's evidence and use of other special measures – which we have addressed in Chapter 30
- exempting children from giving evidence at committal and pre-trial hearings to reduce the number of times a child gives evidence – which we have addressed in Chapter 30 and in this chapter
- case management to reduce delays and arrange pre-trial matters – which we address in this chapter.

It is also clear from our work that focusing only on child complainants is not sufficient and that the needs of adult complainants of child sexual abuse must also be considered. We have considered these needs, as well as the needs of child complainants, throughout our criminal justice work.

### 32.5.3 Early allocation of prosecutors

A number of discussions about inefficiencies in the criminal justice system identify the late briefing of Crown prosecutors, and the late involvement of prosecution staff in general, as a significant contributor to trial delays.<sup>1019</sup>

A common view we have heard expressed by professional stakeholders is that allocating prosecutors in general early in proceedings and having that team remain with the matter until its conclusion is a key measure which would alleviate many of the factors which contribute to both delays and complainant dissatisfaction with the court system.

In Chapter 20 on prosecution responses, we noted that the late appointment of Crown prosecutors was a significant contributor to complainant dissatisfaction with the criminal justice system. The NSW LRC has noted that the early involvement of prosecutors would enable victims to be better informed about the case when it is in its early stages and to consult with the prosecution much earlier than at present.<sup>1020</sup>

In addition to issues of general complainant satisfaction, the early allocation of prosecutors is important for:

- making sure the charges are correct
- early identification and narrowing of the issues
- facilitating disclosure and any negotiations which may encourage early guilty pleas.

In section 32.3, we identified late charge negotiations, the reluctance of defendants to enter a plea earlier in proceedings, the late withdrawal of prosecutions, the late identification of issues in the case, and listing practices by the courts as key factors which contributed to inefficiencies in the criminal justice system. The late allocation of prosecutors contributes to all of these factors to varying degrees.

A common cause of late charge negotiations is the late briefing of a Crown prosecutor with sufficient authority to negotiate with defence counsel. The late briefing of a Crown prosecutor can also result in a re-evaluation of the strength of the evidence close to the trial date. This can lead to a variation of charges, or even a withdrawal of the matter, the possibility of which contributes to a reluctance on the part of defendants to enter a plea earlier in proceedings.

The late allocation of prosecutors also contributes to inefficient listing practices. The late allocation of prosecutors contributes to the high rate of matters being finalised late in proceedings or adjourned. This in turn prompts courts to over-list matters to maximise the use of judicial resources, which in turn creates uncertainty in trial dates and hampers efforts to brief counsel earlier in proceedings.

These issues do not arise only in Australian jurisdictions. In 2014, the Rt Hon. Sir Brian Leveson, President of the Queen's Bench Division, was requested to conduct a review of efficiency in criminal proceedings in England and Wales (Leveson Review).

The Leveson Review identified a number of overarching principles for achieving efficiency in criminal proceedings, including the following:

- **Getting it right the first time:** As gatekeepers to the criminal justice process, police and prosecutors must make appropriate charging decisions based on the evidence.
- **Case ownership:** To maximise opportunities for case management, there must be one person who is identified to be responsible for the conduct of the case.
- **Duty of direct engagement:** Representatives from either side who have case ownership responsibilities should be under a duty to engage at the first available opportunity.

The early allocation of prosecutors is essential to achieving these principles.

In section 20.5.4, we discussed the importance of getting the charges right early in the process. Identifying and narrowing the issues is also important, as we discuss in section 32.5.6. No meaningful discussion can occur with the defence until a Crown prosecutor has been briefed, and no mechanism for the pre-trial identification of contentious issues can succeed without the early appointment of counsel for both the prosecution and defence.<sup>1021</sup>

The advantages of ensuring the earlier involvement of a Crown prosecutor include earlier engagement of the parties and a reduced likelihood that a matter will be adjourned or discontinued shortly before the trial date because the evidence is not strong enough.

In its submission in response to the Consultation Paper, PACT stated that:

This [the early allocation of prosecutors] would enable cases to be managed more effectively and the ability for rapport to be built with the child which would increase their level of comfort and trust. This could facilitate further disclosure and encourage early guilty pleas. All of which would be significantly beneficial to the victimised child or young person.<sup>1022</sup>

The South Australian Commissioner for Victims' Rights submitted:

Early allocation of prosecutors, coupled with consistency in such allocation, would likely achieve some of the outcomes the Royal Commission flags, such as 'enable the prosecutors to make sure the charges are correct early in the proceedings' and 'allow early identification and narrowing of the issues'.<sup>1023</sup>

In his submission in response to the Consultation Paper, the Victorian DPP agreed that there are many advantages in the early allocation of prosecutors to incoming matters.<sup>1024</sup> He stated that the current practice within his office is for a matter to be assigned to a prosecution solicitor as soon as possible after the Victorian Public Prosecution Service takes over the matter and for the solicitor to consider and apply all of the relevant Director's policies, including the assessment of correct charges, the early identification of issues and potential problems of proof, disclosure to the defence, and charge negotiations. He also noted that legislation in Victoria requires the early filing of indictments in all sex offence cases, so a Crown prosecutor will be involved at an early stage for the purposes of assessing the evidence and settling the appropriate charges in conjunction with the prosecution solicitor.<sup>1025</sup>

The Victorian DPP submitted that the practicalities and logistics of court lists and Crown prosecutor availability meant that the Crown prosecutor might not become involved again in a matter until some weeks prior to the hearing date and that in some cases this might result in new plea negotiation opportunities or a reassessment of the evidentiary viability of the charges or the whole matter. However, he submitted that in most cases the majority of such issues will have been sufficiently addressed by the prosecution solicitor at an early stage and that matters were currently briefed as early as logistics and resourcing allowed.<sup>1026</sup>

Both the Victorian Government and the Tasmanian DPP identified the importance of engaging defence lawyers at an early stage. The Victorian Government agreed that the early allocation of prosecutors was important, but submitted:

it may be equally important to ensure that lawyers for accused persons, the vast majority of whom are publicly funded, are also engaged at an early stage, have analysed the evidence and are able to narrow the issues in dispute and provide authoritative advice about settlement. Mechanisms that further 'front load' funding arrangements and strengthen expectations that, early in proceedings, defence practitioners analyse briefs and conduct negotiations could also be considered.<sup>1027</sup>

The Tasmanian DPP submitted:

Delays can be avoided by earlier identification of issues at trial and this can be assisted by the early appointment of a Crown prosecutor. However, there is also a need for defence counsel to be so engaged.<sup>1028</sup>

In the Consultation Paper, we stated that we had heard that resourcing issues make it difficult for Crown prosecutors to be allocated to matters early. The Law Society of New South Wales agreed that the early allocation of Crown prosecutors was best practice but noted that this was a significant resource issue, particularly if the courts did not take into account prosecutor availability when setting trial dates.<sup>1029</sup> The South Australian Commissioner for Victims Rights also referred to the lack of resources, submitting that 'a lack of resources for the key participants, particularly courts and prosecution agencies, will (not may) make it difficult to implement reforms'.<sup>1030</sup>

In the Consultation Paper, we suggested that, where resourcing issues make the early appointment of a Crown prosecutor impracticable, there may be alternative means of capturing at least some of the benefits.

In its 2009 report, the Trial Efficiency Working Group noted that in New South Wales all matters are allocated to a pre-trial unit following committal. The pre-trial unit consists of Crown prosecutors who review each matter. While issues between the defence and prosecution can be resolved at this stage or charge negotiations entered into, decisions made by Crown prosecutors during this phase are not binding on the Crown prosecutor who is ultimately briefed to run the trial. However, if the defence is in a position to enter into meaningful discussion on the proposed conduct of the trial, the ODPP can make arrangements for the matter to be allocated to a Crown prosecutor for the purpose of negotiations.<sup>1031</sup>

In 2014, the NSW LRC produced Report 141, *Encouraging appropriate early guilty pleas*. It identified a number of issues with the New South Wales criminal justice system and suggested reforms to promote efficiencies and encourage appropriate early guilty pleas. One of the key elements the NSW LRC identified was the early involvement of prosecutors as well as a level of continuity of the prosecutor.<sup>1032</sup>

The NSW LRC reported that stakeholders expressed concerns during consultations that the ODPP would not be able to fund the early appointment of prosecutors.<sup>1033</sup> The ODPP's view, on the other hand, was that the NSW LRC's proposals could be resourced with existing allocations if efficiencies in other areas envisaged by the NSW LRC were realised.<sup>1034</sup>

In the Consultation Paper, we suggested that, if current levels of resourcing do not permit the early allocation of Crown prosecutors, a next best option might be implementing processes under which, upon request by the defence, Crown or senior prosecutors can be allocated to a matter to enter into discussions and negotiations, with the explicit understanding that any decisions made will be binding on the Crown prosecutor who is briefed to appear in the matter at trial.

However, we noted that such a process would not achieve some of the other benefits of early allocation of a Crown prosecutor, including complainant satisfaction arising from continuity in the team.

Submissions in response to the Consultation Paper did not explicitly comment on this possible next best option.

### 32.5.4 Early guilty pleas

In Chapter 20, we discussed the importance of securing appropriate guilty pleas for the efficient operation of the criminal justice system as well as for victims who are spared the ordeal of giving evidence in a criminal trial.

If a matter is to be concluded by way of a guilty plea, it is better for the courts, criminal justice professionals, victims and often the accused for the plea to be entered as early as possible.

For the courts, where a plea of guilty is entered after a trial date has been set, the matter would already have been mentioned on multiple occasions in the court of summary jurisdiction, undergone committal proceedings (or equivalent proceedings in jurisdictions that have abolished committals), been arraigned in the trial court and been listed for trial. It is not uncommon for guilty pleas to be entered on the day of the trial. In such matters, a jury may already have been empanelled.<sup>1035</sup>

The probability of a significant number of late guilty pleas prompts courts to over-list matters, which creates uncertainty for complainants who are awaiting trial and creates an additional barrier to maintaining continuity in prosecution staffing. Over-listing is discussed in section 32.5.7.

For criminal justice professionals such as the police, prosecutors and legal aid lawyers, late guilty pleas represent significant wastage, as already limited resources are expended in preparing for a trial that does not eventuate.

For victims, a late guilty plea can contribute to profound emotional suffering. In the previous section dealing with delays in general, we discussed the often debilitating impact on complainants of the stress of waiting for a criminal trial. Given the typical time frames between committal hearings and trials that currently apply in Australian jurisdictions, a plea of guilty entered on the day of the trial can represent well over a year of unnecessary stress and uncertainty.

Finally, for the accused, a discount on sentence which recognises the utilitarian value of a guilty plea will be greatest when the plea is entered at the earliest possible opportunity.

In the Consultation Paper, we suggested that appropriate early guilty pleas served the interests of all participants in the criminal justice system.

As noted above, the NSW LRC's Report 141, *Encouraging appropriate early guilty pleas*, identified a number of issues with the New South Wales criminal justice system.

According to the NSW LRC, the main obstacles to securing early guilty pleas are as follows:

- The prosecution serves part of the brief of evidence late.
- The defence expects further evidence will be disclosed closer to the trial.

- The defence believes that it is common practice for the prosecution to overcharge early and that the charges may well be reduced as the proceedings advance.
- The prosecution accepts a plea to a lesser charge late in the proceedings.
- Crown prosecutors with the authority to negotiate are not briefed until late in the proceedings.
- The defence believes that they will obtain better results in negotiations that occur before trial.
- Discontinuity of legal representation (on both sides) means that advice and negotiations are inconsistent.
- The defence perceives the sentencing court to be flexible in the way it applies a sentence discount for the utilitarian benefit of an early guilty plea that has occurred later in the proceedings.
- The defence is sceptical that sentencing discounts will be conferred on their client.<sup>1036</sup>

In order to address these issues, the NSW LRC proposed a blueprint for change to indictable proceedings which incorporated the following interdependent elements:

- **Early charge advice:** The ODPP should settle the charge before the matter proceeds, and there should be no expectation that the charge will be varied later in proceedings.
- **A framework for disclosure:** The NSW Police Force should give the ODPP, and the ODPP should give the defendant, an initial brief of evidence which contains the key available evidence to support early determination of the charge and defence assessment of the case.
- **Case management:** Local Court case management should replace the current system of committals and move the matter towards resolution.
- **Meaningful structured case management:** A mandatory criminal case conference should be held in all cases.
- **Sentence discount:** Statutes should provide a clear scheme of maximum sentence discounts for the utilitarian value of an early guilty plea which rewards early pleas and discourages late pleas.<sup>1037</sup>

In section 32.4.1, we outlined the New South Wales Government's announcement on 9 May 2017 of proposed reforms to the criminal justice system, which include measures which appear to implement the key elements of the blueprint for change proposed by the NSW LRC.

A number of submissions in response to the Consultation Paper referred to the importance of early guilty pleas.

VLA submitted:

VLA considers that where a case can be resolved it should happen as early as is reasonably possible. The strengths and weaknesses of a case should be identified early and a case strategy developed as a result. This was a major focus of the implementation of our Delivering High Quality Criminal Trials review. VLA supports the Royal Commission's focus on achieving early appropriate resolution as this benefits both the accused, the victim and the broader community.<sup>1038</sup>

The Victorian DPP submitted:

I fully agree with the Commission in relation to early plea identification, and I note that in Victoria we have had legislative and other procedures in place for many years, designed to require both Crown and defence to actively seek appropriate resolution in every matter at the earliest possible stage.<sup>1039</sup>

The DPP for the Australian Capital Territory submitted that trial date certainty could encourage pleas of guilty by focusing the minds of accused persons and their legal representatives. He also observed that the nature of the offending and the probability of lengthy sentences of imprisonment made guilty pleas less common for sexual offences, although there had recently been an increase in the proportion of pleas of guilty entered in sexual offence proceedings in the Australian Capital Territory. He attributed this increase to a number of factors, including the use of police evidence in chief interviews for all child sexual offence complainants.<sup>1040</sup>

In the Consultation Paper, we suggested that the approach recommended by the NSW LRC was one possible model that governments might consider to encourage early and appropriate guilty pleas. A number of submissions in response to the Consultation Paper expressed support for this position.

The Victorian DPP stated that many of the NSW LRC's proposals had merit and he supported further investigation of the proposals.<sup>1041</sup>

SAMSN and Sydney Law School stated:

Encouraging early guilty pleas is crucial, and as the consultation paper argues so clearly, it serves the interests of all participants in the criminal justice system. The proposals by the New South Wales Law Reform Commission, not yet responded to by the New South Wales government, provide a promising 'blueprint for change' and the basis for very useful recommendations.<sup>1042</sup>

Legal Aid NSW also indicated support for implementation of the NSW LRC recommendations subject to adequate resourcing of both Legal Aid NSW and the ODPP to effectively implement the reforms.<sup>1043</sup>



In addition to general support for the NSW LRC's proposals, some submissions, particularly those of the Australian Capital Territory Victims of Crime Commissioner and the Victorian Commission for Children and Young People, expressed strong support for the greater involvement of prosecutors in charging decisions.<sup>1044</sup>

Some interested parties commented on the use of sentencing discounts to encourage early guilty pleas. SAMSN and Sydney Law School identified a clear scheme of maximum sentence discounts to reward early pleas in particular as an important component of the NSW LRC model.<sup>1045</sup> The Tasmanian DPP submitted that early guilty pleas could only be brought about with significant discounts on sentence and suggested that consideration could be given to statutory discounts which depended on the time at which the plea was entered.<sup>1046</sup>

VLA submitted that the criminal justice system's response to child sexual offending would be improved if there were tangible advantages for early guilty pleas, such as a sentencing indication scheme that allowed judges to indicate the likely duration or range of penalties as well as the sentence type.<sup>1047</sup>

As noted in section 32.4.2, in Victoria the court is permitted to indicate to an accused whether it would be likely to impose a sentence of imprisonment if the accused entered a plea of guilty. However, in its submission in response to the Consultation Paper, the Victorian Government stated that such a scheme was unlikely to encourage early guilty pleas in sex offence matters given that most such offences resulted in sentences of imprisonment.<sup>1048</sup>

A sentence indication scheme was trialled in New South Wales between 1992 and 1995, with the aim of encouraging earlier and more frequent guilty pleas. An evaluation by BOCSAR found that not only had the scheme been ineffective but that it may have also created a situation where defendants who withheld their plea until a sentence indication hearing were treated at least as leniently as those who entered a plea at the earliest possible opportunity.<sup>1049</sup>

The NSW LRC also commented on sentencing indication schemes in its work on early guilty pleas. While the NSW LRC did not oppose sentencing indications of the type suggested by VLA, it noted that accurate sentencing indications required a level of disclosure that was not likely until later in proceedings and that such measures may therefore not result in earlier guilty pleas.<sup>1050</sup>

### 32.5.5 Committal hearings

As noted in section 32.5.4, one of the recommendations of the NSW LRC in its report on early guilty pleas was to replace committal hearings with a system of Local Court case management.

While some submissions to the NSW LRC suggested that abolishing committal hearings would result in savings to the criminal justice system, other submissions highlighted the benefits of retaining committals.<sup>1051</sup> For example, it was noted that, while rarely used, the testing of a

witness by the defence typically had an impact on proceedings – it could generate a plea or a downgrading of the charge (although this may be of less relevance in child sexual abuse matters, with cross-examination of the complainant at committal greatly restricted if not prohibited in all Australian jurisdictions).<sup>1052</sup>

A number of jurisdictions, including England and Wales, New Zealand and Western Australia, have effectively abolished committal hearings in all matters in recent years.

The primary purpose of a committal is to have the strength of the evidence against the accused tested by a judicial officer. However, the NSW LRC's research indicated that the great majority of cases that did not proceed on indictment in New South Wales were discontinued after review by the ODPP, with more matters discontinued by the ODPP after committal than are discharged by a magistrate.<sup>1053</sup>

Also, perceived benefits of the committal process as identified to the NSW LRC by professional stakeholders predominantly relate to matters that are not related to testing the strength of the evidence against the accused.<sup>1054</sup> For example, earlier engagement of the parties and prosecution disclosure were identified as benefits of the committal process.<sup>1055</sup>

In the Consultation Paper, we suggested that, if this understanding is correct, it may be possible to abolish committal hearings in those jurisdictions that currently retain them while preserving their benefits, such as case management systems aimed at improving early identification of the issues and early appointment of counsel, through amendments to criminal procedure. Replacing the committal hearing with alternative measures such as criminal case conferencing and the earlier involvement of senior prosecutors may be a more effective means of encouraging early guilty pleas.

However, a risk of abolishing committal hearings and commencing proceedings in the trial court is that delays will merely be shifted to the superior court. The NSW LRC's Report 141, *Encouraging appropriate early guilty pleas*, noted this has occurred to some degree in Australian jurisdictions where committal hearings have been abolished.<sup>1056</sup>

A number of submissions in response to the Consultation Paper supported the proposal that consideration be given to abolishing committal hearings.

Mr Greg Davies APM, the Victorian Victims of Crime Commissioner, referred to his submission to the Victorian Law Reform Commission's (VLRC's) reference on the role of victims of crime in the criminal trial process in which he recommended the replacement of committal hearings with an alternative system of case management that provides for proper review and disclosure. He noted that in the 2014–15 financial year, only 24 of 2,859 matters listed for committal in Victoria were discharged by a magistrate.<sup>1057</sup> In his view, a robust system of case management would provide for a process of appropriate disclosure for the accused, while also reducing delays in the court process and secondary victimisation of victims of crime.<sup>1058</sup> Mr Davies recommended that:

The Royal Commission consider an alternative to the current committal process that provides for a system of review and disclosure, avoids delays and reduces the number of instances a victim is required to give evidence.<sup>1059</sup>

The Victorian DPP also expressed support for considering the partial or complete abolition of committal hearings. He submitted:

It is becoming increasingly recognised that the extra time added to the resolution of a matter by the committal hearing may not be justified by the extent to which the committal hearing achieves its traditional purpose of helping to usefully refine the matters in dispute.

Various alternative mechanisms, including pre-trial 'Basha' hearings, may sufficiently fulfil the role of committals, but involve far less delay.

I also acknowledge that there are good arguments for the abolition of committals in those child sex offence matters in which, as a matter of current law, the complainant may not be cross-examined at committal.

The potential advantages to the criminal justice system generally – and to child sex offence prosecutions in particular – of the abolition of committals are such that high priority should be given to assessing the merits of committal reform.<sup>1060</sup>

The DPP for the Australian Capital Territory submitted that the abolition of committal hearings could significantly reduce delays, suggesting that, while they performed an important filtering process before the existence of independent DPPs, their utility now is questionable.<sup>1061</sup> He outlined the 2008 reforms to committal proceedings in the Australian Capital Territory as follows:

In 2008 committal proceedings in the ACT were radically reformed. The ACT went from full committal hearings to virtually all paper committals. A prosecution witness can be required to attend a committal hearing but there is a high threshold to be met before a prosecution witness can be cross-examined. Applications for prosecution witnesses to be required for cross examination are rarely made, and there is a prohibition on any sexual assault complainant being required to attend for cross examination at committal. This not only reduces the trauma for complainants, it ensures all matters that should be determined at trial are set for trial. Previously, it was not uncommon for a complainant, or their carer, to indicate that they were not prepared to give evidence at trial because they found the process of giving evidence at committal so difficult. While the presence of a jury may encourage some restraint on cross examination of complainants in sexual offence proceedings, that same restraint does not apply in a committal hearing.<sup>1062</sup>

The New South Wales ODPP also submitted that committals were of little utility and had virtually no role to play in allegations of child sexual abuse.<sup>1063</sup>

In the Consultation Paper, we queried whether proceedings for child sexual abuse matters should be initiated in a summary jurisdiction at all. In New South Wales, matters that are committed for trial spend around 230 days in the Local Court before being committed to the District or Supreme Courts. However, the issue might again arise as to whether commencing proceedings in the District Court would simply shift this time delay to that jurisdiction.

While the New South Wales ODPP could see a number of advantages in commencing child sexual abuse proceedings in the District Court, it identified a number of logistical and procedural impediments that may outweigh the advantages:

- A proportion of child sexual abuse cases in NSW are dealt with summarily. Given the current backlog of trials in the District Court, there would currently appear to be little advantage in moving all child sexual abuse cases to the District Court.
- However, if the current jurisdictional division is maintained and there was the option to commence proceedings in the District Court, given that all child sexual abuse cases are prosecuted by the ODPP, it would be possible for us to determine where the proceedings are commenced.
- The Child Sexual Offence Evidence Pilot has established a precedent for specialist and separate handling of child sexual abuse cases in the District Court. Therefore, these matters already receive preferential or different handling by that Court, which is correspondingly building expertise in the area. This may support the argument for District Court commencement.
- However, the Pilot operates on much work being done on matters during the Local Court stage and therefore, the time factors currently at play in the District Court would blow out.
- Further, these matters would lose the benefits other types of criminal matters would receive by commencing in the Local Court, such as the discount for an early plea and opportunities to argue against progression to trial or otherwise test the evidence. Adjustments to incorporate these features in the District Court would likely add to that Court's backlog.
- One particular impediment in NSW is access to the District Court in regional centres. The District Court does not regularly sit in all regional centres and nor is it set up to deal with bail after arrest.<sup>1064</sup>

The Victorian Government noted that, while committal proceedings could assist in the early resolution of some matters and help narrow issues in dispute, they built in additional delay.<sup>1065</sup> It also cautioned that shifting part of the committal process to trial courts could merely shift the burden and delay to a different court and that the net effect of such a change would have to be considered.<sup>1066</sup>

As discussed in section 3.3.1, on 7 May 2017 the Victorian Government announced a number of initiatives in response to the VLRC's report, *The role of victims of crime in the criminal trial process*, including the release of a discussion paper on proposed reforms to committal hearings.<sup>1067</sup>

VLA's submission highlighted the potential value of committals:

In Victoria, carefully run committals allow for timely testing of the strength of a case, narrowing of the issues for trial, discussions regarding resolution or discontinuance, and the early and full disclosure of evidence. They can also prompt the prosecution to make decisions about how a case is to be put at an early stage well before trial. The pre-committal phase is also important as it is an opportunity to identify whether the case can be resolved early or whether it needs to proceed, with the benefit of a plea of guilty prior to committal a driving factor.<sup>1068</sup>

VLA submitted that more streamlined committals could result in lawyers losing the ability to properly test the strength of the evidence and that more difficult cases could benefit from an early assessment or identification of the strength of the evidence, which can also impact on the ability to resolve cases early.<sup>1069</sup> However, VLA also stated that committals were not the only way in which goals such as early disclosure, preparation and resolution could be achieved and indicated support for a system of case management which would facilitate early resolution and ensure early and full disclosure by police and prosecutors.<sup>1070</sup>

Generally, the views expressed in submissions appear to be broadly consistent with the model proposed by the NSW LRC, where committal proceedings would be replaced by a system of case management in the local or magistrates court, which would move the matter towards finalisation.

### 32.5.6 Case management and early identification of the issues

#### Case management generally

In the Consultation Paper, we suggested that a failure to establish the issues in dispute as early as possible in the prosecution process may lead to:

- time spent preparing to deal with issues that ultimately do not arise
- the presentation of evidence of little probative value
- delays in the trial to deal with legal issues that could have been identified earlier and dealt with before the trial commenced
- longer trials, increased burdens on court resources and increased delays.

Both the Trial Efficiency Working Group and the Leveson Review highlighted the need for the early identification of issues to address trial delays. The working group noted that in many cases it is not until after the jury has been empanelled and the trial commenced that any discussion of contentious issues takes place, and in some criminal trials the real issues in dispute may not become apparent until after the close of the prosecution case.<sup>1071</sup>

The Leveson Review identified as an overarching principle for achieving efficiency in criminal proceedings the need for consistent judicial case management in that the court must be prepared to robustly manage its work, and all parties must be required to work to identify the issues to ensure that court time is deployed to maximum effect.<sup>1072</sup>

The Royal Commission has heard that many child sexual abuse trials commence with an extended period of legal argument in the absence of the jury, witnesses and complainant. Where the argument relates to an application for trial severance which is successful, some complainants may be informed that their trial will be delayed by several months. This can cause great distress for complainants and witnesses who have prepared to give evidence, only for their involvement to be postponed for an indeterminate but potentially lengthy period.

In addition to leading to protracted legal argument before the trial commences, a failure to identify the issues undermines the efficiency of the trial itself. It increases the chances of evidence of little relevance or probative value being called, leading to longer trials. This increases burdens on complainants and witnesses and also contributes to jury fatigue and obfuscation of the meaningful evidence on which the jury should be making its decisions.

Also, unless defence counsel and the judge have a clear understanding of the issues in dispute in the trial, there may be unnecessary and irrelevant cross-examination of prosecution witnesses. It will be more difficult for judges to intervene in this cross-examination where the issues in dispute have not been clearly identified in advance.

Further, where the issues in dispute are not identified before the trial, estimates of trial durations will be uncertain, limiting the ability of prosecution agencies to provide continuity of staffing and making trial listing practices more difficult for the courts.

Pre-trial and other case management mechanisms may help courts to manage some of these difficulties.

As discussed in section 32.4.1, legislation to support pre-trial case management exists in New South Wales, but it may be underused. The NSW LRC noted that this level of case management in the District Court rarely occurs. It attributed this to a lack of judicial resources.<sup>1073</sup>

A number of submissions in response to the Consultation Paper expressed support for the increased use of case management.

The Victorian Government's submission listed some of the possible benefits of the earlier identification of issues:

Achieving earlier identification of issues in dispute may help to reduce court time in the committal hearing or trial system (including case management), preparation and appearance costs of the parties, and negative impacts on victims, witnesses, investigators and the accused.<sup>1074</sup>

The Tasmanian DPP's submission noted the importance of pre-trial determinations on evidentiary matters:

Further, pre-trial hearings where evidentiary matters are decided can also prevent delays as once rulings are made an early determination as to whether a matter is to proceed to trial or will resolve in a plea of guilty can be expected.<sup>1075</sup>

The Victorian DPP expressed strong support for case management mechanisms designed to ensure early issue identification and to promote appropriate resolution.<sup>1076</sup>

Similarly, the New South Wales ODPP submitted that it had 'advocated for some time that there be greater case management by the District Court to promote, if not mandate, the early identification of issues by the parties'.<sup>1077</sup> The New South Wales ODPP submission recognised the impact on victims of delays which can be attributed to the parties not being ready to proceed:

The Sexual Assault Review Committee ... has, over the years, compiled many examples of delay created by the fact that one or both parties were not ready to proceed due to late preparation of the case. We recognise that postponement of trials places unacceptable stress on victims, their families and also disrupts the schedules of other witnesses involved in the case. Further, it is an impediment within this Office to continuity of prosecution lawyers as it creates the possibility that the instructing and trial lawyers will not be available on the next occasion and the matter will need to be reallocated or re-briefed.<sup>1078</sup>

The New South Wales ODPP recommended that the District Court of New South Wales implement proper case management, including call-overs for all country sittings, noting that there is a higher percentage of child sexual abuse matters in the regional courts.<sup>1079</sup> It also expressed support for effective defence disclosure, submitting:

Late pleas, delays in commencing trials/calling victims due to pre-trial arguments and matters not ready to proceed could be addressed with more effective defence disclosure. It is recommended that Legal Aid consider their fees structure to brief Counsel early and that the Court expects and enforces considered responses to Crown disclosure.<sup>1080</sup>

The DPP for the Australian Capital Territory referred to pre-trial disclosure provisions which apply in New South Wales and expressed strong support for a more comprehensive pre-trial disclosure regime than that which currently operates in the Australian Capital Territory, where only the disclosure of expert reports is required:

The essence of any regime should be to determine what the issues at trial will be. When that is known, it will condition the length of time the trial will take and what witnesses will be required. The aim of the exercise is not to discover what the ‘defence’ will be, and I for one have no interest in trying to have that revealed.<sup>1081</sup>

On the subject of disclosure, VLA submitted that, during consultations in its Delivering High Quality Criminal Trials review, stakeholders expressed frustration about late disclosure by the police and prosecutors at various stages of the trial process, which can lead to delay and unfairness.<sup>1082</sup>

In section 32.5.4, we discussed the NSW LRC’s blueprint to facilitate early guilty pleas. As noted by the New South Wales ODPP, the early discussion and resolution of issues via mandatory case management at the Local Court level was a central component of the blueprint.<sup>1083</sup>

In the Consultation Paper, we outlined some of the case management mechanisms that operate in Victorian courts. In its submission, the Victorian Government suggested that such procedures can be an effective way to encourage early guilty pleas:

Whilst there may always be some accused people who ‘delay the inevitable’ by withholding a guilty plea until the last moment, early engagement by a judicial officer who is able to comment, with the authority of the court, on the strength of the prosecution case may help bring such guilty pleas forward. Similarly, early and informed judicial intervention can assist with reconsideration of charging decisions by the prosecution.<sup>1084</sup>

In section 32.4.1, we discussed the RLC and child sexual offence evidence pilot schemes in New South Wales. The preliminary evaluation of the RLC suggests that it may have significant positive impacts on delay. The child sexual offence evidence pilot scheme also appears to envisage a high level of case management, which may provide a useful example for the benefits of – and any problems with – greater use of case management in child sexual abuse trials.

## Sexual assault communications privilege

In addition to legal arguments related to issues such as severance, late applications by the defence for access to privileged sexual assault communications may add additional delays before the commencement of the trial.



As sexual assault trials, including child sexual abuse trials, are frequently ‘word against word’ cases, the credibility of the complainant is likely to be tested. This has led to provisions being put in place to protect confidential medical and therapeutic records of sexual assault victims. The defence may seek access to communications between the complainant and the counsellor to assist with their preparations for trial and potentially to use against the complainant during cross-examination. For complainants, who may not have anticipated that their counselling records could be sought, a ‘protected confidence’ or ‘sexual assault communications privilege’ application can be distressing.

While the approach taken in each jurisdiction differs, all Australian jurisdictions other than Queensland have specific legislation protecting such communications by making them privileged. The Queensland Government has accepted a recommendation by the Special Taskforce on Domestic and Family Violence in Queensland to adopt the New South Wales model. The Queensland state budget for 2016–17 includes an allocation of \$2.2 million over four years for the implementation of a sexual assault counselling privilege.<sup>1085</sup>

In New South Wales, the privilege is absolute during preliminary proceedings such as committal proceedings and bail proceedings and qualified in proceedings which relate to the trial or sentencing, including pre-trial and interlocutory proceedings.<sup>1086</sup> For proceedings where the privilege is qualified, a person cannot seek access to communications without making an application for the leave of the court,<sup>1087</sup> with the court making a determination based on considerations such as the probative value of the material and the public interest in preserving the confidentiality of protected communications.<sup>1088</sup>

Tasmania is the only jurisdiction in which the privilege is absolute in all proceedings.<sup>1089</sup> In all other jurisdictions, applications for access to such material during phases of the proceeding where the privilege is qualified are likely to contribute to further delays unless the defence’s intention to seek the material is identified early in proceedings and the matter is determined early and well in advance of the trial.

In its most recent annual report, the County Court of Victoria identified the late filing of applications for access to these communications as a pressing issue, as it can result in significant workloads on the list judge who must read voluminous material in order to determine what should and should not be released and which material ought to be redacted.<sup>1090</sup>

In the Consultation Paper, we raised the issue of the sexual assault communications privilege because of its potential to cause delay in the trial and the risk that attempts to avoid causing delay might lead to the effective non-observance of the privilege. This privilege can be particularly significant in adult sexual assault prosecutions, and we have not sought to examine it more broadly. In Chapter 3, we noted the VLRC’s consideration of the privilege and its recommendation that VLA should be funded to provide representation to complainants in relation to the privilege, similar to the service provided in New South Wales by Legal Aid NSW.

In relation to the interaction between the privilege and the issue of delay, in its submission in response to the Consultation Paper, Legal Aid NSW submitted that pre-trial case management is not only underused but is also ineffective in protecting victims' confidential communications. It stated:

Legal Aid NSW observes that there is widespread non-compliance with the notice requirements in the legislation. Section 299C of the *Criminal Procedure Act 1986* (NSW) prevents the production or adduction of protected confidences unless the party seeking to do so gives reasonable notice in writing to the parties and the complainant. Leave to serve a subpoena cannot be granted until 14 days after notice is given. The court has the power to waive these notice provisions, but the legislation requires that to occur in 'exceptional circumstances.'

Anecdotally, these provisions are rarely enforced. Notice is often waived in the absence of a finding of exceptional circumstances. In practice, non-compliance with the notice provisions:

... creates significant difficulties for complainants. Often [the sexual assault communications privilege lawyer is] ... asked to appear the day before the return date of the subpoena or the first day of the trial, when the ODPP receives information of the issue of subpoenas. When notice is given, it is often very late. When it is not, the complainant is left to hope that an objection will be raised by the party producing the document.<sup>1091</sup>

Ms Christine Mendes, a barrister who gave evidence on behalf of Legal Aid NSW, told the public hearing in Case Study 46:

One significant concern relating to procedures with respect to the use of the privilege in courts [in New South Wales] is that there's widespread abuse, if I could use that word, of the notice requirements with the legislation, such as bringing to the attention of the court that leave is required; there are problems with the issuing of subpoenas by the registry when confidential communications are sought; there are problems in terms of getting documents to the court when issues are raised as to whether or not a confidential communication might be included in the documents that are sought – all kinds of practical difficulties with the implementation of the legislation.<sup>1092</sup>

In relation to the requirement to give notice, including to the complainant, before a subpoena is issued, Ms Mendes told the public hearing:

Can I say, in my experience, having appeared in these matters since the beginning of 2012, I have never ever seen a notice under section 299C – never. ...

Never seen a notice. As far as the leave application [to issue a subpoena seeking production of documents containing protected confidences], that is quite haphazard. From time to time you might have something scrawled in handwriting, called an application for leave. At times you might receive a notice of motion with an affidavit in support.<sup>1093</sup>

Where additional time is required to resolve outstanding disputes, it is likely to lead to delays in the proceedings, which can in itself have an adverse impact on victims' wellbeing. Legal Aid NSW suggested that 'consistency in the application of the notice provisions is clearly required for the benefit of all parties'.<sup>1094</sup>

In relation to possible reforms, Legal Aid NSW submitted:

Legal Aid NSW would welcome procedural reform aimed at the diversion of subpoenas which are likely to catch protected confidences before they are given a return date and stamped by the court registry. We note in this respect that the District Court of Western Australia has issued a Circular to Practitioners which requires any witness summons that might require production of a protected communication to be referred to a legally qualified Registrar for review. The Registrar will decline to issue the summons if he or she forms the view that the records or objects required under the summons appear to include protected communications. The applicant will be notified of this decision by letter.

The applicant can then either: (a) resubmit the summons with an amended description of the records or objects sought, or (b) apply to the court for leave to require production of the protected communications. Alternatively, the applicant can expressly exclude protected communications from the scope of the documents sought pursuant to the witness summons.

Adoption of a similar screening process in NSW would encourage compliance with SACP [sexual assault communications privilege], reduce pressure on complainants close to trial to consent to the production of protected confidences, and promote the principles and purposes of SACP.<sup>1095</sup>

Ms Mendes told the public hearing:

One issue that Legal Aid have thought considerably about is what process would occur at the first port of call. The subpoena is issued invariably by the defence. When that subpoena is received by the registrar, Legal Aid have suggested there could be an additional box in the subpoena itself where a practitioner would certify that they are not seeking any documents that are privileged. That would be one way of addressing this issue, that subpoenas are vetted at the registry itself so that these issues are addressed right at the beginning.<sup>1096</sup>

Ms Helen Fatouros, representing VLA, told the public hearing in Case Study 46 that case management appears to be effective in addressing these issues in Victoria:

I think, generally speaking, some of the notice challenges that have just been described [by Ms Mendes in relation to New South Wales] were experienced in the early days, a number of years ago, in Victoria, but we have very close judicial case management and supervision in the pre-trial phase, which has, to an extent, eliminated like issues. So the experience in Victoria is one where there's very close judicial and registry oversight in the administrative and legal decisions that are made around the management of the subpoenas and the judgments around what material will be released and what will not.<sup>1097</sup>

### 32.5.7 Trial listing practices

In the Consultation Paper, we stated that a number of stakeholders had told us that court listing practices can operate as impediments to maintaining continuity in prosecution staffing.

As we discussed in section 32.3, in the interests of efficiency, courts often over-list matters on the pragmatic assumption that many matters will be discontinued or resolved by a plea of guilty shortly before or on the day of the trial. On occasions where this assumption is not borne out, it can result in matters not being reached on their listed trial date, leading to uncertainty for complainants.

While it is typical for child sex abuse matters to be given a high listing priority by the courts, we have heard that it is still possible for child sex abuse matters not to be reached on their listed trial date due to over-listing practices. In some cases, this will mean the matter is heard later that week. In other cases, the matter may be adjourned, possibly for months, leading to significant further delay.

An adjournment in these circumstances can result in a different prosecution team then being assigned to the matter due to scheduling conflicts for the existing team, resulting in further uncertainty for complainants.

Similarly, in jurisdictions where matters can be listed as 'back-up' trials, there can be situations where a judge becomes available to hear a back-up matter and a child sex abuse matter is allocated to the judge, but the existing prosecutor is unable to run the trial due to a scheduling conflict.

In addition to delays for the complainant, listing practices can present difficulties for prosecution agencies and defence lawyers. Over-listing means multiple cases must be prepared for trial, some of which will not proceed on the listed date, leading to wasted resources.<sup>1098</sup> Further, Crown prosecutors may be reassigned to different matters at the last minute and may disagree with the outgoing prosecutor as to which charges are most appropriate on the face of the evidence. This contributes to the reluctance of defendants to enter pleas at the earliest opportunity – there may be a possibility of a downgraded charge closer to the trial date.<sup>1099</sup>

Over-listing is not unique to Australian jurisdictions. The Leveson Review noted that over-listing practices in courts in England and Wales had the effect of ensuring maximum utilisation of the courts at the cost of ineffective trials. For example, over-listing meant the advocate who attended at the preliminary hearing was frequently not instructed for the trial, leading to difficulties in maintaining continuity, creating unnecessary duplication of work<sup>1100</sup> and contributing to a lower standard of advocacy due to inadequate preparation.<sup>1101</sup>

In the Consultation Paper, we suggested that it may not be sensible for courts to change their practice of over-listing. It is a pragmatic approach which ensures maximum use of limited court resources. However, it is also a practice that can hamper the efficacy of other measures that might reduce delays in the court system. We suggested that some of the other options we have discussed in section 32.5, if successfully implemented, might reduce the need for courts to rely on over-listing as a means of managing high case loads and limited court time.

In the public hearing in Case Study 46, we heard evidence of the impact on complainants of delays arising from listing practices. FAA, a survivor, told the public hearing:

My trial was scheduled to occur immediately after the conclusion of the second trial, but I recall being told by the detective that it would be pushed back a further few months because there was not enough time for it to be heard. This again caused me significant anxiety and I felt like everything was just dragging on.<sup>1102</sup>

Professor Judy Cashmore, representing the Sydney Law School in its joint submission with SAMSN, told the public hearing:

The over-listing I think is a really big issue, and it doesn't just affect the survivors – well, the witnesses, the complainants, in a very negative way; it also is a massive inefficiency for the DPP and the defence who have to sit around or come back on a regular basis, not knowing whether it is today or tomorrow or next week, and then six months time or later.<sup>1103</sup>

In its submission to the Consultation Paper, the New South Wales ODPP noted that, while child sex abuse matters were given a high listing priority by the courts, it was still possible for child sex abuse matters not to be reached on their listed trial date due to over-listing practices. For example, matters in which the accused is awaiting trial in custody may be given priority over sex offence matters where the accused is on bail.<sup>1104</sup> The New South Wales ODPP submitted that this can have serious consequences for victims, who will have prepared to give evidence under significant stress:

if a judge is not immediately available, a trial is often adjourned to the next day for mention. This can happen over a number of days. This process is distressing for victims and their families. Victims have prepared to give evidence and the trial date is one that assumes great importance for them.<sup>1105</sup>

The New South Wales ODPP noted that the need for over-listing may be reduced through the better use of case management.<sup>1106</sup>

The New South Wales ODPP also suggested that courts' listing practices can make some of the other elements that improve prosecution responses for complainants more difficult to implement. In particular, the New South Wales ODPP recommended that the District Court of New South Wales implement listing procedures that can accommodate the prosecutor's and defence counsel's availability. In relation to the District Court of New South Wales, it submitted that '[I]f a prosecutor is briefed in a matter the Court should allow some flexibility in listing the matter on the next occasions so that continuity can be maintained where possible'.<sup>1107</sup> Presumably in some cases, accommodating counsel's availability might lead to greater delay for the complainant, although the disadvantages of greater delay might be offset by the advantages of maintaining the same prosecutor.

In its submission in response to the Consultation Paper, the Victorian Government stated that the County Court of Victoria was currently reviewing its listing practice as follows:

A major ongoing project for the County Court is a 'ground up review' of listings practice to further reduce delay between charge and finalisation. This review will consider the practice of 'over listing' which, as identified in the Consultation Report, ensures that there is always a trial ready to proceed, but can impact on the efficient use of prosecution and defence resources who either wait in a 'reserve list' or have their cases not reached.<sup>1108</sup>

The 2014–15 annual report of the County Court of Victoria stated that 'an intense focus on optimising listings during the reporting period' had resulted in the lowest number of not reached trials in five years as well as a reduction of over 10 per cent in the pending case load and in the number of cases disposed of outside 12 months.<sup>1109</sup>

The submission from the DPP for the Australian Capital Territory outlined recent changes to listing practices in the Australian Capital Territory which he submitted have had a positive impact on delays:

Until 2013 the ACT was plagued by inordinate delays in trials, and this particularly affected sexual offence trials. It was not unusual for there to be a delay of up to one year between the hearing of a pre-trial application, or the taking of pre-trial evidence, and the actual trial. Chief Justice Murrell was appointed in 2012 and instituted significant changes to the listing of criminal trials which have resulted in trials being listed more quickly. Following committal (now virtually all paper committals) there is a period of about five to six weeks when committal documents are prepared by the prosecution. The committal documents consist of the indictment, a case statement, witness list and questionnaire. The case statement sets out the prosecution case, the charges, the elements, and how they will be proved. The accused is required to file a response questionnaire. The matter is then ready to be set down for trial.

The requirement of a case statement to be filed with the indictment forces the prosecution to engage with its case at an early stage. In particular, the prosecution will at

that stage identify the basis of any plea negotiation – for example whether counts could be ‘rolled up’ on a plea of guilty. The prosecution will therefore be on the front foot when the defence engages with the case.

There are now four criminal trial listing periods a year each of five weeks duration. Trials are over listed on the basis that many will resolve. Generally 50% of trials are resolved by way of plea of guilty prior to the trial. There are four call overs where matters are allocated trial dates in the trial listing period three months later. From committal to trial date is therefore between 4 ½ and seven months in the normal course.<sup>1110</sup>

We note the assessment in the AIC report, discussed in section 32.3.2, which suggests that over-listing may lead to the inefficient use of court time, despite it being intended to ensure more efficient use of court time. While over-listing reduces some inefficiencies in the criminal justice system, it contributes to other inefficiencies.

We are not persuaded that we should recommend that courts change their practice of over-listing. However, we consider that it should be reviewed from time to time, particularly in courts in which trials are subject to lengthy delays. Reviews should consider whether over-listing is producing efficiencies rather than inefficiencies in use of court time, and whether it is producing inefficiencies for other parts of the criminal justice system, and should also take account of any other changes in the criminal justice system that might have reduced – or increased – the need for over-listing.

We note that the outcome of the current review of listing practices in the Victorian County Court may be of interest to other jurisdictions, particularly those experiencing delays in their intermediate courts.

## 32.6 Discussion and conclusions

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In the Consultation Paper, we suggested that the issues and possible options we had discussed in relation to delays in the criminal justice system may have significant and complex interactions with each other. For example:

- trial durations may be improved by the early identification of the issues at trial
- early identification of the issues at trial is only possible with the early involvement of Crown prosecutors
- failure to identify the issues early leads to uncertain estimates of trial duration, which acts as a barrier to continuity of prosecution staffing
- lack of continuity and the late appointment of Crown prosecutors in general contributes to a lack of early guilty pleas, as the defence may have an expectation that charges might be downgraded upon a review of the evidence by the Crown prosecutor appointed for the trial

- late guilty pleas contribute to overall delays in the system
- securing appropriate early guilty pleas requires the early involvement of Crown prosecutors
- the expectation of late guilty pleas can lead courts to over-list trials for hearing
- over-listing of trials for hearing is a barrier to continuity of the prosecutor and prosecution team and it may deplete prosecution resources.

In the Consultation Paper, we acknowledged that some states and territories do not have particular problems with delay, or at least not to the same extent as the larger jurisdictions, in relation to child sexual abuse trials. We also noted that differences between jurisdictions that are experiencing unacceptable delays may mean that solutions in one jurisdiction may not work in other jurisdictions and that the interactions between different aspects of the criminal justice system meant that the problem of delays could be tackled from a number of different directions.

Given the jurisdictional differences and the complexities involved, we suggested that it may not be feasible for us to make detailed recommendations about how eight very different prosecution and court systems should operate.

Instead, we suggested that it may be that some principles could be identified, such as:

- the importance of reducing delay
- the importance of allocating prosecutors as early as possible
- the importance of the Crown – including subsequently allocated Crown prosecutors – being bound by early prosecution decisions
- the importance of securing appropriate early guilty pleas
- the importance of determining preliminary issues before trial.

We sought submissions as to whether it was sufficient to address the issue of delays by setting out general principles or whether we should consider making more specific recommendations.

No interested party submitted that we should make specific recommendations.

In its submission in response to the Consultation Paper, the Victorian Government expressed support for principles, noting the importance of including all parties in the criminal justice system. It submitted:

What is essential with any case management process is that there is an alignment of resources and effort between the courts, prosecution and defence. This means that the courts, prosecution and defence need to engage with each other cooperatively so that each entity is able to maximise the results of their effort and operate more efficiently.



One of the challenges in making recommendations to address delay is that there can often be difference [sic] administrative or cultural barriers that have shaped procedures in each jurisdiction. This provides the context in which legislative schemes operate but may not be apparent from the legislative scheme. As a result, some mechanisms that work in some jurisdictions may not work in other jurisdictions.

Statements of general principle from the Royal Commission about delay reduction may assist different jurisdictions to adapt existing mechanisms and structures. In devising principles it may be important to expressly include each component of the criminal justice system, including, for example, defence practitioners, legal aid agencies, investigators, in addition to prosecutors and the courts.

Existing structures and resource allocation may currently conspire with human nature to relegate meaningful discussion about a case to the ‘door of the court’. It may be helpful for any general principles to encourage each component of the criminal justice system to focus on outcomes or results (for example, earlier resolution), rather than mere compliance with court processes.

Principles may assist regarding the allocation of resources to early stages of proceedings as discussed above. Principles may also guide the implementation of enforceable requirements and incentives for early engagement between the parties well in advance of a court hearing. Early engagement may include proper disclosure and analysis of the brief of evidence by both prosecution and defence that will enable the most to be made of each court appearance.<sup>1111</sup>

We remain satisfied that it is not feasible for us to make detailed recommendations about how eight very different prosecution and court systems should operate.

It also seems likely that other recommendations we make in this report, if implemented, will have an effect on delay, although it might not be clear whether that effect is positive or negative.

For example, the experience of the child sexual assault evidence pilot suggests that greater prerecording of complainants’ evidence might reduce delay by requiring earlier briefing of the prosecutor and defence counsel; earlier identification of the issues; and earlier assessment of the strength of the evidence. It might also encourage appropriate guilty pleas to be made earlier, and it might reduce the likelihood of charges being withdrawn late in the pre-trial process.

However, to the extent the pilot encourages complainants to come forward and to remain in the criminal justice process, and if it enables them to give their best evidence so that trials are more likely to proceed, it may increase the number of prosecutions in the system, potentially leading to increased delay.

The interconnectedness of the criminal justice system makes it likely that any significant changes will require additional resources, at least initially, not just for the courts but also for prosecution agencies and publicly funded defence services and in some cases for police. Even where reforms achieve improvements, these may require an initial additional investment, and they may lead to increased demand rather than reducing the need for resources.

It is likely that each jurisdiction will differ as to where resources are best directed across the system and in relation to particular reforms, depending on the problems being experienced most acutely in the relevant jurisdiction, and this is likely to change over time.

It is clear that delay can be a significant problem in the criminal justice system in child sexual abuse prosecutions, even though such prosecutions are often afforded a degree of priority. Delays can be particularly damaging for complainants, encouraging them to give up on obtaining a criminal justice response or even discouraging them from reporting the abuse they have suffered to police.

It is also clear that a number of jurisdictions have adopted measures to seek to reduce delays, to better case manage child sexual abuse prosecutions and to trial different programs that might both reduce delays and bring about other improvements in child sexual abuse prosecutions. Some jurisdictions are conducting reviews and evaluations or are implementing responses to relevant recommendations of law reform bodies, and the outcomes of these processes should be of interest to all jurisdictions that are experiencing delays.

### **Recommendations**

72. Each state and territory government should work with its courts, prosecution, legal aid and policing agencies to ensure that delays are reduced and kept to a minimum in prosecutions for child sexual abuse offences, including through measures to encourage:
  - a. the early allocation of prosecutors and defence counsel
  - b. the Crown – including subsequently allocated Crown prosecutors – to be bound by early prosecution decisions
  - c. appropriate early guilty pleas
  - d. case management and the determination of preliminary issues before trial.
73. In those states and territories that have a qualified privilege in relation to sexual assault communications, the relevant state or territory government should work with its courts, prosecution and legal aid agencies to implement any necessary procedural or case management reforms to ensure that complainants are effectively able to claim the privilege without risking delaying the trial.

# PART VIII POST- CONVICTION ISSUES



## 33 Introduction

In this part, we discuss steps in the criminal justice process that occur or may occur after an offender is convicted – that is, sentencing, appeals and post-sentencing issues. Our discussion here primarily relates to adult child sexual abuse offenders. We discuss these juvenile offenders in Chapter 37.

The sentencing of offenders involves an often complex task of applying the principles and purposes of sentencing to the characteristics of the offence and the subjective characteristics of the offender. Terms of imprisonment must be within statutory limits and will be influenced by sentences imposed for similar offences and, in some jurisdictions, standard non-parole periods or baseline sentences.

The approach to sentencing child sex offenders, and the term of head sentences, have altered significantly in recent times. There has been an upward trend in the number of offenders who receive custodial sentences, and the lengths of sentences for child sexual abuse has increased.

The sentencing of child sex offenders is an important issue. This is in part because of the role sentencing plays in achieving some of the purposes of the criminal justice system – particularly punishment and deterrence.

In Chapter 34, we discuss the findings of the two research reports that we commissioned on sentencing in matters of child sexual abuse, with a focus on institutional child sexual abuse: *Sentencing for child sexual abuse in institutional contexts* (Sentencing Research) and *A statistical analysis of sentencing for child sexual abuse in institutional contexts* (Sentencing Data Study). The Sentencing Research examines the factors that inform sentencing policy and judicial decision-making when sentencing for institutional child sexual abuse. The Sentencing Data Study analysed 283 matters in which an offender was sentenced for child sexual abuse offences in an institutional context.

We outline the general principles and purposes of sentencing and the sentencing factors that are most relevant in child sexual abuse cases.

In the Consultation Paper, we identified the following possible areas for reform of sentencing for child sexual abuse, including institutional child sexual abuse:

- excluding good character as a mitigating factor
- cumulative and concurrent sentencing
- sentencing standards in historical cases.

We discuss what we were told in submissions in response to the Consultation Paper and in the public hearing in Case Study 46 in relation to these issues and the issue of victim impact statements, and we make recommendations in relation to them.

Appeals play an important role in the criminal justice system. They provide an avenue for parties to correct errors in individual matters. They also enable the appellate courts to provide guidance to trial courts on the correct way to apply the law in similar cases, which improves consistency across the criminal justice system.

While a criminal appeal following a conviction for child sexual abuse offences may be traumatic for the complainant, a defendant's right to appeal is enshrined in the criminal law. It is fundamental to the integrity of the criminal justice system and the ongoing development of principles of law.

Each state and territory's legislation governing appeals in criminal matters allows a convicted person to appeal against their conviction, either as of right or with leave depending upon the issues raised in the appeal. A convicted person is allowed to appeal against their sentence with the leave of the court. Some offenders appeal only against their sentence, while other convicted persons appeal against both their conviction and sentence.

The prosecution is allowed to appeal against a sentence imposed by the sentencing court, although such appeals should be rare. The prosecution is generally not allowed to appeal against an acquittal.

In most jurisdictions, the prosecution is allowed to appeal against interlocutory judgments or orders – that is, judgments or orders made by the trial judge before or during the trial – at least in some circumstances. The accused may also appeal against interlocutory judgments or orders with the appeal court's leave or a certificate from the trial judge. Interlocutory appeals may be particularly important for the prosecution if a trial judge makes orders that could have a significant impact on the prosecution's case.

In Chapter 35, we discuss research we commissioned on appeals to the New South Wales Court of Criminal Appeal in child sexual assault matters in New South Wales from 2005 to 2013 – the Appeals Study.

In the Consultation Paper, we discussed a number of issues in relation to appeals and raised the following as areas for possible reform:

- interlocutory appeals by the prosecution
- inconsistent verdicts
- the importance of recording complainants' evidence
- the exercise of the prosecution's discretion following a successful appeal against conviction
- ongoing monitoring of appeals.

We discuss what we were told in submissions in response to the Consultation Paper and in evidence in the public hearing in Case Study 46 in relation to appeals, and we make recommendations in relation to some of the areas we identified for possible reform.

In Chapter 36, we discuss three criminal justice responses that can occur at sentencing or after a child sexual abuse offender has been sentenced:

- treatment for adult offenders who have committed child sexual abuse offences while they are serving their sentences, either in custody or in the community
- indefinite sentences and supervision or detention orders
- risk management measures applying on release of child sexual offenders, including sex offender registration schemes.

Generally, these measures aim to protect the community through treating offenders, keeping offenders in custody or restricting offenders' activities in the community. Only a few survivors have raised concerns with us about any of these measures in relation to institutional child sexual abuse.

We held a public roundtable on adult sex offender treatment programs. We outline the roundtable discussions on current programs and evidence for the effectiveness of treatment programs.

We outline the provisions for and use of supervision and detention orders and indefinite sentences in Australian states and territories.

In relation to risk management measures on release of an offender, we outline the operation of child sex offender registries and discuss how they interact with Working with Children Check schemes and the different approaches adopted between the states and territories.

# 34 Sentencing

## 34.1 Introduction

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The sentencing of offenders involves an often complex task of applying the principles and purposes of sentencing to the characteristics of the offence and the subjective characteristics of the offender. Terms of imprisonment must be within statutory limits and will be influenced by sentences imposed for similar offences and, in some jurisdictions, standard non-parole periods or baseline sentences.

The approach to sentencing child sex offenders, and the term of head sentences, have altered significantly in recent times. There has been an upward trend in the proportion of people convicted of child sexual assault offences who receive custodial sentences, and the lengths of sentences for child sexual abuse have increased.<sup>1112</sup>

Parliaments have enacted increased maximum penalties for child sexual offences.<sup>1113</sup> In New South Wales, a large portion of offences in the standard non-parole scheme now consists of child sexual abuse offences.<sup>1114</sup> As noted by the Judicial Commission of New South Wales, remarks in the New South Wales Court of Criminal Appeal also indicate a growing understanding by the community, and judiciary, of the harm that child sexual abuse can cause victims, their families and the broader community. In *R v MJR*,<sup>1115</sup> Mason P expressed the view that there has been a pattern of increasing sentences for child sexual assault and stated that this:

... has come about in response to greater understanding about the long-term effects of child sexual abuse and incest; as well as by a considered judicial response to changing community attitudes to these crimes.<sup>1116</sup>

Research has shown that community members are still often dissatisfied with the length of sentences given to convicted child sexual abuse offenders, although jury members may be less likely to be dissatisfied with the sentence given in the particular case.<sup>1117</sup>

Sentencing sits at the 'end of a long series of decisions', including the initial decision by the complainant to report the abuse to police, the police response, and the finding by the prosecutor that there is a reasonable prospect of conviction followed by a decision to prosecute.<sup>1118</sup> Much of our focus is on pre-conviction concerns and ensuring that victims and survivors are able to report to police, have their reports investigated and, where appropriate, have offenders prosecuted.

However, the sentencing of child sex offenders is an important issue. This is in part because of the role sentencing plays in achieving some of the purposes of the criminal justice system – particularly punishment and deterrence.

This chapter draws heavily from research we commissioned on sentencing in matters of child sexual abuse in institutional contexts.<sup>1119</sup> The research is published on the Royal Commission website.



In this chapter, we outline:

- the findings from the research we commissioned on sentencing in institutional child sexual abuse cases – in section 34.2
- the general principles and purposes of sentencing – in section 34.3
- the penalties available for child sexual abuse offences – in section 34.4
- the sentencing factors that are most relevant in child sexual abuse cases – in section 34.5
- the submissions we received in response to the Consultation Paper – in section 34.6.

We then discuss and, where relevant, make recommendations in relation to:

- restricting consideration of the offender’s good character in sentencing
- restricting concurrent sentencing where there are multiple instances of offending and/or multiple victims
- sentencing in accordance with standards that apply at the time of sentencing rather than at the time of the offence when sentencing historical child sexual abuse offences.

## 34.2 Sentencing research

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### 34.2.1 Introduction

The Royal Commission commissioned research on sentencing in matters of child sexual abuse, with a focus on institutional child sexual abuse. The objective of the research was to examine the factors that inform sentencing policy and judicial decision-making when sentencing institutional child sexual abuse.

This sentencing research resulted in two reports:

- *Sentencing for child sexual abuse in institutional contexts* (Sentencing Research), by Emeritus Professor Arie Freiberg, Mr Hugh Donnelly and Dr Karen Gelb, took a broad view on sentencing offenders of child sexual abuse and canvassed issues such as community (mis)perceptions of sentencing; the availability of ancillary orders; and sentencing factors considered by the sentencing court. It also discussed the possibility of institutional offences, which we discussed in Chapter 18.

To better understand sentencing of child sexual abuse in an institutional context, the researchers conducted a study of 84 institutional child sexual abuse matters finalised in the District Court of New South Wales. The database of sentenced matters was not comprehensive; rather, it constituted a 'collection of institutional abuse cases drawn from many sources and compiled to reveal the dynamics of abuse'.<sup>1120</sup> From this database, the collected remarks on sentencing were reviewed to provide insight into the application of sentencing principles; the use of grooming; and institutional responses to child sexual abuse.

- *A statistical analysis of sentencing for child sexual abuse in institutional contexts* (Sentencing Data Study) by Dr Karen Gelb extended the institutional child sexual abuse study in the Sentencing Research. It expanded the study to include cases from a range of jurisdictions and undertook a more 'nuanced examination of the interactions among the factors measured'.<sup>1121</sup>

### 34.2.2 Sentencing Research

The key observations of the Sentencing Research include the following:

- The number of offenders sentenced for child sexual abuse offences represents only a small proportion of total offenders.<sup>1122</sup>
- Studies suggest that the rate of repeat offending (of the same type of offence) for convicted child sex offenders is low – generally at about 13 per cent.<sup>1123</sup> The Sentencing Research indicates that low reporting rates, high rates of attrition and the substantial delays in the reporting of child sexual abuse offences mean that the estimated rate of repeat offending that emerges from these studies is a 'reasonable, if conservative' estimate of sex offender recidivism.<sup>1124</sup> (Note that these studies only count offenders who, after an initial conviction for one or more child sexual abuse offences, go on to commit further child sexual abuse offences for which they are tried and convicted. They do not count offenders who commit many offences before they are convicted or offenders who are not convicted for subsequent offences.<sup>1125</sup>)
- While statutory maximum penalties signal the community's views of the seriousness of a crime, there is a question as to whether maximum penalties make a significant difference to sentencing practices as they are rarely, if ever, imposed.<sup>1126</sup>
- A meaningful comparison of sentencing across Australia is not achievable due to a number of factors identified by the Sentencing Research, including:
  - the substantial differences in how Australian jurisdictions have drafted offences and the respective maximum penalties
  - the factors that influence sentencing for child sexual abuse vary in each jurisdiction – these factors include lower crime rates or differences in sentencing culture

- different charging practices between jurisdictions, meaning that there may not be significant numbers of similar offences to compare.<sup>1127</sup>

The Sentencing Research identified a number of factors relevant to child sexual abuse that may influence the type and length of sentence that a sentencing court gives to an offender. Aggravating factors may include:

- premeditation<sup>1128</sup>
- offending facilitated by a breach or abuse of trust or authority<sup>1129</sup>
- the exploitation of an offender's standing of good character<sup>1130</sup>
- delay between the date of the offence and the sentencing date if the delay has negatively impacted on the victim or survivor<sup>1131</sup>
- the applicability of any laws relating to mandatory sentences and mandatory non-parole periods, such as those that apply in Queensland, Victoria and the Northern Territory.<sup>1132</sup>

Mitigating factors include the consequences of conviction for the offender, including if they are of old age or ill health.<sup>1133</sup>

A sentence may also be reduced for other reasons. These include:

- a consideration of sentencing practices at the time of the commission of the offence (as opposed to the date of conviction)<sup>1134</sup>
- the willingness of the offender to facilitate the course of justice – for example, by confessing to having committed other offences.<sup>1135</sup>

To better understand the way existing sentencing laws are applied to institutional child sexual abuse, the authors performed a quantitative analysis of 84 New South Wales institutional child sexual abuse cases that were finalised in the District Court of New South Wales.

The analysis comprised 72 offenders (12 of whom were sentenced on two occasions) with sentences handed down between 1989 and 2015. Fifty-one per cent were sentenced before 2003. Thirty-eight per cent of matters were sentenced more than 25 years after the sexual assault occurred. The longest period between the offending and sentence was 51.7 years.<sup>1136</sup> The majority of institutions in the study were religious institutions. Table 34.1 shows the researchers' categorisation of the institutions in which the abuse occurred.

**Table 34.1: Institutions presented in New South Wales study**

Institutions	Number of cases	Percentage of cases
Catholic schools	24	28.6
Catholic church (including Catholic-run homes)	21	25
Schools (unspecified)	7	8.3
Anglican church (including Anglican-run homes)	6	7.1
Sporting clubs	5	6
Scouting clubs	5	6
Uniting schools	3	3.6
Cult/sect	3	3.6
Jehovah's Witnesses	2	2.4
YMCA	2	2.4
Creative arts organisations	2	2.4
Presbyterian schools	1	1.2
Public school	1	1.2
Anglican schools	1	1.2
Hospitals	1	1.2

Other key findings in relation to the sentenced institutional child sexual abuse cases included the following:

- Forty-four per cent of offenders were schoolteachers and 27.4 per cent of offenders were priests.
- Most offenders were sentenced for multiple offences, totalling 707 offences. Twenty-eight per cent of offenders also had matters taken into account on a Form 1,<sup>1137</sup> so that offenders admitted guilt to a further 337 offences.
- Indecent assault on a male was the most common offence (19 per cent).<sup>1138</sup>

### 34.2.3 Sentencing Data Study

The Sentencing Data Study expanded the database of institutional child sexual abuse offenders to include 283 matters (including the 84 matters from New South Wales analysed in the Sentencing Research). It included matters from across Australian jurisdictions, although even this database represented only 'the tip of the iceberg'.<sup>1139</sup>

The Sentencing Data Study focused on understanding a number of factors that influence sentencing outcomes and also delays between the offending and the sentencing of offenders for committing child sexual abuse in an institutional context. These factors included:

- the age or gender of the victim
- the institutional response to the offence
- the characteristics of individuals who offend against multiple victims.<sup>1140</sup>

Table 34.2 shows some key data from the 283 matters in which offenders were sentenced for child sexual abuse offences in an institutional context.<sup>1141</sup>

**Table 34.2: Key data from 283 matters in which offenders were sentenced for child sexual abuse in an institutional context**

Guilty plea entered	71% of matters
Full-time custodial sentence imposed	74% of matters
Suspended sentence imposed	15% of matters
Median term for full-time sentence of imprisonment	3 years
Longest term for full-time sentence of imprisonment	21 years
Longest delay from offence to sentence	58 years

The key observations of the Sentencing Data Study included the following:

- **Sentencing outcome:** Seventy-four per cent of offenders received a sentence of imprisonment. The longest term was 21 years. The median was three years.<sup>1142</sup>
- **Delay:** The median delay was from offence to sentence 25 years. The longest delay was 58 years.<sup>1143</sup> A longer delay was more likely for offending that took place at a church or religious school.<sup>1144</sup> A longer delay was more likely between the first offence and sentencing:
  - in more recent periods
  - in cases with male victims
  - in cases where the offending was conducted over a long period of time
  - in cases that involved more offences
  - in cases involving more than one victim
  - in offending that occurred in a religious institution.<sup>1145</sup>
- **Victims:** Approximately two-thirds (67.6 per cent) of victims in the database were male. The most common age of victims at the time of offending was between 12 and 16 years.<sup>1146</sup>
- **Offender characteristics:** In over half of the cases, the offender had no prior criminal record. In 9 per cent of matters, the offender had previously been convicted of a sexual offence against a child. This represented 14.6 per cent of all matters where the offender had a previous conviction.<sup>1147</sup>

- **Multiple victims:** In just over 58 per cent of all matters there was more than one victim. Cases with multiple victims were more likely than single victim cases in religious institutions. Multiple victim cases were also more likely to involve penetration and grooming than single victim cases. Accordingly, '[t]here is clearly a pattern among cases with multiple victims of offending, primarily against young males, within institutions steeped in religious authority'.<sup>1148</sup>
- **Various offending behaviour:** In 49.4 per cent of cases the nature of the offending varied to some degree (and included various child sexual abuse offences by the same offender over time).<sup>1149</sup>
- **Guilty plea:** The offender entered a plea of guilty in just over 71 per cent of cases.<sup>1150</sup>
- **Offending characteristics:** Offending was most likely to occur in a school or boys' home, whether religious or non-religious (27 per cent) or a church (23 per cent). Two-thirds of these institutions were Catholic.<sup>1151</sup> Nearly 53 per cent of cases involved indecent assault (one-third involved a penetrative offence). In almost half of the cases, the offending lasted less than five years, while in over 7 per cent of cases, the offending took place over 20 years or more. The average number of offences per case was 8.5 – the maximum was 67 offences. Data was missing in more than half of the cases, but the sentencing remarks in just over 30 per cent of the cases referred to grooming or behaviour that can be recognised as grooming.<sup>1152</sup>
- **Predictors of custodial sentences:** The likelihood of receiving a custodial term was predicted by three variables: the presence of grooming; a high number of offences; and offence type. The number of offences and offence type also impacted on the length of sentence.<sup>1153</sup>
- **Historical sentencing:** The period in which a case was sentenced had a significant impact on the type of penalty imposed. The proportion of cases receiving a custodial term increased, particularly from 1999. However, there was no relationship between the period in which the person was sentenced and the length of the total effective sentence – changes over time have manifested in the decision to incarcerate rather than the length of the incarceration.<sup>1154</sup>

## 34.3 Purposes and principles of sentencing

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### 34.3.1 Purposes of sentencing

The purposes of sentencing are well established. In every Australian jurisdiction laws govern the sentencing of offenders. Trial judges are guided in sentencing by statute and the decisions of superior courts. Generally speaking, sentencing legislation outlines the purposes for which sentences can be imposed, factors a sentencing court must consider when sentencing, and the type of sentences a court may impose.

The main purposes of sentencing are stated to be:

- **Punishment:** To ensure that the offender is punished for the offence and is held accountable for his or her actions.
- **Rehabilitation:** To promote the rehabilitation of the offender.
- **Deterrence:** To deter the offender from committing more offences (specific deterrence) and to prevent crime by deterring others from committing the same or similar offences (general deterrence).

Statutory provisions in relation to child sex offences sometimes allow the court to give greater weight to the purpose of general and specific deterrence. For example, the *Criminal Law (Sentencing) Act 1988* (SA) says that, in determining a sentence in a case of an offence involving the sexual exploitation of a child, a court must give proper effect to the 'need to protect children by ensuring that paramount consideration is given to the need for general and personal deterrence'.<sup>1155</sup>

- **Denunciation:** To publicly denounce the conduct of the offender.
- **Community protection:** To protect the community from the offender. Statutory provisions sometimes provide that, for serious offenders, including sex offenders, community protection should be given weight such that a sentencing court may impose a disproportionate sentence, an indefinite sentence or an onerous supervision or detention order. For example, the *Sentencing Act 1991* (Vic) provides that, when sentencing a 'serious sexual offender'<sup>1156</sup> for a relevant offence:<sup>1157</sup>

the Court, in determining the length of that sentence –

- (a) must regard the protection of the community from the offender as the principal purpose for which the sentence is imposed; and
- (b) may, in order to achieve that purpose, impose a sentence longer than that which is proportionate to the gravity of the offence considered in the light of its objective circumstances.<sup>1158</sup>

Legislation in some jurisdictions also refers to the purposes of recognising the harm done to the victim and the community; and accountability of the offender for his or her actions.<sup>1159</sup>

Except for Western Australia, South Australia and Tasmania, states and territories list the statutory purposes of sentencing in their sentencing acts.<sup>1160</sup> In Western Australia, the *Sentencing Act 1995* is silent on the purposes of sentencing.<sup>1161</sup> In South Australia, the *Criminal Law (Sentencing) Act 1988* contains sentencing considerations that a court must give proper effect to in determining the sentence for an offence.<sup>1162</sup> In Tasmania, there is a statutory statement of the purposes of the *Sentencing Act 1997* itself.<sup>1163</sup>

Table 34.3 summarises the statutory purposes by state and territory.

**Table 34.3: Statutory purposes of sentencing by state and territory**

Purpose	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
Punishment	✓	✓	✓	✗	✓	✗	✓	✓
Rehabilitation	✓	✓	✓	✗	✓	✓	✓	✓
Deterrence	✓	✓	✓	✗	✓	✓	✓	✓
Denunciation	✓	✓	✓	✗	✗	✓	✓	✓
Community protection	✓	✓	✓	✗	✓	✓	✓	✓
Harm recognition	✓	✗	✗	✗	✗	✗	✓	✗
Accountability	✓	✗	✗	✗	✗	✗	✓	✗

### 34.3.2 Principles of sentencing

In addition to the statutory purposes of sentencing, the common law has developed a substantial body of general sentencing principles. Some of these principles are also set out in legislation. The principles vary in how they are expressed and applied between Australian jurisdictions.

The main principles of sentencing are as follows:

- **Proportionality:** A sentence ought to be appropriate or proportionate in consideration of all of the circumstances of the offence. Some jurisdictions have adopted the principle of proportionality in their sentencing legislation.<sup>1164</sup> Considering whether a sentence is proportionate requires a court to consider the maximum statutory penalty and the whole of the circumstances of the offence, including the degree of harm caused and the offender's culpability. In the Sentencing Research, the authors comment that determining 'the appropriate level of punishment for any offence ... is essentially a value judgement, one that tends to be culturally determined'.<sup>1165</sup>

Statutory provisions may limit the application of the principle of proportionality. For example, the *Criminal Law (Sentencing) Act 1988* (SA) provides that, when sentencing a 'serious repeat offender', which means a person who has been convicted of at least two separate serious sexual offences against a person under the age of 14 years, the 'court sentencing the person is not bound to ensure that the sentence it imposes for the offence is proportional to the offence'.<sup>1166</sup>



- **Parity:** A sentencing officer should treat like cases alike and different cases differently.<sup>1167</sup> The parity principle supports consistency between sentencing decisions and supports the principle of equality before the law.
- **Totality:** A sentence should reflect the overall criminality of offending. The principle of totality applies in cases of multiple offending by one offender and seeks to avoid the imposition of a ‘crushing’ sentence.<sup>1168</sup>

In practice, the principle applies in cases of multiple offending to reduce the total effective sentence imposed on the offender. Sometimes this is done by imposing sentences concurrently; and sometimes it is done by reducing individual sentences so that the total effective sentence when cumulated is less.<sup>1169</sup>

Totality is an established sentencing doctrine, but exactly how it is applied is the subject of academic debate and appeal. Some jurisdictions have enacted a series of presumptions about whether particular sentences are to be served concurrently or cumulatively. These are discussed in section 34.6.2.

- **Imprisonment as a last resort:** A court must not sentence an offender to imprisonment unless it is satisfied that no penalty other than imprisonment is appropriate. This principle is set out in some jurisdictions’ sentencing legislation.<sup>1170</sup> For example, the *Crimes (Sentencing Procedure) Act 1999* (NSW) provides that:

A court must not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate.<sup>1171</sup>

Some jurisdictions have removed this principle when sentencing for child sex offences. For example, Queensland removed the principle in 2003,<sup>1172</sup> and the *Penalties and Sentencing Act 1992* (Qld) now provides that:

In sentencing an offender for any offence of a sexual nature committed in relation to a child under 16 years, the offender must serve an actual term of imprisonment, unless there are exceptional circumstances.<sup>1173</sup>

- **The De Simoni principle:** An offender is only to be sentenced for an offence for which he or she has been convicted, so a sentencing court cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence.<sup>1174</sup> In practice, this principle means that, in cases where the prosecution has accepted a plea of guilty to a lesser charge than the offence first charged, the prosecution must amend the ‘facts sheet’ to remove any evidence of the more serious charge. This means that a sentencing court cannot consider factors which are relevant to a more serious offence (such as an aggravated version of the basic offence) not charged.

- **Parsimony:** A sentence must be no more severe than is necessary to meet the purposes of sentencing. This principle does not apply in all Australian jurisdictions. It is applied by legislation in Victoria,<sup>1175</sup> but it has been rejected by courts in New South Wales.<sup>1176</sup> The New South Wales Court of Criminal Appeal has held that the principle of parsimony is inconsistent with the range of sentences a judge may impose and the discretions properly open to sentencing judges.<sup>1177</sup>

Most jurisdictions' sentencing legislation states that a combination of two or more purposes can apply.<sup>1178</sup> Sentencing legislation in the Australian Capital Territory also states that the order in which the purposes appear in the legislation does not imply that any single purpose should be presumed to have greater emphasis than another.<sup>1179</sup>

The High Court said of the purposes section in the New South Wales sentencing legislation:

The purposes there stated are the familiar, overlapping and, at times, conflicting, purposes of criminal punishment under the common law. There is no attempt to rank them in order of priority and nothing in the Sentencing Act to indicate that the court is to depart from the principles explained in *Veen v The Queen (No 2)* in applying them.<sup>1180</sup> [References omitted.]

## 34.4 Penalties available for child sexual abuse offences

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There is a wide range of sentencing options for criminal offences – for example, imprisonment, community-based sanctions, home detention and fines. There is a wide range of child sex abuse offences to which different penalties can apply.<sup>1181</sup>

The Sentencing Data Study shows that the majority of offenders in the sample studied received a sentence of imprisonment.<sup>1182</sup>

New South Wales, Queensland and South Australia have a maximum penalty of life imprisonment for certain sexual offences against children in the lowest age category or with particular vulnerabilities.<sup>1183</sup>

In addition to imprisonment, other custodial sentences include:

- a suspended sentence, where detention is avoided subject to ongoing good behaviour
- home detention, where a sentence is served at the offender's home address under strict supervision
- intensive corrections orders, which require the offender to comply with particular conditions, such as attending counselling treatment, complying with a curfew and avoiding particular activities that increase the risk of reoffending (for example, drinking alcohol or taking drugs).

Offenders may also be sentenced to various non-custodial sentences, including:

- an order to perform community service
- a bond for the offender to maintain good behaviour
- monetary fines.

In some cases, the court may not record a conviction at all. For example, section 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) gives the court the discretion not to record a conviction. However, the New South Wales *Sentencing bench book* notes that the scope for such action narrows if the offence is objectively serious and general deterrence and denunciation are important factors in sentencing for the offence.<sup>1184</sup>

In addition, each jurisdiction has a sex offender register, governed by statute.<sup>1185</sup> Inclusion in the register is a mandatory step following conviction for a range of sexual offences, including all sexual offences involving children. Upon registration, sex offenders are required to comply with various reporting requirements. In some jurisdictions, judges also have a discretionary power to order a person convicted of any offence to comply with the reporting obligations.<sup>1186</sup> Sex offender registers are discussed further in Chapter 36.

## 34.5 Sentencing factors

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### 34.5.1 Introduction

A sentencing hearing follows a conviction, regardless of whether the person entered a guilty plea or was found guilty at trial. The sentencing court generally hears evidence regarding the culpability of the offender. It is the role of the sentencing judge to determine the length and type of sentence, usually assisted by submissions from the prosecution and defence.

All states and territories have legislation that outlines the factors sentencing courts can take into account in sentencing an offender. The provisions vary in detail and levels of prescription.

For example, the New South Wales legislation provides a detailed list of the mitigating and aggravating factors that the court can take into account.<sup>1187</sup> Aggravating factors look to the seriousness of the offence;<sup>1188</sup> the criminality of the offender;<sup>1189</sup> and the identity, vulnerability or occupation of the victim.<sup>1190</sup> If the offender's culpability for the offence was lowered due to actions beyond the control of the offender,<sup>1191</sup> the otherwise good behaviour of the offender<sup>1192</sup> or the offence not causing substantial harm,<sup>1193</sup> this may mitigate the severity of the sentence. There are special rules regarding the use of good behaviour and character where the offence is a child sexual offence. These are discussed below.

Other jurisdictions tend to either list a number of neutral factors that a court must have regard to in sentencing (which are not expressed to be aggravating or mitigating)<sup>1194</sup> or provide that the court must take into account any aggravating or mitigating factors without identifying specifically what these are.<sup>1195</sup>

Generally, aggravating factors raised in sentencing must be proven by the prosecution beyond reasonable doubt, and mitigating factors need to be shown by the offender to the balance of probabilities.<sup>1196</sup>

Aggravating elements can also be included in the offence. Where the particular aggravating factor (such as a breach of trust or the young age of the victim) is an element of the offence, the court is not to treat it as a separate aggravating factor at sentencing.<sup>1197</sup>

### 34.5.2 Key sentencing factors for child sexual abuse offences

The factors discussed below are commonly raised when sentencing for child sexual abuse offences, including institutional child sexual abuse.

The factors are arranged depending on whether they relate to the nature of the offence; the characteristics of the offender; or the impact of the offence on the victim.

#### Sentencing factors relating to the nature of the offence

The Sentencing Research emphasised the central role that the nature of the offence has to the sentencing decision: the more serious the offence, the less weight is given to mitigating factors.<sup>1198</sup> The seriousness of an offence will depend upon 'all the facts and circumstances, including the duration of the offence and the kind of act committed. ... The court must take into account all the surrounding circumstances of the offence, including the breach of trust and the age of the child'.<sup>1199</sup>

The Sentencing Research also stated that the seriousness of an offence is given primary expression by the legislatures through the maximum available penalty.<sup>1200</sup> Child sexual abuse offences generally attract maximum penalties in the higher range. However, the Sentencing Research suggests that the sentence quantum imposed by the court is rarely responsive to an increased maximum penalty.<sup>1201</sup>

The seriousness of the offence may also be expressed through:<sup>1202</sup>

- **Mandatory minimum sentences:** A mandatory minimum sentence is a fixed minimum penalty prescribed by legislation for committing a particular criminal offence. Where mandatory minimum sentences have been implemented, the stated aims have been

to increase consistency in sentencing and improve public confidence in the courts by ensuring that sentences reflect community views.<sup>1203</sup> Mandatory minimum sentences are usually attached to serious, highly visible criminal offences.

The imposition of statutory mandatory (minimum) sentences for child sexual assault matters is rare. Queensland introduced a mandatory sentence of life imprisonment (20 years before being eligible for parole)<sup>1204</sup> for repeat serious child sex offenders in 2012.<sup>1205</sup> The penalty of life imprisonment cannot be mitigated or varied under any law.<sup>1206</sup> An alternative penalty of an indefinite sentence is available to the court.<sup>1207</sup>

In September 2016, the Tasmanian Sentencing Advisory Council published a final report on mandatory sentencing for serious sex offences against children. While restating its view that mandatory sentencing is inherently flawed,<sup>1208</sup> in response to its terms of reference to provide preliminary advice on how to implement a mandatory minimum sentencing scheme, the Sentencing Advisory Council gave preliminary advice that a limited number of offences, including rape or aggravated sexual assault of a complainant under 17, and aggravated offences of maintaining a sexual relationship, or engaging in sexual intercourse, with a young person, be included in any scheme, with minimum head sentences ranging from 18 months to four years.<sup>1209</sup>

On 3 May 2017, the Tasmanian Government announced that it will introduce legislation to implement mandatory minimum sentences in line with the Sentencing Advisory Council's preliminary advice. The minimum sentences will be:

- four years' imprisonment for the crime of rape where a victim is under 17 years
- four years' imprisonment for maintaining a sexual relationship with a young person where there are aggravating circumstances and rape
- three years' imprisonment for the crime of maintaining a sexual relationship with a young person where there are aggravating circumstances
- two years' imprisonment for the crime of sexual intercourse with a young person where there are aggravating circumstances.<sup>1210</sup>
- **Standard non-parole periods:** Standard non-parole periods aim to give a 'further important reference point' to sentencing judges in regard to the appropriate non-parole period to be set for certain offences.<sup>1211</sup> New South Wales has had a standard non-parole period scheme since 2003, which currently includes 14 child sexual abuse offences.<sup>1212</sup>

Baseline sentences were introduced in Victoria in 2014. Baseline sentences were intended to be the median sentence for the nominated offence. They attached a minimum non-parole period (usually of 60 per cent of the total effective sentence). Four child sexual abuse offences were included in the scheme, including persistent sexual abuse and sexual penetration of a child. However, the Victorian Court of Appeal

decision in *DPP v Walters* found the scheme to be incapable of being given practical operation.<sup>1213</sup> The Victorian Sentencing Advisory Council stated that, on the basis of *DPP v Walters*, the baseline sentencing provisions are unenforceable.<sup>1214</sup> In its submission in response to the Consultation Paper, the Victorian Government referred to its announcement that it will introduce a standard sentencing scheme for 12 serious crimes, including some sexual offences against children. The 'standard sentence' will represent the mid-point of seriousness for the offences and will be calculated at 40 per cent of the maximum penalty. Courts will be required to provide reasons to depart from the standard sentence lengths.<sup>1215</sup> The Victorian Government also noted that it had announced restrictions on the availability of community corrections orders for serious offences, including some sexual offences against children.<sup>1216</sup>

No other jurisdictions currently have a standard non-parole period or equivalent scheme.

There are other sentencing factors relating to the nature of the offence that may be particularly relevant in child sexual abuse offences, including institutional child sexual abuse offences.

If there is a degree of premeditation in the offending, this may increase the culpability of the offender.<sup>1217</sup> In child sexual abuse offences, premeditation may be demonstrated particularly through grooming behaviour.

Particularly in institutional child sexual abuse, offending may involve an abuse of a position of trust or authority by the offender. That abuse of trust or authority can be an aggravating factor which is taken into account in sentencing<sup>1218</sup> or it can be an element of the offence itself. Where an abuse of trust or authority is present, it will often offset mitigating factors, such as good character evidence.

The Sentencing Research noted that offenders who were in a position of authority receive a more severe sentence if prosecuted for offences in which breach of trust or abuse of authority was an element of the offence rather than being considered only as an aggravating factor at sentencing.<sup>1219</sup>

## Sentencing factors relating to the characteristics of the offender

An offender's degree of criminal responsibility for the criminal act can be affected by numerous factors. Culpability may be less where the offender has a mental illness or cognitive impairment,<sup>1220</sup> resulting in a decreased or varied sentence.

Characteristics of an offender that may impact on the sentencing decision include the following:

- **Remorse:** Remorse (or contrition) will usually result in a discount on sentence.<sup>1221</sup> Many factors are taken into account in mitigation of sentence because they demonstrate the remorse of the offender.

- **Personal history:** In some circumstances, an offender's experience of sexual abuse as a victim may be a mitigating factor in sentencing.<sup>1222</sup>
- **Age and health of offender at sentencing:** The court may take into account an offender's old age where the sentence may be more onerous due to age and illness or may end up being a life sentence.<sup>1223</sup> This factor may be particularly relevant in matters of historical child sexual abuse where the offender at the time of sentencing may be elderly and infirm.
- **Consequence of a conviction:** We discuss the possibility of continuing detention or supervision, and placement on the sex offender registry, in Chapter 36. Generally, the sentencing court cannot know, for example, whether the offender will be rehabilitated at the completion of their total sentence, so the possibility of continuing detention or supervision is not a factor to be considered at sentence. However, placement on the sex offender register is a consequence of conviction for all child sexual abuse offending.

Generally, placement on the sex offender registry requires the offender to report to police any changes in address and employment status for a prescribed period after the offender has completed his or her sentence. New South Wales,<sup>1224</sup> Victoria<sup>1225</sup> and South Australia<sup>1226</sup> have instituted provisions that prevent sentencing courts from taking into account an offender's placement on the sex offender registry in mitigation of sentence. The sentencing courts in other jurisdictions do not appear to take into account placement on the sex offender registry in mitigation of sentence, although this is not prescribed by statute.

- **Prior criminality:** Repeat offending affects the sentencing decision because it may indicate:
  - a diminished likelihood of rehabilitation
  - an increased need for specific deterrence
  - the need for an increased emphasis on community safety concerns.

The Sentencing Research states that the offender's prior criminality 'has a powerful influence in sentencing. It can increase the statutory powers of the sentence, the choice of sanction and the weight given to the various purposes of sentencing'.<sup>1227</sup>

An offender's record of prior convictions is a statutory aggravating factor in New South Wales, particularly where the offending constituted a personal violence offence.<sup>1228</sup> As noted above, repeat serious child sexual abuse offending may result in a mandatory sentence of life imprisonment in Queensland.

At common law, an offender's prior criminal history is not permitted to lead to a sentence disproportionate to the offence for which the offender is being sentenced.<sup>1229</sup> This approach has been adopted in legislation in some jurisdictions.<sup>1230</sup>

- **Prior good character:** Good character evidence can be a relevant factor in sentencing. Where there is evidence that the offender is otherwise of 'good character', this can assist the sentencing court in the determination of whether:
  - the offender has a greater amenability to rehabilitation
  - there is a reduced need for specific deterrence
  - the offender poses a low risk to the community.

Good character evidence can operate to show that the offender's actions were out of character and that the offender is unlikely to reoffend.<sup>1231</sup>

Most jurisdictions have legislated to require that an offender's good character be taken into account in sentencing.<sup>1232</sup> Good character evidence is generally assessed independently from the actual offence – it is raised as 'otherwise' or 'previous' good character.<sup>1233</sup> Good character is generally assessed in a two-step process:

- Is the offender otherwise of good character?
- If so, what weight can be given to his or her good character in mitigation of the sentence?<sup>1234</sup>

Sentencing judges do not usually quantify the discount given for good character; it is instead considered in the matrix of sentencing factors.<sup>1235</sup>

However, allowing prior good character as a mitigating factor in sentencing for child sexual abuse offences can be highly problematic. We discuss this further in section 34.6.1.

## Sentencing factors relating to the victim

The culpability of the offender may be increased by the vulnerability of the victim<sup>1236</sup> and the consequences of the offending on the victim. The vulnerability of the victim may also arise in relation to a breach of trust or abuse of authority, discussed above.

In matters of child sexual abuse, the courts and legislatures have indicated that the younger the victim, the greater the culpability of the offender.<sup>1237</sup> As well as the age of the victim, the character and the status of the victim are relevant factors to the exercise of the sentencing discretion.<sup>1238</sup> Further, some jurisdictions have legislation to require the courts to have regard to any personal circumstances of the victim of the offence.<sup>1239</sup>

The effect of the offence on the victim has also become an important factor in assessing the nature of the offence in child sexual abuse matters.<sup>1240</sup> An understanding of the full and long-term effects of child sexual assault on the victim may have resulted in increased sentences for child sexual abuse offences over time.<sup>1241</sup>



The consequences of the offence for the victim may also be expressed to the court through a victim impact statement.

All jurisdictions allow victim impact statements to be considered by the sentencing court.<sup>1242</sup> Victim impact statements are made after a guilty conviction has been entered but before sentencing.<sup>1243</sup> They provide an opportunity for victims to outline their experiences of the sexual abuse and to tell the sentencing court about the impact the abuse has had on their lives. Generally speaking, victim impact statements include a description of the physical, financial, social, psychological or emotional consequences to the victim of the offences.

Depending on the jurisdiction, victim impact statements can be read to the court by a victim, tendered in writing and handed up to the judge, or read by someone close to the victim in certain circumstances. Recent developments in some jurisdictions also allow for victim impact statements to be delivered via closed circuit television (CCTV) or delivered in court in the absence of the offender.<sup>1244</sup>

There are differences between states and territories in the provisions that regulate the reception, form, content and use of victim impact statements. In each jurisdiction, there are rules in legislation or common law, or guidelines provided to victims, about what content can be included in a victim impact statement.

Details of the conduct of the offender which would denote a more serious offence cannot be taken into account by the sentencing judge, even if no objection is taken to the material being included in the statement. To do so would be in breach of the De Simoni principle of sentencing, discussed above.<sup>1245</sup> In New South Wales in 2005, in *R v H*,<sup>1246</sup> the New South Wales Court of Criminal Appeal held that a victim impact statement should only refer to the impact on the victim of the offence before the court.<sup>1247</sup>

We have heard from victims and survivors in private sessions and public hearings that they have been required to narrow the scope of their victim impact statement, and some victims and survivors have felt that this limited their capacity to fully explain the impact of the abuse on them.<sup>1248</sup>

The Australian Capital Territory and the Northern Territory allow the defence to cross-examine a person who makes a victim impact statement on the contents of the statement in some circumstances.<sup>1249</sup>

In all Australian jurisdictions, children can provide their own victim impact statements. In most jurisdictions, this can be done in writing or orally.<sup>1250</sup> Generally speaking, legislation permits others to:

- help a child victim to write a victim impact statement
- write a victim impact statement on a child victim's behalf
- present a victim impact statement to the court on a child victim's behalf.<sup>1251</sup>

In practice, we understand that many children who are the victims of child sexual offences may not read victim impact statements in open court. However, many children write victim impact statements with assistance, and those statements are read by someone else or handed up to the sentencing court to be read.

## Discount for assistance to justice

The sentencing court may consider discounting a final head sentence in acknowledgment of assistance to justice that the offender has given. This is not a sentencing factor as such, but it affects the final sentence given.

Discounts are routinely given for the utilitarian value of a guilty plea and for an offender's assistance to authorities. All states and territories except Tasmania have enacted legislation enabling sentence discounts to be given for guilty pleas.<sup>1252</sup> The discounts given for early guilty pleas have been prescribed by legislation in some jurisdictions, and they are outlined by the common law in New South Wales.<sup>1253</sup> The maximum discount for an early guilty plea is set by legislation at 25 per cent in Western Australia<sup>1254</sup> and 40 per cent in South Australia.<sup>1255</sup>

An offender may receive a discount on sentence for assisting authorities – usually providing information regarding the charged or other offences.<sup>1256</sup> The amount of the discount will depend on factors including the quality of the information and any consequences suffered by the offender, such as harsher custodial conditions (for example, in protective custody).<sup>1257</sup> A discount may also be available where the offender aided the conduct of the trial – for example, by agreeing to limit the facts in issue and reduce the number of witnesses required to give evidence.<sup>1258</sup>

We discussed in Chapter 20 the concerns that victims and survivors may have about guilty pleas, particularly where they have been negotiated so that the offender pleads guilty to a lesser offence. However, unless the crime was so serious to warrant no discount, generally offenders who enter an early guilty plea or who otherwise assist authorities will receive a discount on sentence.

Guilty pleas are important for securing convictions in child sexual abuse prosecutions. They can be significant in some cases in avoiding the need for complainants to give evidence, potentially reducing distress for complainants. They can also be significant in contributing to reduced delays in finalising particular prosecutions and in reducing delays in prosecutions more generally. In its 2014 report *Encouraging appropriate early guilty pleas*, the New South Wales Law Reform Commission (NSW LRC) argued that the introduction of a graduated statutory sentencing discount scheme would provide a clear incentive for a defendant to plead guilty early.<sup>1259</sup>

On 9 May 2017, the New South Wales Government announced a range of sentencing reforms. The reforms include the introduction of statutory sentencing discounts to encourage early guilty pleas, discussed in section 32.4.1. The New South Wales Government also announced reforms in response to the Law Reform Commission’s Sentencing report which include:

- the abolition of suspended sentences
- greater supervision of Intensive Correction Orders
- replacing community service orders and good behaviour bonds with Community Correction Orders
- replacing non-conviction bonds with Conditional Release Orders, which allow conditions such as supervision, non-association and place restrictions.<sup>1260</sup>

## 34.6 Possible areas for reform

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In the Consultation Paper, we identified the following as possible areas for reform of sentencing for child sexual abuse, including institutional child sexual abuse:

- restricting consideration of the offender’s good character in sentencing
- restricting concurrent sentencing where there are multiple instances of offending and/or multiple victims
- sentencing in accordance with standards that apply at the time of sentencing rather than at the time of the offence when sentencing historical child sexual abuse offences.

In addition to these possible areas for reform, a number of interested parties raised in their submissions in response to the Consultation Paper issues regarding sentencing practices generally and issues in relation to victim impact statements.

### 34.6.1 Excluding good character as a mitigating factor

#### Discussion in the Consultation Paper

In section 34.5.2, we noted that the offender’s prior or other good character (apart from the offending behaviour) can be a mitigating factor in sentencing.

As we set out in the Consultation Paper, allowing good character as a mitigating factor can be highly problematic in sentencing for child sexual abuse offences. In particular:

- **Use is based on certain assumptions:** It has been argued that there is no empirical support for the notion that prior good character suggests a low risk of reoffending. Further, prior good character judged by lack of prior convictions can be a fallacy. A lack of prior convictions (especially in child sexual assault) does not necessarily mean a lack of prior bad behaviour.<sup>1261</sup>
- **Accepting an offender's otherwise good character may belittle the harm done by the offence:** Acknowledgement of the offender's good character can minimise the 'vindicatory aspects of criminal proceedings if the offender is regarded as not being fully responsible for the offence, and is consequently treated more leniently'. In the eyes of the victim and the community, accepting the offender's good character in mitigation 'potentially deletes the "wrongfulness" message of this crime'.<sup>1262</sup>
- **Without the offender's good character, the offending would have been less likely to take place:** The offender may have used his or her reputation and good character to facilitate the grooming and sexual abuse of a child and to mask their behaviour. This may be particularly so in matters of institutional child sexual abuse.<sup>1263</sup>

Good character in a matter of institutional child sexual abuse was discussed by the High Court in 2001 in *Ryan v The Queen*<sup>1264</sup> (*Ryan*). In that case, a New South Wales priest was convicted of numerous child sexual abuse offences committed over a period of more than 20 years.<sup>1265</sup> The sentencing judge refused to take account of his otherwise unblemished character and reputation, stating that high standards of behaviour were to be expected of a priest. District Court Judge Nield stated:

[W]hatever he had done and achieved, he is not a good man. The prisoner is a man who preyed upon the young, the vulnerable, the impressionable, the child needing a friend or a father figure and the child seeking approval from an adult ... How can a man, who showed a kind and friendly face to adults, but who sexually abused so many young boys in so many ways over such a long period of time, be considered a good man? ... His unblemished character and reputation does not entitle him to any leniency whatsoever.<sup>1266</sup>

The New South Wales Court of Criminal Appeal dismissed the appeal, stating that the offender created, and then abused, a position of trust and that the appellant's good work did not warrant the extension of significant leniency.<sup>1267</sup>

The offender then appealed to the High Court, which found that the appellant's good works were a minor factor to be weighed at sentencing; however, as the offences were conducted in the course of his duties as a priest, involving a breach of trust, the weight given to his good character should be minimal. Accordingly, the appellant was not entitled to significant leniency but was entitled to *some* leniency for his otherwise good character.<sup>1268</sup>

In 2008, New South Wales legislated to overcome the effect of the High Court's decision in *Ryan*. Section 21A(5A) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), which commenced in 2009, provides:

In determining the appropriate sentence for a child sexual offence, the good character or lack of previous convictions of an offender is not to be taken into account as a mitigating factor if the court is satisfied that the factor concerned was of assistance to the offender in the commission of the offence.

The provision applies to offending that occurred before it commenced but not to matters already convicted but not yet sentenced.<sup>1269</sup>

In its submission in response to the Consultation Paper, the New South Wales Government noted that section 21A(5A) was introduced on the recommendation of the NSW Sentencing Council in their 2008 report *Penalties relating to sexual assault offences in New South Wales*, and its retention was supported in the NSW LRC's 2013 report, *Sentencing*.<sup>1270</sup>

The provision has operated to exclude good character evidence in mitigation of sentence in some cases of institutional child sexual abuse. In 2015, for example, the New South Wales Court of Criminal Appeal found that an offender who was convicted of sexual offences against an eight-year-old girl committed in the context of his work as a supervisor in after-school care could not enter good character evidence in mitigation of sentence under section 21A(5A).<sup>1271</sup> The offender's prior good character was not allowed to mitigate his sentence, as his prior good character assisted him to hold a position as a childcare worker, which he abused by committing the offences against the victim.<sup>1272</sup>

Most institutional child sexual abuse offending in New South Wales may come within section 21A(5A) because prior good character may be likely to give the offender access to the institution. However, the requirement that the good character in question specifically *aid* the offence may limit the application of the provision, both in some institutional offending and in offending that is not in an institutional context.

For example, in 2015 the New South Wales Court of Criminal Appeal found that a stepfather who had abused his nine-year-old stepdaughter was able to enter good character evidence to mitigate his sentence because, while the relationship the offender had with the victim's mother and the subsequent trust that was created engendered an environment in which the offence could be committed, the offender's good character did not assist in the commission of the offences.<sup>1273</sup>

In 2014, South Australia enacted section 10(3)(ba) of the *Criminal Law (Sentencing) Act 1988* (SA).<sup>1274</sup> It prescribes that, in sentencing for certain child sexual abuse offences,<sup>1275</sup> the sentencing court must not have regard to the good character or lack of previous convictions of the defendant if the court is satisfied that the defendant's alleged good character or lack of previous convictions was of assistance to the defendant in the commission of the offence.<sup>1276</sup> This has been applied to sentencing for child sexual abuse in an institutional context.<sup>1277</sup>

The position adopted by New South Wales and South Australia is similar to the position that now applies in England and Wales, although England and Wales have gone further in allowing good character to be considered an aggravating factor. In 2013, the sentencing guidelines in England and Wales were amended so that, where previous good character had been used to facilitate an historical sexual offence, mitigation due to good character is generally not allowed, and good character is instead to be considered an aggravating factor.<sup>1278</sup>

Jurisdictions other than New South Wales and South Australia have not enacted legislation to displace the High Court's decision in *Ryan*, which remains the law in those jurisdictions.<sup>1279</sup> However, where prior good character is raised in mitigation in types of matters where a breach of trust is apparent, it appears to be given very little weight.<sup>1280</sup> Indeed, the use of a person's good character and position of trust and authority to facilitate the offending can be raised as an aggravating factor in sentencing.<sup>1281</sup>

However, this is not always the case. In a recent Victorian Court of Appeal case, a child sex offender's sentence was reduced on appeal because the sentencing judge had not given appropriate weight to the offender's otherwise good character.<sup>1282</sup>

At the time of the offending, the victim was 13 years old and acquainted with the offender's mother through her association with the Maronite Church. The offender was highly regarded in the family's community and was a respected church member. The complainant's parents were encouraged by this to allow their children to be supervised and entertained on outings with the offender.

Following his guilty plea to one charge of sexually penetrating a child under 16 years, the offender was sentenced to 20 months imprisonment combined with a two-year Community Corrections Order, with a requirement of 300 hours of unpaid community work. The sentencing judge had regarded the offender's betrayal of the complainant's trust as a significant aggravating factor and stated that his previous good character did not carry significant weight, noting that it was integral to the offender developing a deep relationship of trust with the complainant's family.<sup>1283</sup>

On appeal, the Crown conceded that, 'as this was not a case involving the commission of multiple offences ... the [sentencing] judge erred in giving less weight to the applicant's good character'.<sup>1284</sup> The Court of Appeal stated:

In cases concerning sexual offences against children, an offender is ordinarily entitled to have his sentence reduced by virtue of his previous good character. The weight to be given to that mitigating feature will depend on the circumstances of any given case. The sentencing discretion will miscarry if the weight to be given to a mitigating factor such as previous good character is discounted on the basis of features of the offending which have already been taken into account in aggravation of the penalty to be imposed. Such reasoning effectively doubly punishes an offender.<sup>1285</sup>

The Court of Appeal reduced the sentence to 18 months imprisonment combined with a two-year Community Corrections Order, removing the condition that required the offender to complete 300 hours of community work.<sup>1286</sup>

A number of jurisdictions have reviewed the operation of good character as a mitigating factor in sentencing child sexual abuse offences, often focusing on the tension between recognising the general mitigating factor of good character and the fact that good character was often used as a means of facilitating the offending. It was on this basis that the Victorian Sentencing Advisory Council stated that in 2016 the appropriate impact of the offender's prior good character in cases of child sexual abuse was currently 'unsettled and unsatisfactory'.<sup>1287</sup> The Queensland Sentencing Advisory Council has recommended reform similar to that adopted in New South Wales, but this recommendation has not been implemented.<sup>1288</sup> The Tasmanian Sentencing Advisory Council has also recommended reform.<sup>1289</sup>

Wendt and Stevens analysed sentencing transcripts in South Australia before the commencement of the South Australian reform in relation to the use of good character mitigation in matters of child sexual abuse. They found that discussion of the offender's standing in the community, including discussion of the offender's family and work commitments and their involvement in community activities, featured heavily in good character mitigation defence arguments in matters of child sexual abuse.<sup>1290</sup> Wendt and Stevens argued that the sentencing stage is extremely important where there is a high prevalence of child abuse, low reporting and high attrition. They stated:

it is absurd that a defendant convicted of child sexual abuse is constructed as a person of good character within the criminal justice system – the societal institution responsible for denouncing such crimes and deterring other members of society from committing such offences.<sup>1291</sup>

## What we were told in submissions and Case Study 46

Many submissions expressed support for other states and territories to adopt the approach applying in New South Wales and South Australia.<sup>1292</sup>

Ms Clare Leaney, representing In Good Faith Foundation, told the public hearing in Case Study 46 of the effect on victims of allowing evidence of good character in sentencing for historical matters:

In terms of other historical barriers in terms of sentencing, very often the good character reference is able to be provided by or on behalf of the offender. They have no meaning to the victim, because the victim's experience of that offender is not that they are a good person; it is that they are the person who did the most harm to the victim in their life. So to allow the good character references just does enormous harm to a victim.<sup>1293</sup>

Mr Craig Hughes-Cashmore, representing the Survivors & Mates Support Network, gave similar evidence in the public hearing:

The good character references – you know, you have to think about a witness who has been standing up in court, who has spent God knows how long putting together a victim impact statement to talk about how the abuse has affected their whole life, then, following on from that, after they have read it in court, they are forced to sit there and listen to these good character references of these people, which are then seemingly taken into consideration. I know this has been talked about, but I really want to underline it, because it's something that a lot of our members talk about with great distress.<sup>1294</sup>

In its submission in response to the Consultation Paper, Micah Projects reported that participants in its survivors' forum unanimously agreed that good character should not assist an offender in reducing their sentence; and, where they have used their position as trusted members of the community to commit offences, this should count against them.<sup>1295</sup>

The Victorian Aboriginal Child Care Agency suggested that offenders should be prevented from raising good character regardless of whether it was used to help them commit the offence.<sup>1296</sup>

The Victorian Commission for Children and Young People supported 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.<sup>1297</sup>

In its submission in response to the Consultation Paper, the New South Wales Office of the Director of Public Prosecutions (ODPP) noted that making good character an aggravating factor would be in contrast to the current approach of good character being a mitigating factor in sentencing.<sup>1298</sup> It also put forward a hypothetical example showing the possibly counterintuitive results of using good character as an aggravating factor:

two offenders are both charged with identical offences in identical circumstances. Offender A has no prior criminal history and is otherwise of good character. Offender B has prior criminal history and is not otherwise of good character. The circumstance of aggravation would apply where Offender A used his good character to facilitate his offending. Offender B's offence is not aggravated because he has a criminal record. This leads to the counterintuitive result where the offender with no criminal history, Offender A, is dealt with more severely than the Offender with a criminal history. Whilst this example is oversimplified it illustrates a logical inconsistency that leads to a potential for contradictory outcomes.<sup>1299</sup>

The New South Wales ODPP also noted that, where an offender had used their good character to facilitate their offending, it is difficult to see how that would not be seen as increasing the objective seriousness of the offending or be taken into account as an aggravating factor as an abuse of a position of trust or authority.<sup>1300</sup>



The New South Wales ODPP submitted that the existing provisions in New South Wales provide courts with the ability to use good character as an aggravating feature of the offending and are appropriate for dealing with the issue.<sup>1301</sup>

The New South Wales Young Lawyers Criminal Law Committee submitted that it is unnecessary to adopt the approach in England and Wales, noting that other factors, such as breach of trust and authority and the vulnerability of the victim, already recognise such behaviour as an aggravating factor.<sup>1302</sup> Both the Law Society of New South Wales and the New South Wales Young Lawyers Criminal Law Committee submitted that such an approach may also lead to counterintuitive outcomes, where an offender with prior convictions receives a lower sentence than someone with no prior convictions.<sup>1303</sup>

In its submission, the Law Society of New South Wales referred to the existing New South Wales provision excluding good character and expressed opposition to making good character an aggravating factor, because any such circumstance would otherwise be caught by aggravating factors such as the abuse of a position of trust or authority or any special vulnerability of the victim.<sup>1304</sup>

In his submission in response to the Consultation Paper, the Victorian Director of Public Prosecutions (DPP) expressed support for the New South Wales approach – that is, excluding the consideration of good character evidence in those cases where, in the judgment of the court, the good character of the accused actually enabled or assisted the commission of the offending. While supporting further consideration of the English approach of allowing good character to be an aggravating factor, the Victorian DPP expressed some caution, partly on the basis that the concept of ‘breach of trust’ is already an appropriate aggravating factor for such circumstances.<sup>1305</sup>

In its submission in response to the Consultation Paper, the Victorian Government referred to a 2016 report by the Victorian Sentencing Advisory Council which noted that prior good character evidence is of less significance in child sexual assault cases and can actually be an aggravating factor if the offender’s ostensible good character facilitated the offending.<sup>1306</sup> The Sentencing Advisory Council, considering the New South Wales provision, stated:

Though Victoria lacks a similar provision, the point is salient in this state under general sentencing principles. Good character will be of reduced significance for offences that are commonly committed by offenders of otherwise good character, or who exploit their respectability to further their offending.<sup>1307</sup>

The Law Council of Australia submitted that there is no need to enact legislation to prohibit the use of prior good character as a mitigating factor given that, where prior good character is raised in mitigation, it appears to be given very little weight, and it can be raised as an aggravating factor in sentencing.<sup>1308</sup> The Law Council of Australia suggested that prior good character may have relevance to assessing the offender’s prospects of rehabilitation or the

need for specific deterrence in the particular case.<sup>1309</sup> It also suggested that, merely because good character can be raised, it does not mean that it will be accepted and that, even if it is accepted, it may not result in a reduction of the sentence.<sup>1310</sup>

Referring to the Law Council of Australia's submission, Mr Stephen Odgers SC told the public hearing in Case Study 46:

The current position is that prior good character could be used, under the current law, to aggravate in the sense that, as is well established, if you are in a position of trust because of your good character, then that is in turn going to be aggravating because you have breached trust or breached authority, and to the extent that the defence might say, 'Well, we still want to rely on good character', you are going to get very short shrift from the judge who is going to say, 'Well, you took advantage of that good character in order to commit the very offences for which you are to be sentenced.'

The Law Council's position is that you have to be very careful about blanket rules: to say that good character is never to be taken into account is dangerous.

The current position is that, in practice, it will rarely be taken into account in favour of the offender, and, if it is taken into account, it will rarely have any significant impact. But there will be the odd case where, for example, it may be that there has just been one incident of sexual assault in the person's life, where there are mitigating circumstances relating to it, it could be shown that it has never happened before or since, and that there is an explanation for it which doesn't excuse but makes more understandable what happened and bears on questions of prospects of rehabilitation, need for specific deterrence, critical issues that are of general importance in sentencing that offender.

To prohibit the court from taking into account good character in that situation would seem to be unjust.

So that the point that is being made is that the concerns of those that have been expressed about it being taken into account are understood, there is sympathy for that view, but it may be based on a misconception about how the courts do, in fact, take it into account, and that there is concern about a blanket rule that says you may never take it into account. That is really all that is being put by the Law Council.<sup>1311</sup>

In its submission in response to the Consultation Paper, the Bar Association of Queensland submitted that previous good character was not generally accepted as a significant mitigating factor in child sexual abuse cases and, indeed, that the use of good character and position to abuse children is regarded as a significant aggravating factor. As such, the Bar Association of Queensland considered that the concerns raised in the Consultation Paper did not apply in Queensland.<sup>1312</sup>

## Conclusions and recommendation

In many of the cases of institutional child sexual abuse that we have considered, it is clear that the perpetrator's good character and reputation facilitated the offending. In some cases, it enabled them to continue to offend despite complaints or allegations being made.

Very few submissions opposed the proposal that other states and territories adopt the position that applies in New South Wales and South Australia. Those that expressed opposition generally submitted that good character had minimal application in child sexual abuse cases and so the provision was not needed. It would therefore seem uncontroversial to exclude its consideration where it was of assistance to the offender in the commission of the offence.

Although the sentencing courts appear to give only slight consideration to good character in cases of child sexual abuse, we are satisfied that all other states and territories should introduce legislation similar to that applying in New South Wales and South Australia. In child sexual abuse cases, including institutional child sexual abuse cases, there should be no place for evidence of good character to be led on behalf of an offender as a mitigating factor in sentencing where that apparently good character has facilitated the offending.

Many submissions referred to existing sentencing factors, such as breach of trust or authority or the special vulnerability of the victim, which can be taken into account as aggravating factors, where appropriate, in cases of child sexual abuse. On this basis, we are satisfied that it is unnecessary to follow the approach of England and Wales and specifically allow prior good character to be raised as an aggravating factor in cases where it has facilitated the offending.

### **Recommendation**

74. All state and territory governments (other than New South Wales and South Australia) should introduce legislation to provide that good character be excluded as a mitigating factor in sentencing for child sexual abuse offences where that good character facilitated the offending, similar to that applying in New South Wales and South Australia.

## 34.6.2 Cumulative and concurrent sentencing

### Discussion in the Consultation Paper

The issue of whether sentences are imposed concurrently or cumulatively (consecutively)<sup>1313</sup> is relevant in matters where an offender is convicted and sentenced for more than one count on the indictment or on multiple indictments or where the offender is still serving a sentence for a prior conviction.

In the Consultation Paper, we discussed the ways in which multiple sentences can be served. Where an offender is convicted of more than one offence, sentences can be directed to be served:

- **concurrently:** sentences are served at the same time, so that the shorter sentence is subsumed into the longest sentence (the base sentence). There is generally a presumption in favour of concurrency
- **cumulatively or consecutively:** each sentence for each conviction is served one after the other, upon a base sentence. The sentences for each conviction may be reduced to properly reflect the totality principle
- **partially concurrently and partially cumulatively:** some sentences are served concurrently with the base sentence while others will be served after the term of the base sentence has ended or the sentences ‘overlap’ so that one sentence starts before the other sentence has finished. A combined term may also be presented in terms of an aggregate sentence in some jurisdictions.

The final total effective sentence in all options must adhere to the principle of totality discussed in section 34.3.2. Without some concurrency, the total effective sentence may end up being disproportionately severe in comparison to the offending behaviour. Equally, if all sentences are concurrent and without any cumulation, the total sentence may be too lenient to properly reflect the increased criminality associated with multiple offences or victims.<sup>1314</sup>

The imposition of the total effective sentence in matters which include multiple convictions is a complicated area. Generally, the presumption of concurrency applies where more than one offence arises out of a connected series of facts on the same indictment. Otherwise, where there is an overlap with the way the counts are presented, the offender could be subjected to double punishment.<sup>1315</sup>

Cumulation or partial cumulation may be appropriate for sentences between indictments or for sentences for counts within the same indictment that do not show one continuing episode. However, as noted in the Sentencing Research, ‘much will depend upon the nature and number of the charges, the exercise of prosecutorial discretion, the number of victims, and the length of time over which the offending occurred’.<sup>1316</sup>

Issues of cumulative and concurrent sentencing often arise in sentencing child sexual abuse offenders. The majority of offenders sentenced for child sexual abuse offences have been convicted of more than one offence.<sup>1317</sup> The Sentencing Data Study indicated that, in the 283 institutional child sexual abuse matters analysed, the offenders were sentenced for an average of eight counts on the indictment.<sup>1318</sup>

All states and territories other than Victoria continue to have a presumption in favour of concurrent sentencing. Victoria legislated in 1993 to reverse the presumption in favour of concurrency when sentencing serious child sexual abuse offenders.

In states and territories other than Victoria, there is a common law presumption in favour of imposing concurrent sentences.<sup>1319</sup> Most jurisdictions have statutory provisions that mirror this presumption, although there is usually an accompanying statutory provision giving the sentencing court discretion to impose cumulative, aggregate or partially cumulative sentences.<sup>1320</sup>

The NSW LRC has observed that the only reasons for imposing cumulative or partly cumulative sentences will be either ‘because legislation requires it, or, more generally, because a maximum sentence is not available to make the effective total sentence for all the offences long enough to reflect the principle of totality or to denounce separate crimes’.<sup>1321</sup>

Using New South Wales as an example, section 55 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) provides for a presumption in favour of concurrent sentencing. The presumption is to be displaced in favour of consecutive sentencing where the offence to be sentenced occurred in a correctional setting or while escaping from a correctional centre.<sup>1322</sup> The court is also given a statutory discretion to direct sentences to be served consecutively.<sup>1323</sup>

The sentencing provisions in New South Wales require the sentencing court to impose a separate sentence for each offence when sentencing for multiple offences unless the court imposes an aggregate sentence.<sup>1324</sup> If the court imposes separate sentences, the court then decides whether the presumption in favour of concurrency prevails or whether it will accumulate any or some of the sentences. Where sentences are accumulated, the court generally staggers some or all of the starting dates of the sentences.<sup>1325</sup>

An aggregate sentence is a single sentence, including a non-parole period, with respect to any two or more offences. In setting an aggregate sentence, the court is to indicate the sentence that would have been imposed for each offence had separate sentences been imposed instead of an aggregate sentence.<sup>1326</sup> The justification for the requirement to indicate the separate sentences that would have been imposed was outlined in the second reading speech for the amending legislation:

However, it remains important for a number of reasons for there to be some indication given of the respective sentence that would have been imposed had each offence been dealt with directly. These reasons include: the transparency of the sentencing process, the comfort to victims accorded by an explicit recognition of the level of criminality involved in the specific crimes committed against them, the benefits in publicly recognising the particular aggravating and mitigating factors of an offence as required under the Act [the *Crimes (Sentencing Procedure) Act 1999* (NSW)], and to assist appeal courts in resentencing offenders after successful appeals or in identifying where errors in the sentencing process may have occurred where such errors may have been ‘masked’ by the aggregation of the sentence into a single term of imprisonment.<sup>1327</sup>

The legislative frameworks for sentencing in Victoria, South Australia, Tasmania and the Northern Territory also allow for aggregate sentencing in indictable matters.<sup>1328</sup>

Relevant to child sexual abuse matters in New South Wales, the New South Wales Court of Criminal Appeal has held that:

- where multiple sexual offences arise out of one event, the court is to identify the appropriate sentence for each act, and some degree of accumulation may be necessary to address the criminality<sup>1329</sup>
- it is open for a court to make the sentence for each offence with a different victim wholly cumulative upon the non-parole period of the offence before it<sup>1330</sup>
- a sentencing judge may err where the judge applies wholly concurrent sentences for multiple discrete offences.<sup>1331</sup>

Victorian legislation also has a statutory presumption that prison sentences be served concurrently.<sup>1332</sup> However, Part 2A of the *Sentencing Act 1991* (Vic) provides for an exception in relation to 'serious offenders', which includes 'serious sexual offenders'.<sup>1333</sup> Here the presumption is altered in favour of cumulative sentencing.<sup>1334</sup>

A 'serious sexual offender' is an adult offender who has been convicted (either in the current or another trial)<sup>1335</sup> and received a prison sentence for either:

- two or more sexual offences
- persistent sexual abuse of a child under 16 years
- committing the incidents which constituted the course of conduct charge
- a course of conduct charge for a sexual offence *and* a violence offence.<sup>1336</sup>

There is also a statutory exception to the principle of totality. Section 6D of the *Sentencing Act 1991* (Vic) directs that, in determining the length of a prison sentence for serious offenders, the sentencing court 'must regard the protection of the community from the offender as the principal purpose for which the sentence is imposed; and may, in order to achieve that purpose, impose a sentence longer than that which is proportionate to the gravity of the offence considered in the light of its objective circumstances'.<sup>1337</sup>

In *DPP v Bales*,<sup>1338</sup> the offender was a Christian Brother who was convicted after entering guilty pleas to 34 charges of child sexual abuse that had occurred between 1971 and 1985. He was sentenced at the first instance to a total effective sentence of six years, with a three-year non-parole period. The DPP appealed the sentence, arguing that the base sentence for the most serious charge was manifestly inadequate, and the orders for cumulative sentences resulting in the total effective sentence were inadequate (as was the non-parole period).

Relevantly, the Victorian Court of Appeal found that the orders for cumulative sentences made in respect of the more serious offences, which received nine-month sentences to be served cumulatively at two months each, were 'insufficient to mark the individual denunciation of the offending in question which s 6E requires ... the sentence failed to provide for orders making the provision for cumulation which was necessary to reflect the seriousness of the relevant offences consistent with the policy of s 6E'.<sup>1339</sup>

The appeal was allowed, and the offender was resentenced to a total effective sentence of eight years and five months. The most serious charge attracted a term of two years and six months. The other serious charges were to be served cumulatively at four or three months (rather than two), giving an additional 17 months.

As noted in the Consultation Paper, a number of survivors have expressed dissatisfaction about concurrent sentencing in private sessions and in public hearings.

For example, in Case Study 38 in relation to criminal justice issues, Mr Mark Lawrence gave the following evidence:

For all 38 charges, the judge added up over 100 years' worth of gaol time. But due to concurrent sentencing, Doyle only got seven years' imprisonment with a non-parole period of four and a half years. At the time, I did not understand what concurrent sentencing meant. I was disappointed with this lenient sentence, but instead of getting angry, I decided to use this opportunity to push for harder sentencing. Since then, I've become an advocate for sentencing reform.<sup>1340</sup>

Mr Lawrence also told the public hearing:

I was shattered that Doyle got the benefit of concurrent sentencing. Offenders should serve separate sentences for each charge they are convicted for. Courts need to impose punishment that reflects the public abhorrence of child sexual abuse.<sup>1341</sup>

Mr Kevin Whitley gave the following evidence about the same offender:

The judge ordered many of Doyle's sentences to be served concurrently. Again, I was confounded with this concept. Concurrent sentencing suggests that the law views the rape of one victim or a dozen victims the same. It simply made no sense to me and had no basis in logic.<sup>1342</sup>

Mr Whitley also gave evidence that:

I do not understand the logic behind concurrent sentencing. I work in business; if someone buys a hundred of something from me, they get a discount. It appears that the same logic applies in criminal law, so if I'm going to rape someone, I may as well rape ten women because I'm still going to get the same sentence. Concurrent sentencing is illogical and is not a deterrent. Around the same time of Doyle's sentence, a man was sentenced to more time for fraud charges. This just doesn't make sense. It appeared to me from this example that the law values money and property more highly than children.<sup>1343</sup>

## What we were told in submissions and Case Study 46

A number of submissions in response to the Consultation Paper expressed support for a presumption in favour of cumulative sentencing for child sexual abuse offences.<sup>1344</sup>

In its submission in response to the Consultation Paper, Care Leavers Australasia Network (CLAN) stated that a sentence that includes offences against multiple victims should reflect the fact that there were multiple victims. CLAN expressed the view that offenders should not benefit from concurrent sentencing merely because they have committed similar crimes that could be prosecuted and sentenced at the same time.<sup>1345</sup>

The Victorian Victims of Crime Commissioner submitted that he felt concurrent sentencing for child sex offences should be prohibited.<sup>1346</sup>

The Australian Capital Territory Victims of Crime Commissioner expressed support for the Victorian approach of a presumption in favour of cumulative sentencing where the offender is a serious offender, which would include serious child sex offending. He stated that he had observed many sentences that were, in his view, too lenient to reflect the increased criminality involved in committing multiple offences.<sup>1347</sup>

In its submission, knowmore noted the disappointment that survivors may feel with concurrent sentencing decisions, where they feel that the impact of each offence against them should be reflected in the prison time the offender serves.<sup>1348</sup> Mr Warren Strange, representing knowmore, told the public hearing in Case Study 46 about a number of concerns that survivors have raised with knowmore in relation to sentencing, including in relation to concurrent sentencing:

It's a very common complaint made to us by survivors that sentences are inadequate. There's a number of factors in that. Survivors will often speak of their experience of abuse as giving them a life sentence, that ever since being a child, when the abuse occurred, they have had to deal with the impacts, and it's quite clear that all of the information we now have about the developmental impacts of childhood sexual abuse are that many people will, in fact, suffer lifelong impacts. So that is the viewpoint or the prism through which many survivors look at things, that, in effect, they've been sentenced to a life of trauma because of what happened to them by the perpetrator.

One of the other factors – I don't know if it's addressed in our submission – is that people often learn what the maximum sentence is for an offence and are very disappointed to know that the maximum sentence may be 12 years or 14 years or life imprisonment, and their abuser got two or three years as a head sentence. That's difficult to understand.



The way lawyers explain those concepts around the maximum for the worst possible example of offending, that's language which is – it's traumatising to engage in those sorts of explanations with survivors.

Another difficulty is actual time served and head sentences. If a sentence of three years' imprisonment is imposed, then why are they only serving 6 months or 12 months or 18 months. These sorts of things are common issues.

Survivors are not given the information or are not able to process the information around current sentencing practices in a way that they fully understand how those sentences might have been arrived at and why those sorts of factors – or why people haven't received the maximum sentence.

Concurrent and cumulative sentences are not well understood and it's often a very difficult and traumatising process for survivors to engage with prosecutors around their decisions of what matters will proceed on an indictment and what matters the accused will ultimately plead to. Counts may be dropped. There's a lot of difficulty around understanding some of the reasons underlying prosecution decisions. So that's a difficult process.

And then when a certain number of counts are produced, there's an expectation that they will all mean something in the ultimate sentence. So if it's a concurrent sentence, then that can be hard to grasp and understand: 'I had to give evidence about all of these different occasions, and at the end of the day he's got the same sentence for all of them.'

Ultimately, our position on sentencing is that the sentencing judge should have the discretion around cumulative or concurrent sentencing, because I think if you operate with binding presumptions in either way, there can be particular difficulties which might cause injustice in particular cases.

We've referred in our submission that if the presumption was to change, as it has in Victoria, to cumulative rather than concurrent, that may lead to some change in prosecution practices, which may have unforeseen consequences, such as limiting the number of charges in recognition of the cumulative impact, and if there are multiple charges, I would think the sentencing exercise becomes more difficult for the court.<sup>1349</sup>

In its submission, the Centre Against Sexual Violence Queensland queried why concurrent sentencing was favored over cumulative sentencing. It supported further research and review of cumulative and concurrent sentencing procedures in sexual abuse cases.<sup>1350</sup>

In its submission in response to the Consultation Paper, the New South Wales ODPP referred to the importance of judicial discretion in setting sentences and submitted that mandatory provisions inevitably fetter such discretion. In its view, current sentencing principles are adequate to deal with issues of concurrency, accumulation and totality<sup>1351</sup>

In his submission in response to the Consultation Paper, the Victorian DPP submitted that, in practice, the presumption in Victoria in favour of cumulative sentencing for serious child sexual abuse offenders has minimal impact on the sentences imposed, as a consequence of the ongoing obligation to apply the principle of totality.<sup>1352</sup> He submitted that a clear legislative displacement of the principle of totality would be required to make a cumulative presumption effective.<sup>1353</sup>

In its submission, the New South Wales Government noted that in its 2013 report, *Sentencing*, the NSW LRC recommended that the common law sentencing principles of totality and proportionality be given statutory recognition.<sup>1354</sup> As noted in section 34.5.2, the New South Wales Government has announced a response to the NSW LRC's report. However, it is not yet clear whether that response will extend to the recommendation on giving statutory recognition to the principles of totality and proportionality.

The Law Council of Australia expressed opposition to any statutory presumption in favour of cumulative sentencing, noting that it also did not support a presumption in favour of concurrent sentencing. The Law Council of Australia's preferred approach is for the sentencing court to simply apply the totality principle and accumulate sentences accordingly.<sup>1355</sup> The Law Society of New South Wales also expressed opposition to any mandatory or presumptive provisions, preferring the maintenance of a sentencing judge's discretion to impose appropriate sentences in individual cases.<sup>1356</sup>

The Bar Association of Queensland submitted that the discretion to impose cumulative sentences should remain a matter for the sentencing judge.<sup>1357</sup>

## Conclusions and recommendation

It would appear that the principles behind concurrent sentencing are not well understood, and, perhaps as a consequence, the imposition of sentences that are to be served concurrently can cause distress to victims and survivors.

However, given the principle of totality, adopting a simple presumption in favour of cumulative sentencing would be unlikely to provide victims and survivors with any greater comfort. In order to comply with the principle, head sentences for child sex offences would need to be reduced in order to avoid a crushing sentence, which might be just as distressing to victims and survivors.

While we accept the reasoning that leads to concurrency for sentences that arise from the same course of criminal conduct, we also consider that sentencing for multiple offences should, to the greatest degree possible, provide separate recognition for separate episodes of child sexual abuse offending, and certainly for multiple victims.

We are not satisfied that legislating for a presumption in favour of cumulative sentencing would achieve this. However, we are satisfied that there is scope for states and territories to legislate to ensure that the separate harm done to victims by separate offences is recognised where there are multiple discrete episodes of offending, and/or where there are multiple victims.

Adopting a provision similar to that used in New South Wales, which requires the sentencing court to give an indication of the sentence that would have been imposed for each offence when setting an aggregate sentence, should assist in ensuring that separate episodes of offending are given their own recognition in any aggregated sentence.

We do not put this recommendation forward with an expectation that it is likely to lead to longer sentences. Sentencing for multiple offences is a difficult task, and we share the concern expressed in some submissions that preserving discretion for sentencing courts is the most appropriate course to recognise the many and various circumstances that arise in sentencing.

#### **Recommendation**

75. State and territory governments should introduce legislation to require sentencing courts, when setting a sentence in relation to child sexual abuse offences involving multiple discrete episodes of offending and/or where there are multiple victims, to indicate the sentence that would have been imposed for each offence had separate sentences been imposed.

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

#### **Discussion in the Consultation Paper**

##### **Introduction**

In the Consultation Paper, we noted that in most Australian jurisdictions, an offender is sentenced with reference to the sentencing standards that existed at the time of the offending, including in relation to the maximum penalty, non-parole period and the prevailing sentence lengths accepted by the courts at the time of offending.

The use of historical sentencing standards is particularly relevant to matters of institutional child sexual abuse, which are often prosecuted many years, even decades, after the offending occurred.<sup>1358</sup>

The concerns with applying sentencing standards at the time of offending in historical cases include the following:

- Applying historical sentencing standards can result in sentences that do not align with the criminality of the offence as currently understood. The sentences for child sexual abuse offences have increased over time. When the court sentences to the standard existing at the time of the offending, sentences can be shorter than they would be under current sentencing standards,<sup>1359</sup> which can be distressing for victims and may undermine community confidence in the administration of justice.
- The sentencing court may be prevented from considering some aggravating features recognised today, such as grooming.<sup>1360</sup> It may also be prevented from ordering wholly or partially cumulative sentences in cases with multiple offending.<sup>1361</sup>
- Applying historical sentencing standards can also be complicated, especially if relevant sentencing remarks or statistics are not available. Where statistics are not available or reliable, the court is to sentence with regard to the legislative policy current at the time, often visible in the maximum sentence.<sup>1362</sup>

Australian jurisdictions generally sentence by applying historical sentencing standards. However, Victorian legislation directs the sentencing court to have regard to current sentencing practices, and South Australia provides for current sentencing standards to apply in cases of multiple or persistent child sexual abuse, regardless of when the offending occurred.

England and Wales have implemented more substantial reform. While the statutory maximum penalty that applied at the time of the offence continues to apply, they otherwise sentence in accordance with the sentencing standards that apply at the time of sentencing.

We discuss the three current approaches below.

### Applying historical sentencing standards

Under this approach, supported in obiter by the High Court in *Radenkovic v The Queen*,<sup>1363</sup> the sentencing court is to impose a sentence commensurate with the maximum sentence and applicable standards of the time. The New South Wales Court of Criminal Appeal has held that, where an offender is exposed to harsher punishment than that which existed at the time of the offending and reliable statistics or source material exist so to reconstruct the previous sentencing regime, a 'sentence should be imposed that reflects the applicable statutory maxima and sentencing patterns'.<sup>1364</sup> This approach has also been adopted in Queensland and, with qualifications, in the Northern Territory.<sup>1365</sup>

### Partial application of historical sentencing standards

In Victoria, legislation directs the sentencing court to have regard to the maximum penalty for the offence and also current sentencing practices, among other things.<sup>1366</sup> Current sentencing practice has been found to include procedural elements such as pre-sentence reports and victim impact statements; and the imposition of certain sentence types (such as suspended sentences).<sup>1367</sup>

The Victorian Court of Appeal has held that the statutory list of matters to which the court must have regard when sentencing an offender is not exclusive. The sentencing practices at the date of the offending may also be a factor to which the court can have regard when sentencing, as the principle of 'equal justice' (that a person should not be sentenced to a substantially higher sentence than an offender who committed a like offence at the same time) may still require the sentencing court to have regard to sentencing practices at the time of the offending.<sup>1368</sup> However, reference only to the historical statutory maximum in concert with current sentencing considerations, such as current community attitudes, would not be in error, especially where no further information regarding differential sentencing practices at the time of the offence exists.<sup>1369</sup>

In her evidence in Case Study 46, the Acting Director of Public Prosecutions for Western Australia, Ms Amanda Forrester SC, outlined the approach in Western Australia:

In terms of our authorities, the principle is that while it's not relevant to take into account that similar offences committed today would be subject to higher maximum penalties, it's appropriate to take into account contemporary understanding of the seriousness of that conduct. Our Court of Appeal and our District Court, and all our sentencing courts in this sort of offending, don't seem to apply old standards of sentencing for these sorts of offences in terms of how they say they are sentencing people.

My experience is that the sentences applied to people who commit this kind of offending are commensurate with contemporary sentencing standards. We don't notice any particular difference between people sentenced for multiple acts of sexual abuse committed a long time ago versus those that are committed more recently.<sup>1370</sup>

Ms Forrester noted that this was not as a result of a particular statutory provision, but simply the approach the courts had taken.<sup>1371</sup>

In Case Study 11, in relation to the Congregation of Christian Brothers in Western Australia's response to child sexual abuse at Castledare Junior Orphanage, St Vincent's Orphanage Clontarf, St Mary's Agricultural School Tardun and Bindoon Farm School, the Royal Commission heard evidence regarding the offending of Brother Dick, who pleaded guilty to having unlawfully and indecently dealt with a number of unnamed boys under the age of 14 years at Castledare in the period 1960 to 1965.<sup>1372</sup>

Brother Dick received a sentence of three and a half years imprisonment, which he appealed. In rejecting the appeal, the Western Australian Court of Criminal Appeal rejected a submission by Brother Dick's counsel that he should be sentenced by reference to community attitudes at the time the offences were committed. In its decision, which was delivered in 1994, the Western Australian Court of Criminal Appeal stated that:

any change in community attitudes has not come about by reason of some changed view as to the seriousness of the offences in themselves. It has come about by reason of the relatively recent realisation of the prevalence of these offences within the community, a fact which has long been concealed.<sup>1373</sup>

### Exclusion of historical sentencing standards

South Australian legislation requires sentencing courts to apply sentencing standards set out in the 1997 case of *R v D*<sup>1374</sup> in matters of persistent or multiple child sexual abuse, regardless of when the offending occurred.<sup>1375</sup> Due to the nature and harm of child sexual abuse offences, a majority of the South Australian Court of Criminal Appeal determined that heavier sentences should be imposed for matters of child sexual abuse (although they reduced the sentence in the case the subject of the appeal). The majority considered that:

- unlawful sexual intercourse with children under 12 (multiple, over a period of time) should attract as a starting point a head sentence of about 12 years, subject to reduction for a plea of guilty, cooperation with the police, genuine contrition and other mitigating factors
- unlawful sexual intercourse with children over 12 (multiple, over a period of time) should attract as a starting point a head sentence of about 10 years imprisonment.<sup>1376</sup>

The law was subsequently codified after the South Australian Court of Criminal Appeal held that the heavier sentences required by *R v D* could not apply to offending that occurred before the judgment in 1997.<sup>1377</sup>

In *R v Marien*,<sup>1378</sup> the South Australian Court of Criminal Appeal said of the effect of the legislation:

Section 29D does not fetter the Court's discretion to determine the sentence appropriate to each individual case, having regard to all the circumstances of the offending and matters personal to a defendant. The effect of section 29D does no more than require the Court to have regard to the decision in *R v D*. Section 29D(1)(b) gives retrospective effect to the decision in *R v D*.

*R v D* provides a notional starting point of approximately 12 years, subject to various factors personal to the defendant. Doyle CJ was concerned with the need for the range of penalties for this particular offence to be lifted in those cases concerning unlawful sexual intercourse of children below 12 years of age, where there have been multiple offences over a period of time. Nevertheless, a sentence in the general vicinity of 12 years with a higher or lower starting point may be appropriate, depending upon the facts and circumstances of each case.<sup>1379</sup> [References omitted.]

The court referred to the trial judge noting that he had taken into account the principles in *R v D* but stated ‘he does not explain why, in this case, he has departed so significantly from that decision’. The court stated that it considered a starting point of 12 years imprisonment was appropriate, and it allowed the DPP’s appeal against the leniency of the sentence.<sup>1380</sup>

England and Wales have implemented more substantial reforms. The reforms followed decisions in the England and Wales Court of Appeal<sup>1381</sup> and an understanding of how earlier legislative reforms in relation to sexual offending had been implemented by the courts.<sup>1382</sup>

In 2011, the England and Wales Court of Appeal delivered the guideline judgment of *R v H and Others*,<sup>1383</sup> which involved a number of historical abuse cases. The decision noted that, in these types of cases, criminal conduct may often span different legislative provisions and ‘while the substantive law and sentencing provisions have been changing, a variety of different sentencing regimes have been in force’.<sup>1384</sup>

The Lord Chief Justice directed judges deciding these cases to return to first principles, contained within Part 12 of the *Criminal Justice Act 2003* (UK):

In principle, the defendant must be sentenced in accordance with the sentencing regime applicable at the date of sentence. Nevertheless as the offence he committed years earlier contravened the criminal law in force at the date when it was committed, he is liable to be convicted of that offence and no other, therefore the sentence is limited to the maximum sentence then available for the offence of which he has been convicted. Changes in the law which create new offences, or increase the maximum penalties for existing offences do not apply retrospectively to crimes committed before the change in the law. In short, the offence of which the defendant is convicted and the sentencing parameters (in particular, the maximum available sentence) applicable to that offence are governed not by the law at the date of sentence, but by the law in force at the time when the criminal conduct occurred. ... In such circumstances what we describe as retrospectivity would be unlawful.<sup>1385</sup>

The Lord Chief Justice explained the extent of the ban on retrospectivity by reference to a 2005 decision of the House of Lords in *R (Uttley) v Secretary of State for the Home Department*.<sup>1386</sup> In the context of prisoner release, the House of Lords held that an infringement of Article 7(1) of the *European Convention on Human Rights* (prohibiting the imposition of a heavier penalty than one ‘applicable’ at the time when the offence was committed) would only arise ‘if a sentence is imposed on a defendant which constitutes a heavier penalty than that which could have been imposed ... under the law in force at the time that his offence was committed’.<sup>1387</sup>

Relevantly, the court in *R v H and Others* determined that, for sexual abuse cases, the appropriate approach to sentencing includes the following:

- (a) Sentence will be imposed at the date of the sentencing hearing, on the basis of the legislative provisions then current, and by measured reference to any definitive sentencing guidelines relevant to the situation revealed by the established facts.

- (b) Although sentence must be limited to the maximum sentence at the date when the offence was committed, it is wholly unrealistic to attempt an assessment of sentence by seeking to identify in 2011 what the sentence for the individual offence was likely to have been if the offence had come to light at or shortly after the date when it was committed. Similarly, if maximum sentences have been reduced, as in some instances, for example theft, they have, the more severe attitude to the offence in earlier years, even if it could be established, should not apply.<sup>1388</sup>

In 2012, the Sentencing Council for England and Wales commenced a detailed consultation process as part of a broad review of sentencing issues regarding sexual offences generally.

In December 2013, the Sentencing Council issued the guideline on sexual offences, which came into force on 1 April 2014.<sup>1389</sup> The guideline affirmed the approach of the court in *R v H and Others*.<sup>1390</sup>

The guideline applies to sexual offences and provides in respect of sentencing:

The offender must be sentenced in accordance with the sentencing regime applicable at the **date of sentence**. Under the Criminal Justice Act 2003 the court must have regard to the statutory purposes of sentencing and must base the sentencing exercise on its assessment of the seriousness of the offence.<sup>1391</sup> [Emphasis original.]

The guideline explicitly states that the court is not to attempt to establish the likely sentence had the offender been sentenced shortly after the date of the offence; instead, it directs the court to prioritise the culpability of the offender and the harm caused or intended when considering the sentence.<sup>1392</sup> However, the sentence is limited to the maximum sentence at the time of the offending, provided that that maximum is not higher than the current one.<sup>1393</sup>

The Sentencing Council press release on the guideline stated that the guideline will apply to 'all adult offenders, regardless of when offences took place, so while offenders will be subject to the law at the time of the offence, the guideline will bring a modern and victim-focused approach to how historic offenders are dealt with by the courts'.<sup>1394</sup>

The Sentencing Council also stated that public protection was a key element in the development of the broad sentencing guideline, and that it 'reinforces the importance of proper punishment and the prevention of re-offending, either through significant custodial sentences or rigorous treatment programmes that will address the offender's behaviour'.<sup>1395</sup>



## What we were told in submissions and Case Study 46

A number of submissions expressed support for the adoption of the approach in England and Wales, where current sentencing standards apply instead of those that existed at the time of the offending.<sup>1396</sup> Some submissions argued that whichever approach was more severe should apply.<sup>1397</sup>

Pastor Bob Cotton suggested that harsher penalties for child sexual abuse generally were required, and that they should be applied retrospectively.<sup>1398</sup>

In its submission in response to the Consultation Paper, Micah Projects stated that contemporary sentencing standards should apply when sentencing for historical offences, as ‘more is known now about the effects of childhood sexual abuse and so the sentencing laws should reflect this’.<sup>1399</sup>

The Victorian Aboriginal Child Care Agency submitted that, as current sentencing standards better reflect current community expectations, they should apply when sentencing for historical offences.<sup>1400</sup>

In its submission in response to the Consultation Paper, CLAN described sentencing in accordance with historical sentencing standards as ‘archaic’.<sup>1401</sup>

The Australian Capital Territory Victims of Crime Commissioner supported the Victorian approach of having regard to current sentencing practices, and the South Australian approach of using current sentencing standards in cases of multiple or persistent child sexual abuse, regardless of when the conduct occurred.<sup>1402</sup>

In his submission in response to the Consultation Paper, Judge Berman SC of the New South Wales District Court acknowledged that there is now a greater appreciation amongst judges regarding the impact of child sexual abuse on victims than there was in the past:

To put it bluntly we now know that those old sentencing practices were wrong. Current law in New South Wales requires judges to perpetuate the errors of the past. Surely it would be better to impose a sentence which we now think to be a correct one rather than to be forced to impose a sentence which we know to be wrong.<sup>1403</sup>

In its submission in response to the Consultation Paper, the New South Wales ODPP referred to the case law in New South Wales establishing that sentencing for historical offences must take into account sentencing practices at the time of the commission of the offence.<sup>1404</sup> The NSW ODPP also noted case law highlighting the practical difficulties with this approach, including where a ‘clear picture as to the range of penalties imposed at the earlier point of time’ is not available, or perhaps only available when the matter reaches the Court of Criminal Appeal.<sup>1405</sup>

The NSW ODPP also highlighted more recent cases that have considered the issue of sentencing for historical offences. While noting that he was writing separately to the majority in the case of *MPB v R*,<sup>1406</sup> the ODPP quoted the approach of Basten JA, who stated:

It follows that the correct approach to the fixing of the sentence involves the following steps:

- (a) determine the facts as now available to the court;
- (b) have regard to the maximum penalty in force at the time of the offending, as a guide to the range of punishment then available;
- (c) identify where, within the range of offending conduct covered by the offence charged, the offence under consideration falls;
- (d) fix the term of the sentence or sentences;
- (e) determine whether special circumstances require that the relationship prescribed by s 44 be varied [section 44 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) governs the ratio of the non-parole period to the balance of the sentence], and
- (f) fix a non-parole period in accordance with s 44 of the *Sentencing Procedure Act [Crimes (Sentencing Procedure) Act 1999* (NSW)] (as in force prior to the 2002 Amendment Act).

In accordance with that approach, it is neither necessary nor appropriate to have regard to the actual patterns or practices of sentencing which are now believed to have operated at the time of the offending, whether based on acceptable statistical evidence, cases or memory.<sup>1407</sup>

The ODPP submitted:

Where sentencing principles contemporary to the offence have been found to be erroneous, there is something perverse about requiring a Court to be bound by and apply such incorrect principles. The approach taken in England and Wales to apply maximum penalties contemporary to the offences, where they are not higher than today's penalties, but then sentence according to today's standards has much to commend it. Acknowledging that there may be those that would argue that there is a degree of unfairness to the accused in that they may be deprived of consideration of historical community standards that could operate to reduce the seriousness of their offending, this approach strikes the right balance between the presumption against retrospectivity and the need to give effect to current law and community standards.<sup>1408</sup>

In his evidence in the public hearing in Case Study 46, the NSW DPP, Mr Lloyd Babb SC, outlined his view that legislative change was required and desirable in this area:

I believe it requires legislative change, for real clarity, and I believe legislative change is desirable in this area.

In my view, there isn't a logic in applying past sentencing standards to offending where the only reason the offending hasn't come forward is through a lack of earlier complaint. Of course we are always bound by the maximum penalties that applied at the time – that is the true scope within which offenders should be sentenced. Where the sentencing standards have changed over time, it's a clear indication that the courts have determined that the sentencing patterns were wrong at the earlier point in time, and why would we sentence on the basis of a standard that was wrong?<sup>1409</sup>

Speaking of the possible grievance that an offender might have of being subject to more modern, and more punitive, community standards, Mr Babb said:

We talk usually about legitimate sense of grievance in relation to sentencing patterns, and if you are found guilty of serious offending that is historical, then I don't think you have a legitimate sense of grievance, if you haven't come forward and admitted your wrongdoing earlier, in being sentenced by the current sentencing standards.<sup>1410</sup>

In its submission in response to the Consultation Paper, the NSW Young Lawyers Criminal Law Committee stated that it was inappropriate to apply historical sentencing standards in child sexual abuse matters. It submitted that, while the criminal law has a general principle against new law applying retrospectively, it is appropriate to apply current standards specifically for these crimes for a range of reasons, including the inadequacy of past sentencing standards and the difficulty in ascertaining historical standards.<sup>1411</sup>

Expanding on the reasons for this approach, Mr Liam Cavell, representing NSW Young Lawyers Criminal Law Committee, told the public hearing in Case Study 46:

The first reason is that it can sometimes be difficult to discern the appropriate sentencing principles to apply in historic cases, which can in turn cause issues or difficulties for an offender who comes to be sentenced to know the range of sentence or sentencing options that they may face.

The second reason is that the maximum penalties for historic cases, historic offences, are typically much lower than what contemporary standards are, and that's based on an unfortunate misunderstanding about the damage that this type of offending has on victims.

To continue that approach is to perpetuate that misunderstanding, and that has two consequences, in our view.

The first is that it creates a gulf between community expectations and the judicial system, which, as a corollary, ends up undermining public confidence in the judicial system. But also it works against trying to encourage victims to come forward and report their abuse, if they don't think that their allegations will be treated with the seriousness that the penalties seem to reflect.

The third reason is that we don't believe that offenders should receive the benefit of being successful in avoiding detection for a number of years, and this is a particularly pertinent issue in an institutional offending context and in circumstances where offenders have taken advantage of vulnerable people who only at a later stage in their life feel able to report that abuse.<sup>1412</sup>

The NSW Young Lawyers Criminal Law Committee also noted that such a change would not be retrospectively criminalising what had previously been lawful behaviour; rather, it would involve the retrospective application of a different penalty. The Committee also commended the approach of Basten JA in *MPB v R*.<sup>1413</sup>

In his submission in response to the Consultation Paper, the Victorian DPP noted the adverse comments from victims highlighted in the Consultation Paper that offenders might receive a lighter sentence as a result of a delayed prosecution. He also noted the difficulties of accurately determining historical sentencing practices.<sup>1414</sup> He expressed support for applying current sentencing practices in relation to the proportionality between the maximum penalty applicable and the sentence imposed being applied to historical offending, provided that the maximum penalty for the offence at the time is still observed.<sup>1415</sup>

In his evidence in Case Study 46, the Director of Public Prosecutions for the Australian Capital Territory, Mr Jon White SC, explained his preference for a legislative provision supporting the application of current sentencing standards:

This is a matter of great controversy in ACT. We, too, have an injunction for judges to take into account current sentencing practice. We also have a Human Rights Act, and the argument has been run that there is an inherent double jeopardy in sentencing somebody on a different basis to the basis on which they would have been sentenced had they been sentenced at the time they committed the offences. That's an unresolved tension at the moment.

In my view, it should be resolved, if necessary, by legislative intervention in favour of enshrining the current community standards, because that's really what a court should be doing when they are sentencing. There is an element of denunciation on behalf of the community in the sentence that is handed down, and that has to be reflected on current community attitudes, which in this area have changed greatly. It is not just maximum penalties that have changed; community expectations and standards have changed.<sup>1416</sup>

In its submission in response to the Consultation, the Bar Association of Queensland referred to *Radenkovic v The Queen*,<sup>1417</sup> the case cited in the Consultation Paper as authority for the proposition that a sentencing court is to impose a sentence commensurate with the maximum sentence and applicable standards of the time. The Bar Association of Queensland submitted that the decision was relevant to the very particular circumstances of the case, where entirely new sentencing legislation had commenced between an offender's initial sentencing, and a redetermination on appeal.<sup>1418</sup>

The Bar Association of Queensland submitted that the approach in Queensland differs to that in *Radenkovic*, and cited the cases of *R v Carlton*<sup>1419</sup> and *R v Pham*<sup>1420</sup> suggesting that amendments to sentencing legislation, in particular in relation to sentencing child sexual offences, have been held to apply to offences committed before their enactment, thus ensuring ‘that contemporary attitudes to child sexual offending are applied by courts sentencing for historical offences’.<sup>1421</sup>

In his evidence in Case Study 46, the Director of Public Prosecutions for Queensland, Mr Michael Byrne SC, expressed his disagreement with the submission of the Bar Association of Queensland:

The Bar Association submission had referred to two cases from Queensland – one *Pham* and the other *Carlton*. Unfortunately, it didn’t refer to a later decision of the Queensland Court of Appeal of *Wruck* [2014] QCA 39, where, as fate would have it, the lead judgment was written by our current Chief Justice. She wasn’t at that stage. Her Honour, in the lead judgment from paragraphs 24 and following, showed a strong preference to having close regard to the sentencing practices at the time. And that remains the position, as I understand it.<sup>1422</sup>

It is noted that *R v Wruck*<sup>1423</sup> was cited in the Sentencing Research as authority for Queensland having adopted a similar position to that in *Radenkovic*.<sup>1424</sup>

The Law Council of Australia submitted that the principle of non-retrospectivity has application in relation to sentencing, and that, where sentencing standards have changed over time so as to increase sentences for a particular offence, an offender should be sentenced in accordance with the standards at the time of offending.<sup>1425</sup>

The Law Society of New South Wales expressed support for the current approach in New South Wales of applying the sentencing standards in force at the time of the offending, noting the degree of unfairness occasioned by ignoring the community standards relevant at the time of the offending.<sup>1426</sup> Ms Penny Musgrave, representing the Law Society of New South Wales, noted in her evidence in public hearing in Case Study 46 that the Law Society appreciated the difficulties in identifying the appropriate standards that applied at the time of offending.<sup>1427</sup>

In its submission, Legal Aid NSW expressed strong opposition to the adoption of the approach in England and Wales. Legal Aid NSW submitted that sentences for child sexual abuse matters have increased significantly in NSW over the last 25 years, as a result of sentencing reforms, and that consequently an offender who committed an offence in 1976 would have faced a much harsher penalty if sentenced in 2016 rather than in 1976.<sup>1428</sup> Legal Aid NSW also noted that a delay in reporting and conviction may have a negative impact on the nature of sentencing for an offender in any case, stating that old age may make a sentence more onerous, and, in some cases, a life sentence, as well as lifelong registration on the child sex offender register.<sup>1429</sup>

Legal Aid NSW submitted that there is a significant amount of material available in NSW Court of Criminal Appeal decisions, and published by the Public Defenders' Office to assist in determining what historical standards were and that, in any case, challenges in accurately assessing historical standards should not be a justification for departing from the principle against retrospective punishment.<sup>1430</sup>

Finally, Legal Aid NSW stated that applying current sentencing standards undermined fundamental notions of fairness and quoted the International Covenant on Civil and Political Rights Article 15.1, prohibiting a state from imposing a heavier penalty on a person held guilty of a criminal offence 'than the one that was applicable at the time when the criminal offence was committed.'<sup>1431</sup> While Legal Aid acknowledged that the definition of 'penalty' in Article 15 is complicated, they submitted that it should encompass both a statutory maximum penalty and applicable sentencing standards. Legal Aid NSW did not cite any international case law to support this assertion.<sup>1432</sup>

The New South Wales Government submitted that the issue of applying historical sentencing patterns will be considered by the NSW Child Sexual Offences Review, discussed in section 10.3, which it stated will take into account any recommendations made by the Royal Commission.<sup>1433</sup>

## Conclusions and recommendation

Jurisdictions that have departed from the absolute historical standards approach have been criticised for breaching the principle against retrospectivity. As well as the concerns noted above, some stakeholders have told us in private roundtable discussions that using current standards to sentence for historical offences may be unfair. They have suggested that, at the time of offending, the community, including the offender, may not have been alert to the damage that child sexual abuse can cause and may not have considered the offending to be as serious as it is now generally understood to be. Consequently, where historical standards are not absolutely adhered to, they have suggested that the offender may be sentenced unfairly.

As discussed above, the courts and the Sentencing Council for England and Wales considered that fairness to the offender was secured by the continued application of the maximum penalty that applied at the time of the offending (or any lesser penalty adopted subsequently). Similarly, the House of Lords held that a breach of human rights in this context would only occur if a sentence is imposed on a defendant which constitutes a heavier penalty than that which could have been imposed under the law in force at the time that the offence was committed.

We are satisfied that, provided the maximum penalty that applied at the time of the offence continues to apply, there is no unfairness in applying contemporary sentencing standards within that maximum penalty. We are also satisfied that this would not result in an offender receiving a higher penalty than the one that was applicable at the time when the offence was committed.

We have heard survivors' accounts of confusion and anger when the offender receives a sentence for sexually abusing them that is very light compared with current standards. This may be compounded by an understanding that the delay in reporting is a feature of the offending and is caused by the offending behaviour. Delay is likely to be a feature particularly in institutional offending where, as we discussed in section 7.9.2, the Delayed Reporting Research shows that the longest delays in reporting have occurred when the alleged perpetrator was a person in a position of authority.<sup>1434</sup>

It may be difficult to accept that an offender should receive a lighter sentence than another offender who committed a similar offence more recently, because the impact of their offending resulted in the victim substantially delaying reporting. This is especially so considering that an offender may also receive a lighter sentence due to the passage of time between the offending and sentence, especially where the offender had demonstrated good behaviour in the intervening period<sup>1435</sup> or is of advanced age or ill health.

It is also clear from sentencing decisions in cases involving historical offending, particularly in New South Wales, that sentencing judges are determining sentences that are not as severe as would be appropriate under contemporary community standards.<sup>1436</sup>

In the Consultation Paper, we suggested that it was also necessary to consider whether adopting the approach now applying in England and Wales might have a negative impact on guilty pleas. Of the 283 institutional child sexual abuse matters analysed in the Sentencing Data Study, more than 70 per cent were resolved with a guilty plea.<sup>1437</sup> Many of these matters involved historical offending.

England and Wales have not reported a decrease in guilty pleas for historical child sexual assault since the commencement of the guideline. However, there is a lack of data or reviews in relation to the period following the commencement of the guideline.

It is not clear that higher penalties result in fewer guilty pleas. In 2012, the Queensland Sentencing Advisory Council examined whether amendments to legislation in 2003 had affected the rate of guilty pleas.<sup>1438</sup> The amendments had removed the principle of imprisonment as a last resort for child sex offenders, included specific sentencing factors for some child sexual offences and increased maximum penalties for the offences of indecent treatment of a child and maintaining a sexual relationship with a child.<sup>1439</sup>

The Sentencing Advisory Council found a general decline in the proportion of offenders who entered a guilty plea to the offence of maintaining a sexual relationship with a child and an increase in the proportion of offenders who entered a guilty plea to the other offences under consideration, including indecent treatment of a child. However, the Sentencing Advisory Council noted that the increase in guilty pleas began before the 2003 amendments and it said that it was unlikely to be related to the amendments.<sup>1440</sup>

It suggested that the decline in the number of offenders pleading guilty to maintaining a sexual relationship with a child may be partly explained by the 2003 amendment that increased the maximum penalty for some forms of the offence, and by a 2004 Queensland Court of Appeal decision which reviewed the range of sentences that could be expected for this offence. There was an increase in guilty pleas on indecent treatment offences following the amendments.<sup>1441</sup>

The Sentencing Advisory Council also noted that caution was required in interpreting the data given the small numbers of offences involved, and the influence of other factors including legislative reform, changes in the characteristics of the cases being finalised by the courts and changes in the way in which data is collected.<sup>1442</sup>

Regardless of the sentencing standards applying to historical cases, a guilty plea would still be eligible to receive a discount for the utilitarian benefit of the plea, as discussed in section 34.5. This may provide a sufficient incentive for offenders to enter a guilty plea, regardless of the likelihood of a more severe sentence.

Submissions in response to the Consultation Paper did not express concern in relation to the impact of possible reforms on guilty pleas.

We are satisfied that states and territories should legislate to provide that sentences for child sexual abuse offences should be set in accordance with the sentencing standards at the time of sentencing instead of at the time of the offending, as now occurs in England and Wales.

The primary objections we have heard relate to the unfairness that this would occasion to the offender, noting that standards have become more punitive over the last 25 years. We are satisfied from what we have heard that those standards were in error, based on misunderstandings of the impact of child sexual abuse on victims. We also note that, where an offender is being sentenced for historical child sexual abuse offences, it is likely that that offender has benefitted from many years of living in freedom in the community – a benefit that may well not have been available if the offender had admitted to the offending and subjected themselves to the criminal justice system at the relevant time.

On 18 June 2015, Mr David Shoebridge MLC, a Greens member of the Legislative Council in the New South Wales Parliament, gave notice of a motion to introduce the Crimes (Sentencing Procedure) Amendment (Child Sexual Offences) Bill 2015. The Bill has now been drafted and Mr Shoebridge provided us with a copy of the Bill in March 2017. The Bill provides that:

In determining the appropriate sentence for a child sexual offence:

- (a) the offender must be sentenced in accordance with the sentencing practices applicable at the date of sentence, and
- (b) the court should not seek to establish the likely sentence had the offender been convicted shortly after the date of commission of the offence, and



- (c) the sentence is limited to the maximum sentence for the offence available at the date of commission of the offence.<sup>1443</sup>

The Explanatory Note to the Bill states that the Bill is consistent with the approach taken by the then President of the New South Wales Court of Appeal, Justice Keith Mason, in a dissenting judgment in *R v MJR*,<sup>1444</sup> quoted above in section 34.1.

In applying historical ‘standards’, we note the possible distinctions between:

- the maximum penalty applying to the offence
- the principles or ‘rules’ of sentencing as set out in relevant legislation
- the ‘standards’ or sentence outcomes apparent at the time in question.<sup>1445</sup>

In our view, the maximum penalty for the offence should apply as at the date of the offending, but any principles in legislation, or guidance by way of similar decisions, should be drawn from sentencing practice at the time of sentencing. We are satisfied that this approach represents a fair balance in the complex task of sentencing for these types of offences, and, by virtue of the preservation of the then existing maximum penalty, does not infringe the right of an offender to face no harsher penalty than that which would have applied at the time of the offending.

In some cases, this may not result in significantly longer sentences. For some offences, and for some periods of offending, the maximum penalty applying at the time of the offence may have been so low that, even with the application of contemporary sentencing standards, a quite short sentence will still be given.

We also note that applying current sentence patterns may not necessarily result in sentences that adequately reflect community standards. In the recent case of *DPP v Dalgliesh* (a pseudonym),<sup>1446</sup> the Victorian Court of Appeal declined to increase ‘extremely lenient’ sentences for the crime of incest, because the sentences were nevertheless within current standards. The offender pleaded guilty to two charges of incest and one of sexual penetration. The victims were the daughters of his de facto partner, and the abuse resulted in the 13-year-old victim falling pregnant and having the pregnancy terminated. The total sentence was five years and six months’ imprisonment, with a non-parole period of three years.

The Victorian Court of Appeal held that sentences for incest were disproportionately low when considered against the yardstick of the maximum penalty of 25 years’ imprisonment. It stated that:

current sentencing for incest reveals error in principle. The sentencing practice which has developed is not a proportionate response to the objective gravity of the offence, nor does it sufficiently reflect the moral culpability of the offender. Sentences for incest offences of mid-range seriousness must be adjusted upwards. That is a task for sentencing judges and, on appeal, for this Court. The criminal justice system can be — and should be — self-correcting.<sup>1447</sup>

In December 2016, the High Court granted special leave to appeal in relation to this decision.<sup>1448</sup> In argument on the special leave application, counsel for the Victorian DPP identified the point of principle as being whether the ‘instinctive synthesis’ required of the sentencing judge in determining the sentence should be constrained by the range of penalties that have previously been imposed in similar cases.<sup>1449</sup>

### **Recommendation**

76. State and territory governments should introduce legislation to provide that sentences for child sexual abuse offences should be set in accordance with the sentencing standards at the time of sentencing instead of at the time of the offending, but the sentence must be limited to the maximum sentence available for the offence at the date when the offence was committed.

## **34.6.4 Victim impact statements**

As discussed in section 34.5.2, victims can participate in the sentencing process through victim impact statements. A number of submissions raised concerns about victim impact statements, and the limits that can be placed on them.

### **What we were told in submissions**

In their submission in response to the Consultation Paper, Dr Robyn Holder and Ms Suzanne Whiting noted that victims can feel re-traumatised when, as a result of charge negotiations, they can only comment on limited conduct by the offender in a victim impact statement as a result of downgraded charges. However, Dr Holder and Ms Whiting noted that giving victims an unfettered right to describe the impact of offending may have undesirable consequences, as they may ‘expect the sentencing judicial officer to take account of their views and preferences and would be grievously let down to learn that these are irrelevant to the sentencing decision’.<sup>1450</sup>

Dr Holder and Ms Whiting also argued that it is important for victims to have a voice in sentencing, and queried whether victims should have a role in commenting on the sentence itself.<sup>1451</sup>

The South Australian Commissioner for Victims’ Rights submitted that victims should be allowed to comment on sentence, as is allowed in South Australia.<sup>1452</sup> He also suggested that consideration be given by other states and territories to adopting the provision in South Australia that allows for ‘neighbourhood’ and ‘community’ impact statements.<sup>1453</sup>

The Victorian Victims of Crime Commissioner noted concerns raised in the Consultation Paper regarding the consequences for victims of having to narrow the scope of their victim impact statements. He stated that complaints of this nature were frequently made to his office.<sup>1454</sup>

He also referred to a submission he made to the Victorian Law Reform Commission (VLRC), in relation to its reference on the role of victims of crime in the criminal trial process, that survivors should be provided with support to prepare victim impact statements and information regarding the issues that arise in preparing and tendering victim impact statements, including the admissibility of evidence.<sup>1455</sup>

In its report *The role of victims of crime in the criminal trial process*, the VLRC noted the complexities of restricting the content of victim impact statements, while retaining some opportunity for the victim to be heard in relation to what impact a crime has had on them. The VLRC recommended that the *Sentencing Act 1991* (Vic) be amended, so that, when determining the admissibility of material contained in victim impact statements, a sentencing court should have regard to both:

- the purpose of a victim impact statement, that is, to allow the victim to tell the court about the crime's impact on them. The probative value of the evidence and any potential unfairness must be assessed in light of this purpose
- the fact that a victim impact statement will not be inadmissible merely because it contains subjective or emotive material.<sup>1456</sup>

In order to minimise the risk that inadmissible material is included in a victim impact statement in the first instance, the VLRC also recommended that the *Victims Charter Act 2006* (Vic) be amended to require the prosecution to inform the victim about any material in a victim impact statement that the court may rule inadmissible, before the statement is given to the court and the offender or their lawyer. The VLRC also recommended that the *Victims Charter Act 2006* (Vic) should provide that the prosecution is not responsible for the contents of a victim impact statement.<sup>1457</sup>

The VLRC specifically considered the possibility of victims being able to make submissions about the sentence an offender should receive, and rejected the proposal, noting that, amongst other reasons, sentences should not depend on whether a victim is forgiving or punitive.<sup>1458</sup>

In its submission in response to the Consultation Paper, the NSW ODPP noted that while the *Crimes (Sentencing Procedure) Act 1999* (NSW) provided for victims to give an impact statement, it was not an entitlement, and any statement was subject to defence objections, which can be extremely traumatic for victims.<sup>1459</sup> The ODPP also noted that some special measures provisions, for example the right to a support person or a closed court, do not extend to the making of victim impact statements.<sup>1460</sup>

We have also heard examples of defence counsel taking technical objections to victim impact statements, for example objecting to a sentence in a victim impact statement about the offence bringing shame upon the victim and the community, on the basis that there was no evidence of shame. In one case, we were told that going through a process of forensic examination of each sentence in the victim impact statement, and being left with a substantially reduced statement to be read out, was more traumatic for the victim than a three-day cross-examination.

## Conclusions and recommendations

We acknowledge the difficulties and stress that victims may face in preparing a victim impact statement which reflects the harm they feel they have suffered, but does not contain material that goes beyond what an offender has been convicted of, particularly in circumstances where the conviction is the result of charge negotiation.

However, we also note that an offender can only be sentenced for that which they have been convicted of, and, in this context, an offender and their counsel may object to material that is not relevant to the sentencing.

We note the recommendations of the VLRC in relation to providing additional assistance to victims to help them prepare a victim impact statement that is less likely to contain objectionable material. However, we note the additional burden that this may place on DPPs, and the objection the Victorian DPP made to the VLRC that being asked to edit victim impact statements would undermine the independence of the prosecution.<sup>1461</sup>

We are satisfied that state and territory governments should improve the information provided to victims and survivors to better prepare them for the process of making a victim impact statement and give them a better understanding of its role in the sentencing process. This should be done in consultation with DPPs.

We are also satisfied that state and territory governments should ensure that all special measures to assist victims in giving evidence in criminal matters are extended to victims when they are giving their victim impact statements, if they choose to use them. We are of the view that the provision of special measures should be a priority for matters that are proceeding to trial, ahead of sentencing proceedings. However, where the relevant measures are available, for example reading a statement in a separate room via CCTV, or having a support person, they should be provided. Some special measures, for example the use of an intermediary, would only be necessary where there is to be a cross-examination of the victim regarding their statement. However, some special measures, such as recorded and prerecorded evidence, would have no application in sentencing proceedings.

### Recommendations

77. State and territory governments, in consultation with their respective Directors of Public Prosecutions, should improve the information provided to victims and survivors of child sexual abuse offences to:
- a. give them a better understanding of the role of the victim impact statement in the sentencing process
  - b. better prepare them for making a victim impact statement, including in relation to understanding the sort of content that may result in objection being taken to the statement or parts of it.
78. State and territory governments should ensure that, as far as reasonably practicable, special measures to assist victims of child sexual abuse offences to give evidence in prosecutions are available for victims when they give a victim impact statement, if they wish to use them.

## 34.6.5 Sentencing practices generally

### What we were told in submissions and Case Study 46

The Victorian Victims of Crime Commissioner expressed the view that sentences for child sex offences were out of step with community expectations, and were very low when viewed against the maximum penalties available.<sup>1462</sup> He indicated his support for a standard sentencing scheme, whereby child sex offenders would receive a sentence of between 50 per cent and 100 per cent of the maximum term of imprisonment.<sup>1463</sup>

In its submission, Protect All Children Today did not comment on the specific proposals in the Consultation Paper, but expressed a general view that judicial discretion is extremely important in sentencing and that magistrates and judges have the necessary expertise, training and experience to make decisions in relation to sentencing.<sup>1464</sup>

In its submission, Care Leavers Australasia Network (CLAN) stated that the first consideration in relation to sentencing should be the safety of children and other individuals, and that this should also extend to considerations of bail.<sup>1465</sup> CLAN expressed the view that sentences for crimes committed against children are too lenient, when considered against what is now known about the impact of abuse on the child, the importance of deterrence and the importance of survivors feeling like they have achieved justice.<sup>1466</sup>

CLAN also objected to any leniency for first time offenders, stating that given that many instances of child sexual abuse are not reported, it may not necessarily be the offender's first offence.<sup>1467</sup> While acknowledging the benefits of early guilty pleas, CLAN opposed giving discounts for guilty pleas entered after the commencement of a trial, as this still represents a significant waste of resources.<sup>1468</sup>

CLAN also opposed any leniency for elderly offenders, stating that generally offenders may have enjoyed many years of good health while they remained free as a result of delayed reporting.<sup>1469</sup> Ms Robyn Knight and the Victim Support Service also submitted that the old age or ill health of an offender should be irrelevant to the sentence imposed.<sup>1470</sup>

Mr Craig Hughes-Cashmore, representing the Survivors & Mates Support Network, told the public hearing in Case Study 46 about the impact of a non-custodial sentence on a victim:

I don't believe that convicted perpetrators of child sexual abuse, particularly those who will not admit guilt, should ever be given a suspended sentence.

Again, in one of the cases that I'm very familiar with the defence actually argued for home detention because they were so certain that a gaol term would be awarded to this particular offender, and actually at the end of the day his four-year sentence was wholly suspended, and I have to say that victim was just left questioning why on earth they had bothered to put themselves through the trauma of a criminal trial. I think things like that need to change.<sup>1471</sup>

Mr Reginald Little submitted that lengthy terms of imprisonment are required for child sexual offences to act as a deterrent. He suggested that:

- all offences should come under Commonwealth legislation, and thereby be subject to the same penalty
- child sexual abuse offences should be subject to mandatory sentencing
- all child sexual offences should be dealt with by District or equivalent courts, rather than Local Courts
- those who are convicted of aiding, abetting or failing to report child sexual offences should be subject to the same penalty as those who commit the offences
- where there are multiple victims, the offender should be sentenced in relation to all victims at the same time
- where an offender is being sentenced for the third time for a child sex offence, this should carry a mandatory life sentence
- any penetrative offence of a child under 10 should carry a sentence of mandatory life imprisonment without parole.<sup>1472</sup>

knowmore submitted that the general feedback they receive from clients is that sentences are too lenient, in particular when compared with other crimes such as drug or property offences.<sup>1473</sup> This accords with what we have heard in private sessions. One attendee, who had served time in prison for other offences but had been housed with child sex offenders said:

One of the things that pisses me off is to see people coming in for stealing cars and stuff like that and they get years, and then these people get charged with sex offences with children and they get months...

There's a saying in here... 'You can fuck my kids, just don't steal my car', because of that fact.

knowmore noted the difficulty that survivors face in coming to terms with what they feel is a lenient sentence, particularly where the advanced age of the offender was a factor in the length of the sentence.<sup>1474</sup> They also suggested a nationally consistent approach to sentencing to provide confidence to survivors that offenders are being treated consistently and appropriately, regardless of the jurisdiction where, and the period in which, they offended.<sup>1475</sup> ACT Policing also suggested that consistency in sentencing across all jurisdictions would assist in managing the expectations of victims and families.<sup>1476</sup>

In its submission in response to the Consultation Paper, the Tasmanian Government referred to a range of reviews of sentencing in relation to sexual offences that were undertaken or remain underway in Tasmania. The submission stated that the Tasmanian Government is considering the introduction of mandatory minimum sentences in relation to perpetrators of serious child sexual offences, as noted in section 34.5.2.<sup>1477</sup>

The Victorian DPP made a number of observations regarding the Crown's role in sentencing in child sex cases, separate to the issues discussed below. He noted that the High Court case of *Barbaro v The Queen; Zirilli v The Queen*<sup>1478</sup> made clear that while prosecutors must still make submissions on legal issues at sentencing, including comparable cases and the adequacy of any proposed sentence or sentence type, they are prohibited from suggesting any arithmetic 'sentencing range', as had previously been the practice in Victoria.<sup>1479</sup> The Victorian DPP noted that, despite Victorian Court of Appeal authority that defence counsel may still make submissions as to range, he is of the view that this is inconsistent with the High Court's decision in *Barbaro*.<sup>1480</sup>

The Victorian DPP also referred to some statistics regarding Crown appeals against sentence in child sex cases. He noted that he and his predecessors have brought approximately 70 appeals against sentence since 1983, and these appeals have had a success rate of 71 per cent. This is significantly higher than the overall success rate of Crown appeals against sentence in all types of cases over the same period, which is 55 per cent.<sup>1481</sup>

The Victorian Aboriginal Legal Service (VALS) submitted that the historical abusive experiences of child removal and the trans-generational traumas of colonisation should be taken into greater account across all aspects of the judicial system, including sentencing. VALS suggested that therapeutic sentencing options should be more widely considered and adopted when sentencing Aboriginal people with such a history. VALS argued that therapeutic models of sentencing might resolve the traumas experienced by an offender from their abuse, rather than compounding it through punitive sentencing measures.<sup>1482</sup>

Responding to questions about how this might work in practice, Mr Alister McKeich, representing VALS, told the public hearing in Case Study 46:

In Victoria at the moment we're advocating, particularly in a youth justice situation, for better therapeutic treatments and therapeutic sentencing options. So how VALS would envision that would be working with the community where the individual is from and potentially having greater access to cultural processes and cultural knowledge and understanding, so that person starts to learn about their culture as a source of strength...

So I'm perhaps not necessarily talking about the actual sentencing itself but having other options as opposed to just being locked up for 23 hours a day in Parkville youth detention...<sup>1483</sup>

Mr McKeich noted that other options would not necessarily act as a complete substitute for imprisonment:

One of the models that VALS is advocating for at the moment with DHHS [the Department of Health and Human Services], who runs youth justice down in Victoria, is to have, for want of a better word, like a prison farm, for example. One of the examples that our CEO, Wayne Muir, has given is, could you not have a less punitive environment but for a longer period of time – this is just an example – where instead of three months in a very punitive environment, potentially you could have the individual in there for nine months where they could complete some education, where elders could come and visit on a regular basis to be able to conduct some kind of cultural training, cultural understanding.

So the individual leaves that area and instead of being retraumatised by their experience in a short period of time, they walk out of there with an understanding of who they are, where they come from and aim towards being rehabilitated, so we don't see them in Ararat prison 10 years down the track.<sup>1484</sup>

Mr McKeich accepted that such an approach may not be popular, but would be an attempt to balance rehabilitation with punishment, and also recognise that some offenders have themselves been victims of crime.<sup>1485</sup>

The South Australian Commissioner for Victims' Rights submitted that restitution should be a sentencing option, and, where already available, given greater attention as a possible element of the sentence.<sup>1486</sup>



## Conclusions

We acknowledge the many accounts we have heard of lenient sentences being given. We also acknowledge the additional distress of victims and survivors that results from lenient sentences, particularly where they have pursued justice through the criminal justice system despite the essentially inevitable distress they will suffer as a complainant in a prosecution for child sexual abuse.

We have not reviewed maximum penalties for child sexual abuse offences in our work, other than to note that they have generally increased significantly over recent decades. In terms of sentences that are given – as opposed to maximum penalties – we noted at the beginning of this chapter that there has been an upward trend in custodial sentences for child sexual abuse offending, and that the lengths of sentences for child sexual abuse have increased.<sup>1487</sup>

As we discussed in section 34.5.2, the age and health of the offender at sentencing may be taken into account by the sentencing court. We understand that this may cause distress to victims and survivors, particularly where the impact of the abuse has prevented them from reporting the abuse for decades. However, we also note recent cases in which sentencing judges have acknowledged, in imposing custodial sentences, that the sentences are likely to be life sentences, given the age and health of the offender.<sup>1488</sup> In spite of that consequence, custodial sentences of some years' duration have been imposed because of the seriousness of the abuse.

We note that some submissions call for particular reforms that are broader than those we have considered. Some would have implications for offences generally, and some would require fundamentally different approaches to sentencing than those that currently apply.

We do not consider that we have the evidence or submissions necessary to discuss these broader issues or to form a view on them. We note that some of them are being pursued in other forums, including in relation to a wider range of offences than those contemplated by our Terms of Reference.

# 35 Appeals

## 35.1 Introduction

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Appeals play an important role in the criminal justice system. They provide an avenue for parties to correct errors in individual matters. They also enable the appellate courts to provide guidance to trial courts on the correct way to apply the law in similar cases, which improves consistency across the criminal justice system. Appellate courts develop ‘a body of case law that provides guidance for lower courts in undertaking their task, while recognising the proper scope of judicial discretion’.<sup>1489</sup>

In 2001 in his *Review of the criminal courts of England and Wales*, the Rt Hon. Lord Justice Auld wrote that the main criteria of a good criminal appellate system are:

- it should do justice to individual defendants and to the public as represented principally by the prosecution;
- it should bring finality to the criminal process, subject to the need to safeguard either side from clear and serious injustice and such as would damage the integrity of the criminal justice system;
- it should be readily accessible, consistent with a proper balance of the interest of individual defendants and that of the public;
- it should be clear and simple in its structure and procedures;
- it should be efficient and effective in its use of judges and other resources in righting injustice and in declaring and applying the law;
- it should be speedy.<sup>1490</sup>

An important aspect of criminal appeals is the balance between finality and fairness. Finality is necessary, as the defendant, the complainant and the public expect criminal proceedings will come to an end at some point. However, fairness requires that ‘adequate appeal rights are available to both the defendant and the prosecution to review and correct errors of fact and law. It also requires that due regard be had to principles of good process’.<sup>1491</sup>

While a criminal appeal following a conviction for child sexual abuse offences may be traumatic for the complainant, a defendant’s right to appeal is enshrined in the criminal law. It is fundamental to the integrity of the criminal justice system and the ongoing development of principles of law.

Each state and territory’s legislation governing appeals in criminal matters allows a convicted person to appeal against their conviction as of right on a question of law alone; or with the appeal court’s leave or a certificate from the trial judge on questions of fact or mixed law and fact. A convicted person is allowed to appeal against their sentence with the leave of the court. Some offenders appeal only against their sentence, while other convicted persons appeal against both their conviction and sentence.

The prosecution is allowed to appeal against a sentence imposed by the sentencing court. The appeal court may impose a higher sentence or remit the matter for resentencing in a sentencing court. Generally, appellate courts recognise the sentencing court's discretion in imposing a sentence and, unless there is an error of law, they will allow a prosecution appeal only if the original sentence is seen as 'manifestly inadequate' and outside the range of sentences that the sentencing court could have imposed. The New South Wales Prosecution Guidelines provide that:

prosecution/Crown appeals [against sentence] are and ought to be rare, as an exception to the general conduct of the administration of criminal justice they should be brought to enable the courts to establish and maintain adequate standards of punishment for crime, to enable idiosyncratic approaches to be corrected and to correct sentences that are so disproportionate to the seriousness of the crime as to lead to a loss of confidence in the administration of criminal justice.<sup>1492</sup>

The prosecution is generally not allowed to appeal against an acquittal. If a jury determines that the accused is not guilty, that not guilty verdict cannot be challenged on appeal.<sup>1493</sup> However, there may be appeal rights on questions of law in judge-alone trials. Legislation has been introduced to provide a limited exception to the principle of 'double jeopardy', which prevents a person being retried for an offence of which they were acquitted. This legislation may permit an application to be made in particular and limited circumstances for an appellate court to order a retrial of a person acquitted of a very serious offence.<sup>1494</sup> This process is very different from the normal appeals process.

In most jurisdictions, the prosecution is allowed to appeal against interlocutory judgments or orders, at least in some circumstances. The accused may also appeal against interlocutory judgments or orders with the appeal court's leave or a certificate from the trial judge. Interlocutory appeals may be particularly important for the prosecution if a trial judge makes orders that could have a significant impact on the prosecution's case. We discuss interlocutory appeals by the prosecution in section 35.4.1.

In this chapter, we consider:

- what we have heard from survivors of institutional child sexual abuse about the impact of criminal justice appeals
- the results of research regarding appeals
- key issues relating to the experiences of survivors and emerging from the research, and our recommendations for reform.

In the Consultation Paper, we referred to the 2014 report of the New South Wales Law Reform Commission (NSW LRC) in relation to criminal appeals.<sup>1495</sup> In its submission in response to the Consultation Paper, the Law Society of New South Wales stated that it saw a need to simplify appeal processes in New South Wales, but it expressed the opinion that these issues were

addressed by the NSW LRC's report. It made no further submissions in relation to appeals in response to the Consultation Paper.<sup>1496</sup> In its submission, the New South Wales Government stated that it was still considering the recommendations of the NSW LRC and that it would consider the Royal Commission's recommendations in that context.<sup>1497</sup>

We note that appeals are not necessarily indicative of problems in the criminal justice system. In particular, the reforms we recommend in this report, if implemented, may lead to an increase in appeals, at least in the short term, as defendants and the prosecution seek clarity about the correct interpretation of the new provisions.

## 35.2 The impact of appeals on victims and survivors

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It is clear from our private sessions that appeals following the conviction and sentencing of offenders for child sexual abuse offences have had significant negative impacts on survivors. Some survivors have told us they do not understand how the offender's conviction could be overturned on appeal, while others have said that the appeal made them feel like the criminal justice process was 'a never ending story' that continued for years and years.

Survivors told us of the importance to them of being able to move on with their lives once a conviction was secured. If there was a successful appeal, survivors told us of feeling that they have 'to do it all again'. Survivors feel as though their life is 'on hold' while they are waiting to go to court again for a retrial following an appeal. For some survivors, this can create feelings that the abuse is happening again, and their nightmares, insomnia and distress may return and continue through the retrial.

Survivors told us that going through a retrial and giving evidence again was very difficult. Some have felt frustrated at having to tell their story again. Some are anxious that the outcome may be different.

Some survivors told us that they felt the appeal process and outcome were not adequately explained to them. Others told us they were not informed of an appeal until after it had been heard and determined.

In Case Study 38, we heard from a number of survivors regarding the impact that an appeal can have.

Philip Doyle was convicted of 38 counts of child sexual abuse offences in 2012, and his appeal against his conviction was dismissed in 2014. Mr Mark Lawrence, who was one of five complainants in respect of whom Doyle was convicted, noted that, aside from being told of the appeal grounds and the hearing date, he had no involvement in the appeal process. Mr Lawrence gave evidence that he felt frustrated by not knowing what the outcome would be:

In about January 2014, I telephoned the police to express my frustration at the fact that it had been over six months since the hearing and the appeal judgment still hadn't been delivered. I told them that I could not get on with my life without the judgment.<sup>1498</sup>

Doyle subsequently appealed to the High Court. Mr Lawrence gave evidence that:

I couldn't believe it. He [the investigative police officer] told me that I wouldn't have any role in the appeal. He said it would be decided by seven judges and it was now out of our hands. I was angry that Doyle could drag this on for so long.<sup>1499</sup>

In August 2013, David Rapson was convicted in a joint trial of five charges of rape and eight charges of indecent assault relating to eight complainants. Rapson lodged an appeal against his conviction and was granted new trials in respect of three groupings of complainants in February and March 2015. Rapson was convicted of 11 offences in relation to six complainants. He was acquitted in relation to the seventh complainant.

The complainant in respect of whom Rapson was initially convicted but later acquitted, Mr James Brandt, gave evidence that, when notified of the successful appeal and need for a retrial, he was emotionally shattered. He felt uninformed about how Rapson had managed to appeal and get a retrial. He did not wish to give his evidence again, and the retrial of the charges relating to him took place using a recording of his evidence from the first trial.<sup>1500</sup>

We also heard evidence from CDW, the mother of CDX. CDX was abused by CDV, a schoolteacher at an independent school in Perth. CDV was convicted in a joint trial in 2010, but his appeal was successful in part – the convictions in respect of three complainants, one of whom was CDX, were overturned. CDV was retried and CDX again gave evidence in the retrial. CDV was convicted. CDW read the appeal judgment herself and gave evidence that:

[I] was in shock and disbelief to learn that [CDX] had to face a retrial on a mere the [sic] technicality to do with the adequacy of the trial judge's Longman Direction to the jury. The entire appeal process left me feeling betrayed, re-traumatised and completely let down because I could not understand why [CDX] had to go through it all again.<sup>1501</sup>

### 35.3 Research on appeals

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In 2011, the Judicial Commission of New South Wales published research on conviction appeals in New South Wales for indictable matters for the years 2001 to 2007.<sup>1502</sup> The research found that child sexual assault appeals represented nearly a quarter (22.5 per cent) of all successful conviction appeals and almost 70 per cent of all successful sexual assault appeals in New South Wales between 2001 and 2007.<sup>1503</sup> It also found that the success rate for child sexual assault appeals was significantly higher than for sexual assault appeals involving an adult victim.<sup>1504</sup>

Judicial misdirection was reported to be present in more than half of all successful sexual assault appeals (53.8 per cent), regardless of whether the case involved a child or adult complainant.<sup>1505</sup> In particular, Longman misdirections (discussed in Chapter 31) were, by far, the most common type of misdirection leading to successful appeals, arising in 46.4 per cent of misdirection cases.<sup>1506</sup> As noted in Chapter 31, legislative changes in 2006 were designed to make a significant difference to how and when Longman directions should be given, but these changes were made too late to be properly examined in the Judicial Commission research.

In light of the findings of the Judicial Commission, the Royal Commission commissioned a study of appeals in child sexual assault matters in New South Wales from 2005 to 2013 (the Appeals Study). It has been published as part of the report *The impact of delayed reporting on the prosecution and outcomes of child sexual abuse cases* (Delayed Reporting Research). The Appeals Study considered the outcomes of appeals in 291 child sexual assault matters in the New South Wales Court of Criminal Appeal. The focus of the Appeals Study was on the trends in appeals against conviction rather than appeals against sentence.

The Appeals Study found that child sexual abuse appeals are ‘not uncommon’.<sup>1507</sup> A significant number of child sexual abuse cases give rise to an appeal against conviction and/or sentence. While the numbers fluctuated each year, the research estimated the rate of appeal in child sexual abuse cases between 2005 and 2013 at almost 17 per cent of all child sexual abuse convictions.<sup>1508</sup>

The vast majority of the cases included in the Appeals Study involved an appeal by the accused. Almost 85 per cent of cases involved an appeal only by the accused.<sup>1509</sup>

Over the study period, a greater portion of appeals by the accused were appeals against sentence than against convictions. However, that was not consistent in every year.

The study found an overall success rate of 28.1 per cent in conviction appeals, although the rate fluctuated greatly given the small numbers involved (for example, only two out of 13 appeals were successful in 2009, whereas 10 out of 23 appeals were successful in 2006).<sup>1510</sup> The Appeals Study found that the vast majority (76.9 per cent) of successful conviction appeals resulted in a new trial.<sup>1511</sup>

In relation to the key issue of Longman directions, the Appeals Study found:

Fifteen cases in our sample raised an appeal related to a *Longman* direction; most of these, were historical child sexual abuse cases (nine out of 14 [one case could not be classified as historical or non-historical]). Of these 15 cases, only four succeeded on the basis of a *Longman* misdirection. All four were historical cases, with delay ranging from six to 20 years ...

Three of the successful *Longman* appeals were decided on the basis of the pre-amended legislation, and a fourth case, *ST v The Queen*, centred on the misapplication of the new legislation by the trial judge. This suggests that reforms have been successful in reducing *Longman*-related misdirections.<sup>1512</sup> [References omitted.]

The Appeals Study suggested that, while no other specific judicial directions emerged as significant problems over the period covered, judicial misdirections may continue to be a source of error in child sexual assault trials, generating a basis for overturning convictions.<sup>1513</sup>

Of the study's sample of 291 cases, only 29 related to institutional child sexual abuse, which limited any findings that could be made regarding these matters. Eighty-four cases involved historical child sexual abuse (defined as those cases where the victim reported the abuse to police as an adult). Delay was raised as an issue on appeal in more than 60 per cent of these historical cases.<sup>1514</sup>

Overall, historical child sexual abuse appeals (both against conviction and sentence, including by the Crown) were marginally more successful than non-historical child sexual abuse appeals between 2005 and 2013: appeals in cases involving historical abuse were successful in 59.3 per cent of cases, while appeals in cases involving abuse that was not historical were successful in 54.5 per cent of cases.<sup>1515</sup>

Few substantive differences were found between historical and non-historical child sexual abuse appeal cases in the sample, suggesting that there are not particular problems in one type of case or the other.

## 35.4 Issues in relation to appeals

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In the Consultation Paper, we identified the following issues in relation to appeals:

- whether the Director of Public Prosecutions (DPP) in each jurisdiction currently has adequate rights of interlocutory appeal
- whether the current approach of appellate courts in relation to verdicts that are said to be inconsistent is appropriate
- whether there is currently adequate provision for the recording of complainants' evidence for use in any retrial, including following an appeal
- whether the prosecution should be required to consult with the complainant and the relevant police officer before deciding whether to exercise the prosecution's discretion to proceed with a new trial following a successful appeal against conviction
- the importance of ongoing monitoring of appeals to identify areas of the law in need of reform.

### 35.4.1 Interlocutory appeals by the prosecution

#### Discussion in the Consultation Paper

While the prosecution cannot appeal against an acquittal, in most jurisdictions there are provisions that allow the prosecution to appeal against interlocutory decisions, which are judgments or orders made by the trial judge before or during the trial, at least in some circumstances. These appeals are described as interlocutory appeals.

The prosecution is most likely to bring an interlocutory appeal if the trial judge's judgment or order is likely to have a significant adverse effect on the prosecution's case.

For example, in institutional child sexual abuse cases, the prosecution may bring an interlocutory appeal if the trial judge rules that tendency or coincidence evidence is inadmissible and that a joint trial should be severed so that separate trials are required. We discussed this issue in Part VI.

The case of *R v PWD*<sup>1516</sup> is an illustration of an interlocutory appeal in an institutional child sexual abuse case in New South Wales. PWD was charged with 10 sexual offences against four boys between 1977 and 1992, when the boys were students and boarders at a Catholic college in Bathurst, New South Wales, and the accused was the president (that is, principal) of the college.

In a pre-trial ruling the trial judge excluded the asserted tendency evidence of the other complainants and two other students because it lacked significant probative value, or, alternatively, its probative value was outweighed by its prejudicial effect. Separate trials were ordered.

Before the trials commenced, the New South Wales Court of Criminal Appeal upheld an interlocutory appeal by the New South Wales DPP. The court found that the evidence of the four complainants was cross-admissible and the evidence of two tendency witnesses was admissible as tendency evidence. The court ordered that there be a joint trial. A joint trial was held in respect of the 10 charges. The accused was acquitted of all charges.

Only New South Wales, Victoria, the Australian Capital Territory and the Commonwealth provide for a general right of appeal by the prosecution against interlocutory decisions made during the course of a trial.<sup>1517</sup> Some other states have appeal rights but only in respect of specific interlocutory decisions.<sup>1518</sup>

The provision in New South Wales is a general right of appeal, but, to appeal any decision or ruling on the admissibility of evidence, the DPP must show that the ruling eliminates or substantially weakens the prosecution's case.<sup>1519</sup>



In its submission in response to the Consultation Paper, the Victorian Government stated that interlocutory appeals in Victoria require leave and that more stringent rules apply to making interlocutory appeals after a trial has commenced to try to encourage issues to be resolved as early as possible and avoid disrupting a trial.<sup>1520</sup> The Victorian Government identified three features of the New South Wales approach that have not been followed in Victoria:

- In New South Wales, appeals are restricted to judgments or orders, whereas the Victorian system takes a very broad approach to the definition of interlocutory decision. This avoids arguments regarding whether a decision is a ‘judgment or order’, and hence whether it can be appealed.
- In New South Wales, the accused and the prosecution are treated differently as to whether leave to appeal is required and as to the ability to appeal against key evidential points. In Victoria, the parties have equal statutory access to appeals, and leave is required in all cases to allow the Court of Appeal to control the use of interlocutory appeals on a consistent basis.
- In New South Wales, the judge may certify that a judgment or order is suitable for an interlocutory appeal. In Victoria, certification is a necessary precondition to the grant of leave to appeal but is limited to specific threshold issues which the certifying judge is best placed to decide.<sup>1521</sup>

In his submission in response to the Consultation Paper, the DPP for the Australian Capital Territory stated that the right of appeal in the Australian Capital Territory is limited to interlocutory orders or judgments and that there is probably no right to appeal rulings on evidence.<sup>1522</sup>

Queensland’s appeal provision is limited to the Attorney-General referring a point of law that has arisen under a ruling in relation to specific matters, including the quashing or staying of the indictment, the joinder of accused or joinder of charges and the deciding of questions of law, including the admissibility of evidence.<sup>1523</sup>

Western Australia has a specific provision relating to separate trial decisions, allowing both the prosecution and the defence to appeal orders either joining or refusing to join two or more matters in a single trial.<sup>1524</sup> The provision provides that, if an accused unsuccessfully appeals an order for a joint trial, the joinder cannot then be a ground of appeal if the accused is convicted at the joint trial.

In South Australia, the DPP may appeal an adverse pre-trial decision on any ground that involves a question of law alone or on any other ground with the permission of the Full Court of the Supreme Court.<sup>1525</sup>

In his submission in response to the Consultation Paper, the Tasmanian DPP stated that, in Tasmania, the Attorney-General can only appeal a ruling prior to an acquittal where there has been an order arresting judgment or, with leave of the court, an order staying or quashing an indictment or upholding a demurrer.<sup>1526</sup> In practice, the DPP acts in matters on behalf of the Attorney-General.

In 2014, the NSW LRC considered the issue of whether the New South Wales DPP should be required to obtain leave to bring an interlocutory appeal. The NSW LRC stated:

The DPP and the Attorney General may appeal an interlocutory judgment or order as of right, whereas any other party requires the leave of the CCA [the New South Wales Court of Criminal Appeal] or a certificate of the trial judge. This difference may be explained by the more serious consequences for the DPP and the Attorney General of an erroneous interlocutory decision than for a defendant.

The CCA has noted that the DPP's appeal right under s 5F(3A) should be exercised with restraint, to avoid the undesirable situation of trials being aborted, and it does not appear that this right is being abused. However, at the moment the CCA cannot decline to hear an interlocutory appeal from the DPP or the Attorney General, notwithstanding the impact that the appeal might have on the trial.<sup>1527</sup> [Reference omitted.]

The NSW LRC recommended that the leave requirement for interlocutory appeals should apply to all interlocutory appeals, including those from the DPP and the Attorney-General.<sup>1528</sup> It stated:

A general requirement for leave would allow the CCA [the New South Wales Court of Criminal Appeal] to have greater control over the interlocutory appeals that come before it. We have recommended that leave be required for conviction and sentence appeals to the CCA, and a leave requirement for interlocutory appeals would be consistent with our intended scheme. The DPP and the Attorney General's lack of recourse following the trial would continue to be relevant to the court's discretion in determining whether to grant leave.<sup>1529</sup>

In the Consultation Paper, we suggested that, given the significant role that interlocutory appeals have in correcting errors of law before trial, it is important that the DPP in each jurisdiction has adequate rights of interlocutory appeal to reduce the possibility of error in the trial and that it may be beneficial to broaden the DPP's right to bring an interlocutory appeal in those jurisdictions that do not have the broadest general right to appeal.

## What we were told in submissions and in Case Study 46

A number of submissions expressed support for broadening interlocutory appeal rights for the prosecution in jurisdictions that do not already have provisions such as those in New South Wales, Victoria, the Australian Capital Territory and the Commonwealth.<sup>1530</sup>

The Victorian Victims of Crime Commissioner submitted that victims should have a right of representation for certain matters, including appealing interlocutory orders. The Victorian Victims of Crime Commissioner also expressed support for victims having the right to request the DPP make an interlocutory appeal and a right to the provision of reasons where an appeal is not made.<sup>1531</sup>

In its submission in response to the Consultation Paper, the New South Wales Office of the Director of Public Prosecutions (ODPP) expressed support for the New South Wales DPP's existing right of appeal and noted that, since January 2014, there had only been 14 interlocutory appeals, indicating that the right is exercised sparingly. The NSW ODPP submitted that it did not support the NSW LRC's recommendation that leave requirements be imposed on interlocutory appeals.<sup>1532</sup>

In answer to a question about the operation of interlocutory appeals in New South Wales, Mr Tim Game SC, a senior member of the New South Wales Bar, told the public hearing in Case Study 46:

Can I say it's not unusual, where a judge makes an order for separate trials, for that to be appealed and there to be a decision. If there's a separate trial and the prosecution can't appeal it, then that's gone forever, so they don't have a leave requirement, but the accused has a leave requirement.

I don't think you're asking me to comment on whether or not there's excessive use of these appeals, but I think that, used judiciously, they're a very useful thing to avoid mistrials, or to avoid one going through the whole trial and then having a mistrial.

If you take an institution like the Legal Aid Commission that has a lot to do with the criminal justice system, my experience with them is that they're reluctant to – they exercise a significant brake on people's, shall I say, overexuberance in desire to bring section 5F appeals [under the *Criminal Appeal Act 1912* (NSW)]. I do fairly few of them myself, but I've just responded to one about a fundamental issue where the Crown appealed a ruling in a case called Ripolti [actually Rapolti<sup>1533</sup>] just handed down this week. So quite significant issues in that case got resolved, of statutory construction, about material obtained on a warrant on a 5F appeal.

So used judiciously – you asked me about the prosecution side; I don't see kind of like a great pile of these appeals – I think they're okay. I think if you become swamped with interlocutory appeals, then there's a problem, and that's a problem that the court has to work out by refusing leave, but they seem to be alive to that problem.<sup>1534</sup>

The Victorian DPP submitted that the current system in Victoria is generally working well and as intended. He made two recommendations for reform. Firstly, a Court of Appeal decision has suggested that the DPP does not have a right to appeal against a 'no case' ruling at trial, and he believes amendment should be made to give him that right.<sup>1535</sup> Secondly, he submitted that the Court of Appeal should be given additional resources to ensure that interlocutory appeals are heard expeditiously so as to avoid the fragmentation of trials.<sup>1536</sup>

When asked in the public hearing in Case Study 46 whether the system in Victoria was similar to that in New South Wales, Mr Peter Morrissey SC, a senior member of the Bar in Victoria, said:

Yes, it is, and it works very well.

Because of workload and resourcing, there are some delays, but that's really a government matter. The process itself works very well. I make the confession that it's part of why I – it's one of the mechanisms that allows keeping the *Uniform Evidence Act* model in place, because it means that one might say an end-of-life decision for the prosecution can be rationally appealed, and it is.

One of the issues, I suppose, that needs to be looked at is whether or not the sort of reasoning that is – sometimes big issues are determined on interlocutory appeals, and then the court is pressed for time and needs to give a decision, so it places an additional burden on the court.<sup>1537</sup>

The Victorian Government submitted that its interlocutory appeal provisions appeared to be working well.<sup>1538</sup> It also set out the advantages of interlocutory appeals, including reducing the number of retrials, avoiding trials through the early resolution of key issues such as the admissibility of key evidence, which may result in a guilty plea or withdrawal of charges, preventing unjust acquittals and convictions, and increasing the efficiency of the criminal justice system.<sup>1539</sup> The Victorian Government also referred to potential downsides of interlocutory appeals, including delay, the fragmentation of a trial and the increase in an appeal court's workload.<sup>1540</sup> The Victorian Government provided figures showing an initial spike in interlocutory appeals after the provisions were introduced, along with the *Evidence Act 2008* (Vic), followed by a decline.<sup>1541</sup>

In response to a question in the public hearing in Case Study 46 about the desirability of interlocutory appeals, the Queensland DPP, Mr Michael Byrne QC, indicated that he could see much utility in having such a power, although he noted the potential for the procedure to add time and expense to proceedings.<sup>1542</sup> The Acting DPP for Western Australia, Ms Amanda Forrester SC, also noted the potential for delay and additional costs with a broad right of appeal.<sup>1543</sup>

The DPP for South Australia, Mr Adam Kimber SC, told the public hearing in Case Study 46 that he would like to have a broad right to make interlocutory appeals, particularly given the circumstances that, where an order is made to sever a trial and a jury then acquits, there is no option for the prosecution to appeal.<sup>1544</sup>

The Tasmanian DPP submitted that the Attorney-General, represented by the DPP, should be given interlocutory appeal rights, as currently exist in New South Wales.<sup>1545</sup> The DPP also submitted that, given the accused's extensive rights of appeal after conviction, interlocutory appeal rights should not extend to accused persons.<sup>1546</sup>

The DPP for the Australian Capital Territory submitted that his interlocutory appeal rights should be expanded to be equivalent to those in New South Wales, thus encompassing rulings on evidence, and to be made without leave, noting the significant impact on trials where incorrect interlocutory rulings are made.<sup>1547</sup>

In its submission, Legal Aid NSW expressed support for the NSW LRC's recommendation that interlocutory appeals require the court's leave.<sup>1548</sup>

The Bar Association of Queensland submitted that any expansion of the Queensland DPP's current rights of appeal would lengthen proceedings, detract from certainty for both the prosecution and defence, and increase the burden on appellate courts. It submitted that any expansion of appeal rights should apply to both the prosecution and defence.<sup>1549</sup>

## Conclusions and recommendations

Given the significant role that interlocutory appeals have in correcting errors of law before trial, it is important that the DPP in each jurisdiction has adequate rights of interlocutory appeal to reduce the possibility of error in the trial. Given the right of appeal that a convicted person has after a conviction, there is less justification for such rights to be extended to accused persons.

Interlocutory decisions may significantly reduce, and in some cases even destroy, the prosecution's prospects of success in the prosecution. We consider that the prosecution's interlocutory appeal rights should not be subject to a requirement for leave. We note that the New South Wales DPP appears to have exercised his interlocutory appeal rights, which do not require leave, with appropriate restraint.

We received submissions suggesting that, despite certain differences in operation, the interlocutory appeal provisions in New South Wales and Victoria were working well. As such, we do not recommend that one jurisdiction's provisions be used in preference to the other's.

However, we are satisfied that states and territories should, where necessary, expand the DPP's right to bring an interlocutory appeal to a broad general right, with the following features. The DPP's interlocutory appeal right should:

- apply to pre-trial judgments or orders and decisions or rulings on the admissibility of evidence, but only if the decision or ruling eliminates or substantially weakens the prosecution's case
- not be subject to a requirement for leave
- extend to 'no case' rulings at trial.

We also consider that appellate courts should be sufficiently well resourced to ensure that interlocutory appeals can be dealt with expeditiously so as to avoid delay in trials affected by an interlocutory appeal.

We express our recommendations in terms limited to interlocutory appeals in prosecutions involving child sexual abuse offences, in recognition of our Terms of Reference. State and territory governments may wish to consider whether any reforms should apply more broadly.

### Recommendations

79. State and territory governments should introduce legislation, where necessary, to expand the Director of Public Prosecution's right to bring an interlocutory appeal in prosecutions involving child sexual abuse offences so that the appeal right:
- a. applies to pre-trial judgments or orders and decisions or rulings on the admissibility of evidence, but only if the decision or ruling eliminates or substantially weakens the prosecution's case
  - b. is not subject to a requirement for leave
  - c. extends to 'no case' rulings at trial.
80. State and territory governments should work with their appellate court and the Director of Public Prosecutions to ensure that the court is sufficiently well resourced to hear and determine interlocutory appeals in prosecutions involving child sexual abuse offences in a timely manner.

## 35.4.2 Inconsistent verdicts

### Discussion in the Consultation Paper

A ground of appeal that is commonly raised in child sexual abuse cases is what is referred to as 'inconsistent verdicts'. This ground may arise where, in a trial involving multiple counts, the jury returns a guilty verdict on one or more counts and a not guilty verdict on one or more other counts.

Particularly in child sexual abuse cases where the only evidence of the abuse is the evidence given by the complainant, the offender may argue that a verdict of not guilty on one or more counts shows that the jury must not have believed the complainant. The offender may then argue that the verdicts of guilty on one or more other counts are therefore 'unsafe' because the jury should have had doubts about all of the complainant's evidence.

The High Court has considered the approach an appellate court should take when determining an appeal in which it is argued that a verdict is unreasonable because the jury returned 'inconsistent verdicts' on a number of occasions.

The leading High Court case is *MFA v The Queen*<sup>1550</sup> (*MFA*), decided in 2002. In *MFA* the High Court reaffirmed principles it had previously stated in 1996 in *Mackenzie v The Queen*<sup>1551</sup> (*Mackenzie*) and resolved the status of its 1997 decision in *Jones v The Queen*<sup>1552</sup> (*Jones*).

In 1996 in *Mackenzie*, the High Court set out six principles that governed the approach an appellate court should take when it was submitted that a conviction on one or more counts was unsafe or unsatisfactory because the jury had returned guilty verdicts on some counts and not guilty verdicts on others. *Mackenzie* involved perjury offences.

The principles were set out in the joint judgment of Gaudron, Gummow and Kirby JJ as follows:

- There is a distinction between cases of legal or technical inconsistency and cases of suggested factual inconsistency. Legal inconsistencies occur when there are two verdicts which in law cannot stand together. Where this occurs it must be inferred that the jury misunderstood the directions, compromised amongst themselves or fell into some other unidentifiable error. The verdicts must accordingly be set aside.<sup>1553</sup>
- Factual inconsistencies may arise both between different verdicts affecting the same accused and different verdicts affecting co-accused or persons tried separately in relation to connected events.<sup>1554</sup>
- Where inconsistency arises in the verdicts on different counts of the originating process, ‘the test is one of logic and reasonableness’.<sup>1555</sup>
- Courts are reluctant to accept a submission that the verdicts are inconsistent out of respect for the function which the law assigns to juries. Therefore, if there is a proper way by which an appellate court can reconcile the verdicts, that conclusion will generally be accepted. If there is some evidence to support the verdict that is said to be inconsistent, it is not for the court to substitute its opinion of the facts for one which was open to the jury. The court may take the view that the jury simply followed the instruction to give separate consideration to each count and to apply to each count the requirement that all the elements be proved beyond reasonable doubt. Alternatively, the court may conclude that the jury has taken a ‘merciful’ view of the facts on one count and that this is a function that has always been open to juries.<sup>1556</sup> Their Honours approved of the remarks of King CJ in *R v Kirkman*.<sup>1557</sup>
- Nevertheless, there will be a residue of cases where the different verdicts returned represent an affront to logic and common sense which is unacceptable and strongly suggest a compromise of the performance of the jury’s duty. Only where the inconsistency rises to the point that an appellate court considers intervention necessary to prevent a possible injustice will a conviction be set aside. Hard and fast rules cannot be stated; it will depend on the facts of the case.<sup>1558</sup>
- It is for the person making the submission that the verdicts are inconsistent to establish the inconsistency.<sup>1559</sup>

The court held that the verdicts in *Mackenzie* were not irreconcilable. There were a number of explanations available for the verdict pattern, including:

- a direction that it was open to find the defendant not guilty on the more serious charge and guilty on the lesser charge

- a direction on the appropriately high onus the Crown bore to prove each element
- the availability of some objective evidence to support the lack of the mental state required for the accused to be guilty of the more serious offence.<sup>1560</sup>

In 1997, the High Court again considered this issue in *Jones*.<sup>1561</sup> *Jones* involved convictions for child sexual assault offences where a jury had found the accused guilty of two counts and not guilty of one count.

The majority of the High Court held that the not guilty finding on the second count damaged the complainant's credibility with respect to all counts.<sup>1562</sup> Justices Gaudron, McHugh and Gummow stated that implicit in the acquittal on the second count was a rejection of the complainant's account of events said to give rise to that count. The rejection of her evidence on that count diminished her overall credibility.<sup>1563</sup>

Justices Gaudron, McHugh and Gummow held that the fact that the jury gave different verdicts on the three counts demonstrated that the convictions were unsafe and unsatisfactory, and they should therefore be set aside.<sup>1564</sup> The court in *Jones* did not refer to the earlier decision in *Mackenzie* or the principles stated in *Mackenzie*.

The decisions in *Mackenzie* and *Jones*, decided by the High Court within nine months of each other, resulted in confusion in lower courts as to the correct approach and principles to be applied when faced with appeals on the ground that the verdicts were inconsistent.

The High Court resolved the uncertainty in 2002 in *MFA*.

*MFA* concerned multiple counts of sexual offending against a single complainant. The jury acquitted on seven counts and convicted on two relating to a single occasion. The High Court held that the verdicts were not unreasonable pursuant to the test established by section 6(1) of the *Criminal Appeal Act 1912* (NSW).

Two sets of joint reasons were published. The joint reasons of McHugh, Gummow and Kirby JJ made clear that they agreed with the joint reasons of Gleeson CJ, Hayne and Callinan JJ on this issue. They stated, '[u]pon the application of the test in *M*, the operation of the principles in *Mackenzie* and the significance of the decision in *Jones*, this Court speaks with a single voice'.<sup>1565</sup> Thus *MFA* effectively provides a unanimous approach on 'inconsistent verdicts'. The 'test in *M*' is a reference to the test stated by Mason CJ, Deane, Dawson and Toohey JJ in *M v The Queen*.<sup>1566</sup>

The combined effect of the two sets of reasons in *MFA* was to:

- confirm that inconsistency is an element of the test in *M v The Queen*<sup>1567</sup>
- reaffirm the principles set out in *Mackenzie*<sup>1568</sup>
- confine the decision in *Jones* to its facts. There was no standalone principle to be drawn from *Jones*.<sup>1569</sup>



On the relationship between *Jones and Mackenzie*, Gleeson CJ, Hayne and Callinan JJ stated:

It appears ... that some judges have taken *Jones* as authority for the proposition that where multiple offences are alleged involving the one complainant, then verdicts of not guilty on some counts necessarily reflect a view that the complainant was untruthful or unreliable, and that an appellate court should consider the reasonableness of guilty verdicts on the basis that the complainant is a person of damaged credibility. That view is erroneous. It overlooks the attention to factual detail in the reasoning of *Jones*. It also overlooks the principles stated in *Mackenzie*, which were not qualified in *Jones* ... *Jones* is not to be understood as establishing a set of legal propositions, separate or different from the test formulated in *M*, which must be applied in deciding whether a conviction on one or more counts of sexual offences, when the accused was acquitted on other counts, is unreasonable, or cannot be supported, having regard to the evidence.<sup>1570</sup>  
[References omitted.]

The period between *Jones* and *MFA* was characterised by a division in New South Wales courts over the meaning of *Jones*. The case of *R v RAT*<sup>1571</sup> in 2000 effectively established, on the basis of *Jones*, that, if a jury is ‘for any reason not satisfied beyond reasonable doubt that the complainant is telling the truth in relation to one count, it is not open to them to be satisfied that she (or he) is telling the truth in relation to any other count’.<sup>1572</sup>

However, in 2001, the New South Wales Court of Criminal Appeal convened a five-judge bench to resolve the issue in *R v Markuleski*.<sup>1573</sup> The court overruled *R v RAT* and other cases which had adopted the same view of *Jones*, finding that the view of *Jones* taken in *R v RAT* was not what the High Court intended. The court referred to the general principles that governed this area that had been set out by the High Court in authorities before *Jones* – in particular, in *Mackenzie*.<sup>1574</sup>

Chief Justice Spigelman stated that the question of whether failure to accept the complainant’s evidence on one count should lead to reasonable doubt with respect to other matters ‘must depend on the full range of relevant circumstances’.<sup>1575</sup> His Honour said:

By reason of the wide range of matters of fact and degree that must be considered in making a credibility finding that conclusion [on the facts in *Jones*] does not, in my opinion, follow in every such case unless the court is positively satisfied that there is some relevant difference in the quality of the complainant’s evidence.<sup>1576</sup>

The appellate courts in each jurisdiction now accept that verdicts of not guilty on some counts do not necessarily reflect the view that the jury found the complainant to be untruthful or unreliable.

However, this does not remove all disagreement in these appeals. Judges may differ in how they apply *MFA* and how they view the complainant’s evidence and any other evidence in the case.

For example, in 2007 in *Norris v The Queen*,<sup>1577</sup> each judge applied *MFA*, but there were considerable differences in their reasoning and in their views of the complainant's evidence.

The case involved four alleged sexual offences on a child aged 11 and 12. The appellant was convicted of the first two offences, which occurred when the complainant was babysitting the appellant's sons at the appellant's house. The appellant was found not guilty on the latter two counts, one of which was alleged to have occurred when the complainant voluntarily attended the appellant's house on her own (after the events of counts 1 and 2) and the last of which was alleged to have occurred when the appellant visited the complainant's house with a friend, while the complainant's older sister was present. The complainant reported the offences to police some 20 years after they allegedly occurred.

Justice Howie found that not guilty verdicts on two counts 'could only mean that the jury must have had a doubt about the credibility of the complainant on those two counts', and this should have caused them to doubt her credibility on all counts.<sup>1578</sup> His Honour could not identify an alternative reason for the different verdicts. He concluded:

My decision is based upon a consideration of all the evidence, including the delay in the complaint and other matters touching upon the complainant's credibility but in the light of the jury's failure to accept her evidence to the requisite degree in counts 3 and 4. I accept that minds might reasonably differ in making such an assessment, as is the case whenever this Court is considering a ground of appeal based upon a consideration of the evidence to determine whether a verdict was unreasonable.<sup>1579</sup>

Justice Hall stated that the not guilty verdicts on counts 3 and 4 could only rationally have been based on either the fact that the jury was unable to accept the complainant's evidence as reliable and not merely by reason of inconsequential inconsistencies in her evidence; or the jury was not prepared to convict on the complainant's evidence alone without something more.<sup>1580</sup> Justice Hall considered that the only rational explanation for the acquittal on count 3 was that the jury was not prepared to accept that within a week of the occurrence of two sexual assaults the complainant willingly visited the appellant's home unaccompanied by an adult.<sup>1581</sup> In relation to count 4, Hall J considered that the only rational inference was that jury were not prepared to accept the complainant's account that, after being assaulted three times, she would voluntarily leave others in the lounge room, go outside to be alone with the defendant and then willingly accompany him to the bedroom.<sup>1582</sup>

Justice Hall was also influenced by the delay in reporting the offences. His Honour held that, despite there being no criticism in the appeal of the judge's directions, it was necessary for the court, in giving due consideration to the totality of the evidence, to evaluate the circumstances of the delay.<sup>1583</sup> In this case:

the absence of corroboration, the jury's verdicts of acquittal on Counts 3 and 4 and the circumstances of delay and the absence of a sufficient explanation for delay in reporting the alleged events all, in my opinion, support the conclusion that the convictions on Counts 1 and 2 were unsafe and unsatisfactory.<sup>1584</sup>

Justice McClellan, Chief Judge at Common Law, was in dissent. His Honour applied the principles and the test set out in *Mackenzie* and *MFA*. He found particularly significant the statement in *MFA* identifying that verdicts of not guilty on some counts do not necessarily reflect a view that the jury found the complainant to be untruthful or unreliable and do not require appellate courts to consider the reasonableness of the guilty verdicts on the basis that the complainant's credibility is damaged.<sup>1585</sup>

His Honour considered that the verdicts could be properly reconciled by the fact that, for the two counts on which a guilty verdict was given, there was reliable evidence providing support for the complainant's account of relevant surrounding events; while, for the two counts on which a not guilty verdict was given, there was no evidence supporting the complainant's account of events.<sup>1586</sup>

Justice McClellan noted that the jury had been told to consider the evidence on each charge separately, that they needed to be satisfied beyond reasonable doubt that the complainant had been honest and accurate in the details she gave and that 'it would be dangerous to convict' on the unsupported evidence of the complainant.<sup>1587</sup>

## What we were told in submissions

In its submission in response to the Consultation Paper, the Victim Support Service recommended further judicial education to resolve any further difficulties in relation to inconsistent verdicts.<sup>1588</sup>

The Law Council of Australia submitted that the current law on inconsistent verdicts was satisfactory and did not require any reform.<sup>1589</sup> Legal Aid NSW submitted that the issue should be left to the courts.<sup>1590</sup> Legal Aid Victoria referred to a comment by the Victorian Court of Appeal that inconsistent verdict appeals rarely succeed and submitted that there is no case for change.<sup>1591</sup>

The New South Wales ODPP submitted that the law in this area appears satisfactorily settled and that successful appeals in New South Wales on the grounds of inconsistent verdicts are rare. As such, they submitted there was no case for reform.<sup>1592</sup>

The Victorian DPP submitted that, in his experience, appeals on the grounds of inconsistent verdicts are generally unsuccessful in Victoria, although some of those appeals succeed on an alternative ground that the verdict is unsafe. However, he noted that there appeared to be growing acceptance that a fact-finder can find a complainant more credible on one charge than another and that, other than the abolition of any Markuleski direction, discussed in Chapter 31, he does not support any particular reform in this area.<sup>1593</sup>

The Victorian Government submitted that there may be situations in which juries arrive at supposedly inconsistent verdicts because they are ill informed or have misunderstood instructions, and this may be addressed through adequate jury directions. For example, a jury should be directed to consider the evidence on an informed basis, which may include directions explaining that, for example, people may not remember all the details of a sexual offence or may not describe a sexual offence in the same way each time. This may avoid the issues of inconsistent verdicts at an earlier stage.<sup>1594</sup>

## Conclusions

We are satisfied that the approach to arguments on appeal that verdicts are inconsistent has now been satisfactorily resolved by the courts and that there is no need for us to recommend any reform in this area of the law. We discussed and made recommendations in relation to judicial directions and education in Chapter 31.

### 35.4.3 The importance of recording complainants' evidence

#### Discussion in the Consultation Paper

As discussed in section 35.2, survivors have told us of the stress and trauma of having to give their evidence again at a retrial following a successful appeal.

We discussed in Chapter 30 the provisions that apply in each jurisdiction allowing vulnerable witnesses (variously defined) to give evidence with the assistance of 'special measures'. Special measures include the prerecording of evidence (in some cases, evidence in chief only and, in other cases, all of the evidence including cross-examination and re-examination) or giving evidence via closed circuit television (CCTV). As discussed in Chapter 30, these special measures have assisted victims and survivors who have used them to give their best evidence.

As discussed in Chapter 30, some complainants may not have access to special measures or may choose to give their evidence in person. In Case Study 38, we heard evidence of a survivor choosing to give evidence in open court so he could face up to his abuser, which meant that he then had to give evidence again when a retrial was ordered.<sup>1595</sup>

In section 30.8.1, we outlined the current position in New South Wales, Victoria, South Australia, Tasmania and the Australian Capital Territory regarding the tendering of records of original evidence in new trials. We noted that New South Wales and Victoria provide for the use of original evidence in a new trial in prescribed sexual offence proceedings.

We also noted that some jurisdictions had limits on the use of such evidence. In Victoria, the evidence may only be admitted where it is in the interests of justice to do so. In South Australia, the evidence is only admissible where the witness is vulnerable, has died, has become too ill or infirm to give evidence or cannot be located. We noted that other jurisdictions, including Western Australia, did not appear to have relevant provisions.

Despite the legislation in New South Wales and Victoria, we note comments made in the Victorian Court of Appeal (Weinberg AP, Ashley and Coghlan JJA) in May 2016 in *Clark (a Pseudonym) v The Queen*.<sup>1596</sup> The case involved six child sexual abuse charges in relation to one complainant. There had been three trials, with the jury in each trial unable to reach a verdict on any charge. When the DPP took the unusual step of proceeding with the fourth trial, the accused sought a permanent stay of proceedings. The accused then sought leave to appeal against the trial judge's refusal to grant the stay.

The point of concern for us arises because the complainant's evidence was prerecorded in full and had been replayed at each trial. It was proposed that it would also be replayed at the fourth trial.

The court referred to the prosecution's submissions that the complainant was very keen for the matter to proceed and:

the fact that a tape-recording would be played 'really [didn't] change the matter, because [the complainant] too would be foreseeably anxious about the outcome when every single trial (sic) has been empanelled'.<sup>1597</sup> [Reference omitted.]

The court's reasons include exchanges during argument on the appeal as follows:

Accepting that the attitude of a complainant is a circumstance relevant to the question whether a permanent stay should be granted, the complainant's professed position in this case draws attention to an odd and discriminatory feature about this matter ...

In argument in this Court, there was the following interchange between the Bench and the Chief Crown Prosecutor:

COGHLAN JA: ... You know, we just don't see this sort of position.

MR SILBERT: Your Honour, it is clearly

COGHLAN JA: And one of the reasons we wouldn't have seen it in the past, I suspect is, if you were genuinely looking at the complainant giving evidence for the fourth time

MR SILBERT: Yes, you wouldn't do it.

COGHLAN JA: I don't think the matter would have proceeded.

MR SILBERT: No, you wouldn't do it and it is

WEINBERG AP: *You wouldn't go through it if she was to be crossexamined a fourth time.*

MR SILBERT: Absolutely not.

That led on to Weinberg AP saying:

Is there not something ironic about the fact that a statutory procedure which was put in for the, I would imagine, primary purpose of protecting a complainant has a kind of unanticipated effect so far as an accused is concerned, the complainant isn't asked the question, 'Do you want to go on again because all you have to do is press the replay button', and again and again. *Somebody said she's got no skin in the game, I think I've found that expression used somewhere. Whereas for the accused, there is the ordeal of standing trial, being in the dock each time in the hands of a jury, once, twice, three times and then a fourth time,*

which elicited this reply from the Chief Prosecutor:

Can't argue with that either, your Honour.

We should mention also this interchange between Ashley JA and the Chief Prosecutor:

ASHLEY JA: It's got another odd feature to it, perhaps, that the consequence of the *ability to press the replay button in a sex offences case*, means that relative to other charges in the criminal calendar, an accused in such a case faces a risk, this case being the preeminent illustration, which an accused, in other situations, murder, manslaughter, aggravated burglary, call it what you will

MR SILBERT: Doesn't face.

ASHLEY JA: doesn't face and there seems to be something wrong about that.

Now, as we have emphasised, the exercise of the prosecutorial discretion was not under review by the judge, and we are not now seeking to criticise the exercise of that discretion because it appeared to take advantage of legislative provisions which had another purpose. *But the apparently discriminatory operation of criminal law procedures – because a 'push button' trial could be had – this bearing upon oppression and unfairness to the applicant, was a matter which was pertinent to the judge's weighing exercise.* It was a matter opened up, though not squarely so, by the applicant's counsel below. It was a matter connected with submission (4) noted at paragraph [68] of these reasons. It was a matter which deserved attention in the judge's ruling. But in argument, the judge had adopted a very different standpoint, saying to applicant's counsel:

I don't know whether it's a good idea to discourage the Crown to rely on taped evidence, but anyway.

Applicant's counsel did not demur. But the real point was lost.<sup>1598</sup> [References omitted. Emphasis added.]

Everything we have heard from survivors in private sessions, public hearings and submissions leads us to be confident that no survivor would be unaffected by a trial or retrial. The use of prerecorded evidence goes some way toward reducing the often extraordinary stress and distress that complainants face in proceeding with a prosecution.

## What we were told in submissions

Many submissions in response to the Consultation Paper expressed support for the recording of complainants' evidence so that it could be used in any retrial.<sup>1599</sup> Some supported the recording and re-use of evidence, provided that the complainant retained the option to give evidence again if they wished.<sup>1600</sup> Protect All Children Today submitted that the recording of evidence should be mandatory for this purpose.<sup>1601</sup>

The National Association of Services Against Sexual Violence, in supporting the recording of evidence for use in a retrial, submitted that it is frequently not the fault of the victim that the matter was successfully appealed.<sup>1602</sup>

In its submission, Micah Projects gave a range of reasons to support the recording of evidence, including preserving the evidence against the passage of time and the fact that all the survivors they consulted were adamant they would not want to give evidence again in a retrial. Micah Projects also noted that the provisions should apply regardless of whether the complainant had used special measures in the original trial,<sup>1603</sup> which was also supported by Victim Support Service.<sup>1604</sup>

Micah Projects also submitted that, if recording is not possible in some courtrooms, the fact that the complainant may have to give evidence a second time should be a matter to be discussed with the complainant when they are making an initial decision to use special measures.<sup>1605</sup>

The Law Council of Australia expressed support for the recording of evidence for use in retrials, subject to a judicial discretion to modify the procedure if required in the interests of justice.<sup>1606</sup>

In its submission, the New South Wales ODPP noted that the provisions allowing the use of recorded evidence in retrials does not extend to tendency and coincidence evidence. The ODPP recommended the Royal Commission consider whether the provisions should be expanded in this regard.<sup>1607</sup>

## Conclusions

As discussed in Chapter 30, we are satisfied that reliable audiovisual recordings should be made of evidence given by complainants and other relevant witnesses in child sexual abuse matters, and that these recordings should be able to be tendered as the witnesses' evidence in any subsequent trial or retrial.

While we raised this issue in the Consultation Paper in the context of appeals, we have now addressed it with recommendations 56 to 58 in Chapter 30. These recommendations extend to recording and reusing evidence in retrials after successful appeals against conviction, as well as in other circumstances where a new trial is required.

### 35.4.4 Prosecution discretion following a successful appeal against conviction

#### Discussion in the Consultation Paper

As discussed in section 35.3, the Appeals Study found that more than three-quarters of the conviction appeals that succeeded resulted in the New South Wales Court of Criminal Appeal ordering a retrial. In the other successful conviction appeals, the court ordered that the defendant be acquitted.

Following the ordering of a retrial by the court, the DPP retains a discretion as to whether to proceed with a new trial.

The DPP guidelines in each jurisdiction include principles that are central to the decision to continue or discontinue a prosecution. However, the guidelines do not necessarily provide principles guiding whether the DPP should retry a matter where a conviction at trial has been overturned and a retrial ordered.

The principles guiding the decision on whether to proceed with a retrial may be substantially the same as the principles guiding an initial decision to prosecute, with some allowance for the impact of the reasons why the appeal was successful.

In the Consultation Paper, we suggested that, given the impact on complainants of the decision on whether to proceed with a retrial, it may be beneficial for the prosecution guidelines to explicitly address this issue and to require consultation with the complainant and the relevant police officer before the DPP decides whether to retry a matter after a conviction has been overturned.



## What we were told in submissions

In its submission in response to the Consultation Paper, the Victim Support Service expressed support for DPP guidelines explicitly requiring prosecutors to consider the impact on a complainant when considering whether to proceed with a retrial following a successful appeal, as did the South Australian Commissioner for Victims' Rights.<sup>1608</sup> The Victims of Crime Commissioner for the Australian Capital Territory submitted that any decision regarding a prosecution following a successful appeal should be made in consultation with the complainant.<sup>1609</sup>

The South Australian Commissioner for Victims' Rights also submitted that victims should have a right of review over whether any consultation with them was genuine, as well as the decision to prosecute or not itself.<sup>1610</sup>

Protect All Children Today submitted that survivors frequently suffered anxiety regarding appeals and that providing adequate information about appeals is extremely important.<sup>1611</sup> The Victims of Crime Commissioner for the Australian Capital Territory also submitted that more effort needed to be made in monitoring appeals and updating victims regarding outcomes.<sup>1612</sup>

The Victorian DPP submitted that his office applies the same considerations as to whether to proceed with a prosecution after a successful appeal that it applies when considering the initial prosecution, and this includes considering the views of the complainant. Other factors that may have changed since the initial decision to prosecute include whether the offender has already served some time in custody for the offence and whether the available evidence has changed as a result of the appeal ruling.<sup>1613</sup> He submitted that it may be worth explicitly addressing the issue of prosecutions after appeal in the guidelines, and this will be considered in the near future.<sup>1614</sup>

In his submission, the Tasmanian DPP noted that new guidelines issued by his office explicitly deal with the question of whether a retrial should occur after an appeal and that the principal matters for consideration are whether there remains a reasonable prospect of conviction, the views of the complainant or complainants and public interest factors.<sup>1615</sup>

In its submission in response to the Consultation Paper, the New South Wales ODPP submitted that no further guidelines were required, as the existing guidelines adequately cover the field, including the requirement to consult complainants.<sup>1616</sup>

## Conclusions and recommendation

Given the impact on complainants of the decision whether or not to proceed with a retrial, we are satisfied that prosecution guidelines should explicitly address this issue and should require consultation with the complainant and the relevant police officer before the DPP decides whether or not to retry a matter after a conviction has been overturned. We cannot see that an explicit statement of this requirement could cause any harm.

### **Recommendation**

81. Directors of Public Prosecutions should amend their prosecution guidelines, where necessary, in relation to the decision as to whether there should be a retrial following a successful conviction appeal in child sexual abuse prosecutions. The guidelines should require that the prosecution consult the complainant and relevant police officer before the Director of Public Prosecutions decides whether to retry a matter.

## **35.4.5 Monitoring appeals**

### **Discussion in the Consultation Paper**

In the Consultation Paper, we discussed the possible codification or other reforms of judicial directions and suggested that, if governments pursue codification, they would need to keep appellate decisions on judicial directions, particularly in relation to sexual offending including child sexual abuse, under review so that they could introduce amendments to update the legislation as required.

We suggested that this purpose may apply more broadly. Individual appellate decisions might reveal that the courts are relying on mistaken assumptions about sexual offending, including child sexual abuse. In addition, an increased number of appeals might indicate that the law requires clarification, possibly by legislation if the appeal courts do not provide sufficient clarification. This might be particularly important if there are a significant number of appeals raising the same issue. The discussion in section 35.3 in relation to appeals in New South Wales concerning Longman directions and the legislative response provides an example.

We suggested that it may be beneficial if the relevant government agencies monitor the number, type and success rate of appeals generally, and the issues raised, to identify areas of the law in need of reform. We suggested that this may be particularly important following any significant reforms to crimes or evidence legislation – including any such reforms arising from implementation of our recommendations – to ensure that the reforms are working as intended.

### **What we were told in submissions**

In its submission in response to the Consultation Paper, the Victim Support Service expressed support for the collection of data on appeals to identify areas in need of reform and to ensure any reforms are having the desired impact.<sup>1617</sup> The South Australian Commissioner for Victims' Rights submitted that every jurisdiction should have a body, like his office, that is responsible for monitoring all court practices and decisions to ensure that victims' rights are being observed.<sup>1618</sup>

The New South Wales ODPP submitted that they monitor the outcome of appeals for issues relating to reform, and that the Judicial Commission of New South Wales also monitors appeals.<sup>1619</sup> The Victorian DPP submitted that his office comprehensively monitors appeals to identify areas in need of reform.<sup>1620</sup>

## Conclusions and recommendation

We are satisfied that governments should monitor the number, type and success rate of appeals generally, and the issues raised, to identify areas of the law in need of reform.

We consider that this will be particularly important following any significant reforms to crimes or evidence legislation – including reforms arising from the implementation of recommendations in this report – to ensure that the reforms are working as intended.

### **Recommendation**

82. State and territory governments should ensure that a relevant government agency, such as the Office of the Director of Public Prosecutions, is monitoring the number, type and success rate of appeals in child sexual abuse prosecutions and the issues raised to:
- a. identify areas of the law in need of reform
  - b. ensure any reforms – including reforms arising from the Royal Commission’s recommendations in relation to criminal justice, if implemented – are working as intended.

## 36 Post-sentencing issues

### 36.1 Introduction

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This chapter discusses the following three criminal justice responses that can occur at sentencing or after a child sexual abuse offender has been sentenced:

- treatment for adult child sexual abuse offenders while they are serving their sentences, either in custody or in the community
- indefinite sentences and supervision or detention orders
- risk management measures applying on release of child sexual offenders, including sex offender registration schemes.

Generally, these measures aim to protect the community through treating offenders, keeping offenders in custody or restricting offenders' activities in the community.

Only a few survivors have raised concerns with us about any of these measures in relation to institutional child sexual abuse.

We have held private sessions with survivors who were at the time of the private session in prison for sex offending. These discussions provided insights into some sex offender treatment programs.

In relation to sex offender registration:

- Some survivors have told us that they were pleased when the person who offended against them was ordered to be placed on a sex offender registry because they felt that that would help to protect other children by preventing the offender from reoffending.
- Some survivors have told us that, where a prosecution has not proceeded or has not resulted in a conviction, they are concerned that the alleged perpetrator is not on the register and, without monitoring, may reoffend.
- A few survivors have told us that placement on the register has not prevented registered sex offenders from reconnecting with communities and having access to children in a faith-based community and in Aboriginal and Torres Strait Islander communities.

In April 2016, we held a public roundtable on adult sex offender treatment programs to:

- obtain information on current programs and approaches
- consider current evidence for the effectiveness of treatment programs
- discuss any implications for institutional child sexual abuse.

Some of these measures may be relevant for, or interact with, Working with Children Check (WWCC) schemes and clearances. We released our *Working with Children Checks report* in 2015.<sup>1621</sup> It is published on the Royal Commission's website.

Two submissions in response to the Consultation Paper raised issues in relation to parole. Care Leavers Australasia Network (CLAN) suggested that it is too easy for offenders to be released on parole. It recommended limiting eligibility for parole as well as electronic monitoring for those convicted of sexual or violent offences against children who are released on parole.<sup>1622</sup>

The South Australian Commissioner for Victims' Rights referred to the obligations of corrective service agencies with respect to victims, including collecting and protecting relevant victim information and facilitating their right to make submissions on parole, as stated in the United Nations handbook on Justice for Victims of Crime and Abuse of Power.<sup>1623</sup> He submitted that:

Victims should ... have the right to make submissions (written and oral) to a parole authority considering whether to release a prisoner on parole and, if so, on what conditions. Parole authorities should be obligated to take into account victims' safety concerns and to put conditions on prisoners that address the safety concerns. Victims or witnesses should also be given the opportunity to take physical precautions and to prepare themselves mentally for the release of offenders.<sup>1624</sup>

We do not consider that these issues have emerged in any detail during our inquiry, and we do not consider that we have the evidence or submissions that would enable us to make any recommendations in relation to them. We also note that they raise issues in relation to custodial sentences for offences other than child sexual abuse offences.

## 36.2 Adult offender treatment programs

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### 36.2.1 Introduction

Sex offender treatment programs are therapy sessions that offenders attend in prison and sometimes in the community. Programs aim to enhance rehabilitation and reduce the risk of the offender reoffending when released into the community. Most programs are available only for offenders who acknowledge their offending conduct, although some 'deniers' programs' are also provided.

Treatment programs for adult sex offenders are part of the criminal justice system's response to child sexual abuse, including in an institutional context. All Australian states and territories operate programs for adults convicted of sexual offences, including child sexual abuse offences. These programs are generally operated by the government agency with responsibility for prisons and corrective services.

In our criminal justice work, we have only considered treatment programs for those who committed sexual offences as adults.

The Royal Commission has a separate work stream in relation to children with harmful sexual behaviour. These include:

- those who commit sexual offences when they are under 18 years of age
- children who engage in harmful sexual behaviour and who are below the age of criminal responsibility (we discuss the age of criminal responsibility in Chapter 37)
- children who engage in harmful sexual behaviour that either does not constitute a criminal offence or is assessed as not warranting a criminal justice response.

This work stream is considering a number of matters, including treatment programs for children. Our work to date indicates that child-to-child sexual abuse is an important topic for us to examine. Treatment programs for children who engage in harmful sexual behaviour may be particularly important because these children will inevitably continue to be in institutional contexts with other children. In a relatively small number of cases, they may be in juvenile justice institutions, but others may live in out-of-home care and will be in schools and in the full range of sporting, cultural, religious and other institutions in which children participate.

### 36.2.2 Current programs and approaches

In addition to holding the public roundtable referred to above, we obtained from each state and territory, under summons or notice to produce, information about the adult sex offender treatment programs that they operate and any reviews or evaluations that have been conducted in relation to those programs.

Corrective services agencies operate adult sex offender treatment programs in each state and territory. In most jurisdictions, the programs are run within corrective facilities. Most of the programs are group programs. Some programs adopt a 'closed group' format, which means that a fixed group of people undertake the program. Participants are the same from start to finish (with the exception of any who drop out of the program). Some programs adopt a 'rolling group' format, which allows people to enter at any time and to drop out and re-enter at later points. This allows participants, over time, to complete the same units but not necessarily at the same time or in the same order.

In New South Wales, Victoria, Western Australia and the Australian Capital Territory, corrective services agencies also run programs for adult sex offenders living in the community. These include 'maintenance programs' for offenders who have completed some treatment in a correctional facility and for whom continued therapy is a condition of release. There are also programs for offenders who were unable to complete treatment in a correctional facility for some reason and for whom treatment in the community is a condition of release from custody.

Most corrective services agencies offer programs based on an assessment of the offender's risk of reoffending, which will be assessed as either low, medium or high. We understand that most agencies use the 'Static-99' risk assessment tool, which is an internationally recognised actuarial tool for predicting the risk of sexual and violent recidivism in convicted adult male sex offenders. The Static-99 is widely used internationally as a sex offender risk assessment instrument.

In its submission in response to the Consultation Paper, the New South Wales Government stated that:

CSNSW [Corrective Services NSW] has also adopted the Stable and Acute 2007 tools to assess dynamic risk. The current practice is that the combined score of the Static and Stable tools informs decisions regarding treatment in custody, as well as management of sex offenders in the community.

In 2016, the CSNSW Community Corrections policy was changed following the introduction of the Sex Offender Supervision Assessment, which is effectively the combined Static and Stable score. The Sex Offender Supervision Assessment is used by supervising officers in calculating the Community Impact Assessment to determine the level of supervision sex offenders receive when on an order in the community. In addition to the custody based programs noted by the Royal Commission, CSNSW offers a community based maintenance program as well as a community based treatment program delivered in a non-custodial setting.<sup>1625</sup>

In its submission in response to the Consultation Paper, the Tasmanian Government stated that the Tasmanian Sentencing Advisory Council has a current reference regarding mandatory treatment for sex offenders and that its report is due to be released in 2017.<sup>1626</sup>

We were told at the public roundtable that there is a national working party on sex offender treatment that meets annually to share information. The working party also sets out best-practice principles for all jurisdictions to follow, keeping in mind differences in resources and requirements.<sup>1627</sup>

Table 36.1 sets out the adult sex offender treatment programs that we understand are currently provided by states and territories.

**Table 36.1: Sex offender treatment programs currently provided in Australian states and territories**

Jurisdiction	Program
New South Wales	Custody-based Intensive Treatment (CUBIT) Program Custody-based Intensive Treatment (Outreach) – CORE Moderate Custody-based Deniers Program Custody-based Maintenance Program Self-regulation Program: Sex Offenders for Offenders with Intellectual Disabilities Community-based Treatment Program* Community-based Maintenance Program*
Victoria	Better Lives Program (BLP) Treatment Readiness Disability Pathways Sexual Offending Program (DP-SOP) Old Me New Me Social Problem Solving and Offence Related Thinking (SPORT) Program Better Lives Program (BLP)* Crossroads: A Dialectical Behaviour Therapy-Informed Skills Program* Disability Pathways Sexual Offending Program (DP-SOP)* Maintenance Change*
Queensland	Preparatory High Intensity Medium Intensity Adapted [for offenders with low cognitive abilities] Aboriginal and Torres Strait Islander Maintenance
Western Australia	Intensive Sex Offending Treatment Program Medium Intensity Sex Offender Program Good Roads Aboriginal Sex Offender Program Sex Offending Deniers Program Sex Offending Intellectual Disabilities Program Community Based Sex Offender Treatment Program* Community Based Maintenance Program* Community Based Intervention (CBI) (Sex Offender)*



South Australia	Sexual Behaviour Clinic
	Sexual Behaviour Clinic – ME [for offenders with mild to borderline cognitive functioning]
	Owenia House*
	Community Transitions Circle of Support and Accountability Program*
Tasmania	New Directions Sex Offender Treatment Program
	Community Based Sex Offender Case Management and Interventions*
Australian Capital Territory	Adult Sex Offender Treatment Program
	Adult Sex Offender Treatment Program*
Northern Territory	Sex Offender Treatment Program
	Sex Offender Treatment Program – Responsivity Safety Victims Planning Program
	Maintenance Group Programs

*\*Program delivered in a non-custodial setting*

Some of these programs have undergone a formal evaluation. Since we published the Consultation Paper, the New South Wales Bureau of Crime Statistics and Research (BOCSAR) has published a Crime and Justice Bulletin examining whether the Custody-based Intensive Treatment (CUBIT) Program for sex offenders reduces reoffending.<sup>1628</sup> The CUBIT program is targeted towards offenders who present a moderate to high risk of recidivism and/or with moderate to high treatment needs.<sup>1629</sup>

The BOCSAR bulletin referred to a significant body of literature indicating that sex offender treatment programs reduce reoffending. However, the bulletin also stated that:

General scepticism around the dominant results in the existing literature (which imply treatment is effective) suggests that observers are primarily concerned with the possibility that sex offenders who are innately less risky, might be more likely to complete treatment.<sup>1630</sup>

BOCSAR suggested that a reason might be that a motivated offender might be less likely to reoffend regardless of treatment but also more likely to volunteer for treatment in the first place.<sup>1631</sup>

The study examined 386 male offenders who had been assessed as suitable for the CUBIT program, including some who completed the program and some who did not. It examined whether there was a difference in the reoffending rate over the five years following release from custody across the two groups.

The bulletin reported that CUBIT completers had, on average, a five-year general recidivism risk across all types of offences that was 13 percentage points lower than a similar cohort of offenders suitable for CUBIT but who did not participate (42 per cent as against 55 per cent). However, no significant differences between the treated and untreated groups were found for violent or sex reoffending, although the bulletin noted that it was difficult to draw firm conclusions given the relatively small sample size.<sup>1632</sup> The overall recidivism rate for sex reoffending in the study sample was 11.8 per cent over five years.<sup>1633</sup> In conclusion, the study stated:

the available evidence suggests that participation in CUBIT may reduce general recidivism risk considerably, but no evidence is found to suggest a reduction in violent reoffending risk nor sex re-offending risk — though investigations on the latter front in particular are hampered by methodological limitations. It is possible that the CUBIT program is successful in reducing general re-offending on average, but that it does not work effectively to prevent sex and violent re-offending. It is also possible that CUBIT has greater impact on offenders at lower risk of sexual or violent recidivism (with the impact of treatment therefore borne out in the general re-offending analysis only). On the other hand, equally likely is that our finding in relation to general recidivism is indicative of treatment impacts on sex and violent re-offending that our statistical methods are simply unable to identify in the present sample. It should be dutifully acknowledged that this evaluation makes no attempt to address the all-important question of: ‘What kinds of treatment work for what kinds of offenders under what conditions?’. A process evaluation of CUBIT currently underway at Corrective Services NSW is likely to improve our understanding of the myriad of factors that influence program effectiveness.<sup>1634</sup> [References omitted.]

Table 36.2 lists published evaluations and those received by us under summons or notice.

**Table 36.2: Reviews and evaluations**

Jurisdiction	Review/evaluation
New South Wales	<p>I Halstead, <i>Does the Custody-based Intensive Treatment (CUBIT) program for sex offenders reduce re-offending?</i>, Crime and Justice Bulletin Number 193, New South Wales Bureau of Crime Statistics and Research, 2016.</p> <p>AC Woodrow and DA Bright, 'Effectiveness of a sex offender treatment program: A risk band analysis', <i>International Journal of Offender Therapy and Comparative Criminology</i>, 2010, pp 1–13.</p> <p>J Goodman-Delahunty, <i>The NSW pre-trial diversion of offenders (child sexual assault) program: An evaluation of treatment outcomes</i>, Charles Sturt University, November 2009.</p>
Victoria	<p>J Graffam, T Bartholomew, T Carvalho, A Shinkfield and D Edwards, <i>Final report – The Corrections Victoria Sex Offender Program: Promoting psychological and behaviour change through structured intervention</i>, Deakin University, School of Psychology, 2008.</p>
Queensland	<p>S Smallbone and M McHugh, <i>Outcomes of Queensland Corrective Services sexual offender treatment programs</i>, School of Criminology and Criminal Justice, Griffith University, 2010.</p>
Western Australia	<p>Government of Western Australia, Department of Corrective Services, <i>Short-term impact evaluation of sex offender treatment programs: Prison group August 2009 to May 2010</i>.</p>
South Australia	<p>M Proeve, <i>Sexual Behaviour Clinic: A review and discussion paper</i>, October 2010.</p> <p>H Dobbin, <i>Pilot SBC-me Program Oct 2011–Nov 2012 evaluation report</i>, May 2013.</p>
Tasmania	<p>Queensland Corrective Services, <i>Review of sexual offending programs</i>, Risdon Correctional Centre, 2009.</p>

Our public roundtable on adult sex offender programs included participants from government corrective services agencies as well as academics and researchers in the field of sex offender therapy. The New South Wales Office of the Children's Guardian, which is responsible for the WWCC scheme in New South Wales, also participated.

Some of the issues raised during the roundtable, in private sessions and in research are as follows:

- **Diversity:** Sex offenders, including child sex offenders, are a heterogeneous cohort. They are a 'population of people whose individual circumstances and the reasons for their offending vary enormously'.<sup>1635</sup>
- **The impact of prison culture:** The prison environment, and culture among prisoners, can prevent a child sex offender from actively participating in programs. Dr Stephen Wong, Adjunct Professor, Centre of Forensic Behavioural Science at Swinburne University of Technology, told the public roundtable:

Because in the institution, in custody, there is always tension between sex offenders and non-sexual offenders and non-sexual offenders look down on sex offenders, to put it mildly, and there's a pecking order and within this pecking order, even within sex offenders, the rapists tend to be at the highest level and the child sex abusers at the very low level. Quite often in treatment they may feel very unsafe in terms of disclosing about their offending and engaging in therapy and therefore it makes it much more difficult to carry out treatment in a custodial setting, in particular, with child sex offenders. That is one reason why I think the evidence is showing that there is more efficacy treating in the community than in an institution.<sup>1636</sup>

The difficulties child sexual offenders may face in disclosing their child sexual offences in group therapy while in prison were also raised with us in private sessions.

This issue was also discussed in a recent research paper on the preventive detention of sex offenders in Australia. The authors interviewed professionals involved with implementing post-sentencing detention for sex offenders, who noted that placing sex offenders with child sexual offenders in the same treatment program was a 'major failing of the in-prison treatment program': child sexual offenders cannot honestly discuss their crimes for fear of being exposed to the greater prison population.<sup>1637</sup>

- **Effectiveness:** Despite some of the difficulties in in-prison treatment programs, participants at the roundtable suggested that there is considerable rehabilitative value in starting treatment in custodial settings and continuing treatment in the community on release.<sup>1638</sup> However, we were told that treatment programs cannot operate successfully in a vacuum and cannot address the risk alone. Adult sex offender treatment programs are not a 'cure' but, rather, form a part of necessary intervention and management measures that aim to reduce the risk of reoffending.<sup>1639</sup>

There is a requirement to 'wrap around' all services on release of an offender. This includes support services and programs from corrective service agencies and the non-government sector. Dr Henry Pharo, Director, Offender Rehabilitation Services in the South Australian Department for Correctional Services, told the public roundtable:

I think it is important for the discussion to consider all of these things that are important and if we look at the desistance literature, it shows that cognitive shift is one thing, so changes in people's thoughts is really important and I think that can be achieved through prison programs, but those people who do successfully avoid re-offending in the community are those who are able to actually re-integrate with society, maintain employment, establish social connections with their community and things like that.

I just think it is important to consider programs in the community as being more than just them needing to come along to attend a maintenance program. It is that whole-of-systems approach again that we're talking about.<sup>1640</sup>

- **Measures of effectiveness:** For policymakers, the key measure of effectiveness may be the reduction in rates of recidivism. In relation to sex offender treatment, sexual reoffending or other violent reoffending, this measure may be more important than general reoffending. However, low reporting rates of sexual offending may limit the value of measuring recidivism where there may be a significant risk that reoffending may not be detected.

It was suggested that recidivism is too blunt an instrument to ascertain the success of a program<sup>1641</sup> and that programs should be designed and evaluated with regard to attitudinal change and individual effectiveness.<sup>1642</sup>

For example, one study in New Zealand considered gains measured through changes in the attitudes of those who had completed a program, such as reductions in their belief of rape myths or increases in their empathy towards relevant victim types.<sup>1643</sup> Other assessments may focus on program completion or program satisfaction measures.

### 36.2.3 Implications for institutional child sexual abuse

Completion of a sex offender treatment program may be regarded as a step towards rehabilitation and risk management. Completion of a program may sometimes be put forward in support of an application for parole or in answer to an application that an offender's detention should be extended (discussed in section 36.3).

At our public roundtable, we raised the issue of whether the successful completion of an adult sex offender treatment program should have any impact on a convicted sex offender's eligibility for a WWCC clearance.

In our *Working with Children Checks report*, we recommended that all jurisdictions should make provision for an automatic WWCC refusal for certain offences committed by adults, including the following child sexual abuse offences:

- the indecent or sexual assault of a child
- child pornography related offences
- incest where the victim was a child.<sup>1644</sup>

These offences cover many, but not all, child sexual abuse offences. We recommended that offences not included in the list for an automatic WWCC refusal should trigger a risk assessment.<sup>1645</sup>

In relation to risk assessment, we recommended an inclusive list of criteria for assessing risks to children.<sup>1646</sup> In the text, we stated that:

We believe the standardised criteria should be consistent with those set out in the risk assessment guide; endorsed by the Commonwealth, state and territory governments to bring consistency and rigour to risk assessments; and applied to criminal history, disciplinary and misconduct information.<sup>1647</sup> [Reference omitted.]

The criteria we referred to were those published in the Community and Disability Services Ministers' Conference *National framework: Creating safe environments for children – Organisations, employees and volunteers*, 'Schedule: An Evidence-based Guide for Risk Assessment and Decision-making when Undertaking Background Checking'.<sup>1648</sup> The guide suggests that an evidence-based assessment of risk could be informed by asking a number of questions, including:

Have the applicant's circumstances changed since an offence was committed?

What is the attitude of the applicant to their previous offending behaviour, and what relevant information can be provided by the applicant?<sup>1649</sup>

Ms Louise Coe, Director, Child Safe Organisations from the NSW Office of the Children's Guardian, told the public roundtable that the New South Wales Office of the Children's Guardian is not aware that the New South Wales Civil and Administrative Tribunal (NCAT) – the tribunal that can review the New South Wales Children's Guardian's decision to refuse a WWCC clearance – has determined in any review that the participation in a sex offender or intervention program was a persuasive factor in granting an enabling order.<sup>1650</sup> An enabling order entitles an otherwise ineligible person to apply for a WWCC clearance.

Ms Coe told the roundtable that the New South Wales Office of the Children's Guardian is aware of three matters where the applicant had engaged in a sex offender treatment program and appealed to NCAT for an enabling order. She said NCAT still refused to grant an enabling order in those matters on the basis that the more persuasive factors were:

- one applicant said he continued to have fantasies
- another applicant showed a lack of insight
- in the third matter, given the seriousness of the offending, the program was not considered to ameliorate the risk to children.<sup>1651</sup>

Ms Coe also told the roundtable that, in 2014, the New South Wales Children's Guardian engaged the Australian Institute of Criminology to conduct a literature review to inform how they made decisions. She said that, in relation to research on the effectiveness of treatment programs, the literature review was to the effect that:

the literature that they examined at that time identified that there were very few methodologically rigorous evaluations of programs for either sex or violent offenders and on that basis they couldn't comment on the effectiveness of such programs.<sup>1652</sup>

If a person applies for a WWCC clearance after completing a sex offender treatment program, Ms Coe told the public roundtable:

While we would consider [the fact] that there has been positive engagement in a treatment program, there are a number of other factors which may weigh more heavily on whether someone should be granted a clearance or not, but as we've said, if someone has engaged in sex offender programs they must have a conviction and when we conduct a risk assessment at the Office of the Children's Guardian, we don't look at those convicted sex offenders, we're looking at people that may have charges or may have a workplace finding, a sustained workplace finding that there was sexual misconduct.<sup>1653</sup>

This means that, at least in New South Wales, as those who have completed a sex offender treatment program would have received a custodial sentence for a sexual offence, they would be automatically disqualified from being granted a WWCC clearance. Therefore, completion of a treatment program could not affect the grant of a clearance, as the legislation would prevent a clearance being granted.

Dr Wong told the public roundtable:

In sex offender treatment, obviously, it is not about cure, it is about managing risk, teaching the person to manage risk. One of the often-used things to get them to learn is about avoiding high-risk situations. That is, you don't get yourself sort of being drawn into situations where there are children around ... so if a person has that profile and comes to me and says 'I would like to apply for a job to work with children', then I would have a lot of questions to ask about: 'Why would you want to do that?' 'Why would you want to put yourself again in a risky situation, when you have already been told "don't do that"'?<sup>1654</sup>

Similarly, Mr Ashley Phelan, Manager, Offender Intervention Unit in Queensland Corrective Services, told the public roundtable:

We define treatment as a starting point. At no point is it considered an end point. It is a starting point.

If we had a teacher who may generally have an interest in teaching, then there are many cohorts that that person can teach to and it doesn't necessarily have to be children. I would be concerned with a teacher, who was a child sex offender, who specifically wanted to teach with children. If your passion was teaching, there are many avenues in which you can still engage in your profession or your passion, which could be teaching adults, for instance. So we would be very concerned.<sup>1655</sup>

Many participants at the roundtable agreed with a summary proposition put by Justice McClellan as follows:

treatment should be seen as a potential positive for anyone, but it should never be assumed that treatment is a cure. Is that correct?<sup>1656</sup>

### 36.2.4 What we were told in submissions

In its submission in response to the Consultation Paper, Protect All Children Today expressed opposition to the proposition that completion of a sex offender treatment program should enable an offender to be eligible for a WWCC clearance, suggesting that this would introduce a significant and unnecessary risk to vulnerable children.<sup>1657</sup>

The Victorian Centres Against Sexual Assault (CASA) Forum submitted that there is a lack of evidence regarding the effectiveness of treatment programs for child sex offenders.<sup>1658</sup>

In his submission, the Victorian Victims of Crime Commissioner noted comments made at our roundtable that treatment might be more effective in the community and suggested it was unacceptable that a person who required further treatment should ever be released into the community.<sup>1659</sup> He recommended that, in any future reforms relating to child sex offenders, the treatment and rehabilitation of offenders should be considered secondary to the risk of harm to the community.<sup>1660</sup>

In its submission, the Tasmanian Government stated that in March 2016 it introduced amendments to the *Corrections Act 1997* (Tas) to allow participation in an appropriate sex offender treatment program to be taken into consideration by the Parole Board in determining whether or not to release a prisoner on parole and as a matter relevant to a prisoner's eligibility for early remission.<sup>1661</sup>

The Victim Support Service expressed concerns about the access to mental health and disability support for offenders post-release. It suggested it was important for child sex offenders to have access to intervention programs in a timely fashion.<sup>1662</sup>

Although not specifically related to treatment, the Victorian Aboriginal Legal Service raised concerns in its submission in response to the Consultation Paper that adult sex offenders often find it difficult to secure accommodation upon release from prison and that this can hamper the provision of support in the transition back into the community, particularly culturally appropriate support for Aboriginal and Torres Strait Islander sex offenders.<sup>1663</sup>

The Victorian Aboriginal Legal Service also submitted that there should be Aboriginal-specific diversionary programs for young Aboriginal and Torres Strait Islander sex offenders.<sup>1664</sup>



Victoria Legal Aid submitted that there is scope for better accommodation support for released sex offenders as well as more intensive case management and targeted treatment throughout their incarceration.<sup>1665</sup>

The Aboriginal Legal Service (NSW/ACT) expressed concern about the lack of culturally appropriate treatment options and support for Aboriginal and Torres Strait Islander offenders in New South Wales, either in custody or in the community, particularly in remote and regional areas.<sup>1666</sup> The Aboriginal Legal Service (NSW/ACT) also expressed concern about the use of the Static-99 risk assessment methodology in relation to Aboriginal and Torres Strait Islander people, noting concerns that it may not be valid for Aboriginal and Torres Strait Islander people.<sup>1667</sup>

### 36.2.5 Conclusions

Based on what we have heard, including the views of experts canvassed at our public roundtable, we are satisfied that there is not sufficient evidence to demonstrate that the completion of a sex offender treatment program should entitle an offender to be eligible to apply for a role working with children.

We note the various programs made available by state and territory corrective service agencies and encourage the continued evaluation and development of offender treatment programs.

We also note the need to provide support services for child sex offenders moving back into the community to reduce the risk of reoffending, as is the case for any offender finishing a custodial sentence. However, we have not considered this issue in detail and we do not have the evidence or submissions necessary to make recommendations in relation to it. We consider that state and territory governments should keep under review the adequacy of the support services they provide for child sex offenders in the community.

## 36.3 Extended sentences

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### 36.3.1 Introduction

Most states and territories have legislation that enables indefinite, continued or extended detention and supervision of people who are found to pose a high risk of reoffending. Most legislative provisions are directed at serious sex offenders, and we understand that a large proportion of applications under the provisions relate to child sex offenders.

Continued supervision or detention orders are applied for by the state close to the expiry of an offender's sentence.

Indefinite sentences are nominal sentences that are reviewed and reapplied until the person is deemed fit for release. They are initially imposed at the time of sentencing after the offender has been convicted. Some jurisdictions provide for indefinite detention in addition to or instead of indefinite sentences.

### 36.3.2 Supervision and detention orders

New South Wales, Victoria, Queensland, Western Australia, South Australia and the Northern Territory have legislative regimes that permit the court to make extended supervision and detention orders, which are imposed at the end of a person's sentence.<sup>1668</sup> These were developed to address the circumstance where a serious sex offender is considered to still have a propensity to reoffend at the end of their sentence.<sup>1669</sup>

Extended supervision orders require an offender who has been convicted of a serious sex offence to be supervised under certain conditions in the community at the end of their sentence.

Extended detention orders require the continued detention in prison of serious sex offenders (and violent offenders in New South Wales and South Australia)<sup>1670</sup> who are found to pose an unacceptable risk of harm if in the community.

The main purpose of the legislative regimes is to enhance the protection of the community by requiring offenders who have served custodial sentences for certain sexual offences, and who present an unacceptable risk of harm to the community, to be subject to ongoing detention or supervision. The secondary purpose of the provisions is to facilitate the treatment and rehabilitation of these offenders.<sup>1671</sup>

Applications are generally made during the last six months of the offender's custodial total effective sentence by the relevant Attorney-General or secretary of the justice agency, depending on the jurisdiction.<sup>1672</sup> In the majority of jurisdictions, 'custody' is defined to include release on parole.<sup>1673</sup> An offender on parole may be returned to prison in the case of an order for continued detention, but it is more likely that an offender on parole might be the subject of a continued supervision order at the end of the parole term.

The Supreme Court in the relevant jurisdiction must be satisfied that the offender poses an unacceptable risk of committing a similar offence or harming the community before it makes an order. The standard of proof is said to be lower than 'beyond reasonable doubt'.<sup>1674</sup> Risk is assessed by reference to assessment reports and other supporting evidence, including whether the offender has participated in a rehabilitation program.<sup>1675</sup>

Supervision orders may require an offender to report to and receive visits by specified individuals, obey any curfews or not commit an offence or move to a new address without prior written consent.<sup>1676</sup> Failure by the offender to comply with the requirements of an extended supervision order is a criminal offence in all jurisdictions except South Australia.<sup>1677</sup>

The legislative regimes that permit continued detention and supervision have had a complicated history, and provisions facilitating continued detention have been challenged before the High Court.<sup>1678</sup>

The current form of provisions was introduced first in Queensland in 2003, followed by Western Australia and New South Wales in 2006 (with further significant amendments in New South Wales in 2013 and 2014<sup>1679</sup>), Victoria in 2009, the Northern Territory in 2013 and South Australia in 2015. In its submission in response to the Consultation Paper, the New South Wales Government stated that its provisions are currently subject to a statutory review.<sup>1680</sup>

On 9 May 2017, the New South Wales Government announced reforms to the High Risk Offenders Scheme following a review of the *Crimes (High Risk Offenders) Act 2006*. The reforms include:

- making community safety the paramount consideration when a court is considering making a continuing detention order or extended supervision order
- notifying victims when a court is considering making continuing detention orders or extended supervision orders, and allowing them to make submissions either in writing or orally
- allowing the court to consider the offender's criminal history and risk of future offending, whether sexual or violent, when making continuing detention orders and extended supervision orders
- placing a stronger focus on addressing the causes of the offending behaviour while the offender is in prison by identifying eligible offenders earlier in their sentence.<sup>1681</sup>

In its submission in response to the Consultation Paper, the Victorian Government stated that it had accepted, in principle, the recommendations of the Complex Adult Victorian Sex Offender Management Review Panel (Harper Review) on the management of serious sex offenders. The Victorian Government also announced plans to:

- build a new secure facility to manage the most serious offenders
- expand the sex offender supervision scheme to include high-risk offenders
- introduce a new model for assessing and managing prisoners so that intervention happens earlier and those who remain a risk to the community are identified
- establish a new facility for offenders on supervision orders who have disabilities
- develop a new governance model for overseeing the operation of the scheme so that decisions are always made in the interests of community safety.<sup>1682</sup>

Continued detention and supervision regimes continue to be the subject of some academic criticism, mainly focused on human rights concerns.<sup>1683</sup> The risk that continued detention and supervision orders may infringe on the principle of finality in sentencing if the detention is framed as a punitive measure has also been raised. However, detention can be authorised as a non-punitive measure, in which case the principle of finality is less likely to be considered relevant. For example, McSherry, Keyzer and Freiberg state:

Post-sentence preventive detention legislation that authorises imprisonment may be seen as contrary to the principle of finality of sentence. If an order for indefinite detention is made at the time of sentence, then the offender at least knows that there is a nominal term and there is a system for periodic review. By contrast, post-sentence preventive detention schemes operate at the end of the offender's sentence, leading to uncertainty as to how long the offender must remain in prison after the sentence expires.

However, this principle may be considered irrelevant if it is accepted that post-sentence preventive detention is non-punitive. Since the majority of the High Court in *Fardon* has held that the Queensland post-sentence scheme is not akin to a sentence of imprisonment, the principle of finality of sentence may be bypassed.<sup>1684</sup> [Reference omitted.]

In his submission in response to the Consultation Paper, the Victorian Director of Public Prosecutions (DPP) noted that case law in Victoria had agreed with the High Court's approach in *Fardon v Attorney-General (Qld)*,<sup>1685</sup> finding that the Victorian post-sentence legislation was for protective and preventative civil containment, not punishment.<sup>1686</sup> The Victorian DPP also noted that the compatibility of the legislation with the Charter of Human Rights and Responsibilities has been extensively considered by the Supreme Court and that, in this sense, the regime has been found not to infringe upon the principle of finality in sentencing.<sup>1687</sup>

There was little if any public information available on the use of supervision and detention orders before the Royal Commission sought information under summons or notice to produce for use in the *Sentencing for child sexual abuse in institutional contexts* (Sentencing Research).

Table 36.3 provides a summary of the supervision and detention provisions and their use.

In a 10-year period (2004–2014), no successful applications for continued detention for child sexual assault offenders were made in Victoria, and the majority of applications in New South Wales during the same period related to supervision orders.<sup>1688</sup>

**Table 36.3: Summary of supervision and detention order provisions and their use**<sup>1689</sup>

Jurisdiction	Legislation	Standard of proof	Period of order	Applications made between 2004 and 2014	Proportion relating to child sexual assault offenders
New South Wales	<i>Crimes (High Risk Offenders) Act 2006</i> (NSW)	High degree of probability that the offender poses an unacceptable risk of committing a serious sex offence if he or she is not kept under supervision (s 5B2)	Five years maximum, subject to further application (s 18)	85	69 (81%)
Victoria	<i>Serious Sex Offenders (Detention and Supervision) Act 2009</i> (Vic)	Whether the risk of committing a relevant offence is less than a likelihood of 'more likely than not' (s 9(5))	Three years maximum, subject to review (s 40, s 65)	164	116 (71%)
Queensland	<i>Dangerous Prisoners (Sexual Offenders) Act 2003</i> (Qld)	Satisfied to a high degree of probability by acceptable and cogent evidence that the prisoner is a serious danger to the community (s 13)	Indefinite until rescinded by the court (s 14)	157	95 (61%)
Western Australia	<i>Dangerous Sexual Offenders Act 2006</i> (WA)	Satisfied to a high degree of probability by acceptable and cogent evidence that there is an unacceptable risk that the person would commit a serious sexual offence (s 7)	Indefinite until rescinded by the court (s17, s 25)	56	42 (75%)
Northern Territory	<i>Serious Sex Offenders Act 2013</i> (NT)	Satisfied to a high degree of probability that there is acceptable and cogent evidence of sufficient weight that a person is a serious danger to the community (s 7)	Indefinite until revoked or expires (s 10, s 16)	n/a	n/a

In its submission in response to the Consultation Paper, the New South Wales Government stated that, as at 16 September 2016, 78 extended supervision orders and 19 continuing detention orders had been made in respect of high-risk sex offenders since 2006.<sup>1690</sup>

In his submission in response to the Consultation Paper, the Victorian DPP set out his approach to the use of detention orders:

I consider an application for a Detention Order to be a significant power that has been granted to me by legislation and I use this power sparingly in only the most serious of cases where a supervision order is not sufficient to contain an offender's risk of future offending. A detention order may be made by the Supreme Court for a period of three years and is subject to periodic reviews by the Supreme Court. The result of such an order being made is that an offender is detained in a self-contained facility within the prison walls of Hopkins Correctional Centre as an un-sentenced prisoner.

To date, there have been only six applications made for a detention order in respect of four individuals. Two offenders are currently subject to detention orders, but the initial application for a detention order in relation to each of these offenders was unsuccessful. Following these unsuccessful applications, one offender committed further offences whilst being subject to a strict supervision regime, so the second detention order application was successful on the basis that his risk could not be adequately managed without a detention order.

The other offender was made subject to a DO [detention order] when his accommodation under previous legislation became no longer available and a stricter regime was required.

The application made in relation to a third offender was unsuccessful due to the Court finding that his risk of re-offending could be adequately managed under a supervision order. That offender has not committed any further sexual offences to date.

Finally, the application that was made in relation to a fourth offender was not successful on the basis that the offender was facing trial in relation to further serious offending and his risk was adequately contained by his being in custody on remand. He was subsequently convicted and is now facing a lengthy term of imprisonment.<sup>1691</sup>

We note the recent Victorian Court of Appeal judgment in *The Secretary to the Department of Justice and Regulation v Fletcher*,<sup>1692</sup> which discussed in detail the assessment of 'unacceptable risk' when considering an extended supervision order. The respondent, Fletcher, had served a 10-year prison sentence, followed by 10 and a half years of supervision under the extended supervision regime for violent sexual offences against two 15-year-old girls. The most recent supervision order had been revoked in February 2017, although the revocation was stayed pending the outcome of an appeal by the Secretary of the Department of Justice.

In revoking the supervision order, Priest JA had found that, while two clinical and forensic psychologists had found that Fletcher remained a moderate risk of re-offending, the possible consequences of any future relevant offending by Fletcher were no greater than is generally experienced by adolescent female victims of aberrant sexual activity perpetrated by an adult male, and as such, the risk of Fletcher committing a further relevant offence was not 'unacceptable'.<sup>1693</sup>

The Secretary of the Department of Justice appealed on the grounds that, where there was the combination of a moderate risk of the commission of sexual offences and the catastrophic harm invariably associated with such offending, a finding of unacceptable risk was unavoidable. However, the Victorian Court of Appeal held that as the statute specifically set the test as 'unacceptable risk', this allows that there must be an 'acceptable level of risk' in releasing a sex offender into the community without supervision. As such:

Where an offender poses only a moderate risk of reoffending (the risk of the average sexual offender) and the evidence does not enable the conclusion that release of that offender into the community may result in more serious harm to adolescent females than would be caused by other illegal sexual activity with such victims, the circumstances do not necessarily require the conclusion that the offender is an unacceptable risk.<sup>1694</sup>

### 36.3.3 Indefinite sentences or detention

Indefinite sentences or detention can be brought about by different means. The Sentencing Research outlined the following different approaches to give effect to indefinite sentencing or detention:

- nominal, reviewable sentences provide for indefinite sentences
- sentences where a person is incapable of controlling their sexual instincts provide for indefinite detention
- dangerous criminal declarations provide for indefinite detention.<sup>1695</sup>

#### Nominal, reviewable sentences

Nominal, reviewable sentences are currently available in Victoria, Queensland, Western Australia and the Northern Territory.<sup>1696</sup>

These enable sentencing courts to give a nominal sentence to serious, repeat offenders of certain categories of offences, where it is considered that the offender poses a serious danger to the community. Risk of harm is assessed in reference to the offender's character, history, age, health and mental health and the nature and gravity of the current and previous offences.<sup>1697</sup>

Generally, at the completion of the nominal sentence the offender must be reviewed, at which time, on application, the court may order further imprisonment. The offender must then be periodically reviewed as prescribed by legislation, and at each review the indefinite sentence can be lifted or retained.

The provisions attempt to balance, on the one hand, a person's right to certainty and liberty and, on the other hand, the limitations of the courts' ability to predict ongoing dangerousness at the time of sentencing.<sup>1698</sup>

Indefinite sentences have been criticised for:

- among other things, breaching the principles of proportionality and finality and the principle of imprisonment as a last resort
- imposing retrospective punishment for previous acts
- breaking the 'link between crime and punishment'.<sup>1699</sup>

There was little if any public information available on the use of these sentences before the Royal Commission sought information under summons or notice to produce for use in the Sentencing Research.

Table 36.4 provides a summary of the nominal sentencing provisions and their use.

**Table 36.4: Summary of nominal sentencing provisions and their use**<sup>1700</sup>

Jurisdiction	Provision	Review period	Number of orders between 2004 and 2014
Victoria	<i>Sentencing Act 1991</i> (Vic) ss 18A, 18B, 18H, 18M	At the end of the nominal sentence and then every three years	0
Queensland	<i>Penalties and Sentences Act 1992</i> (Qld) ss 163, 171, 173	After 50 per cent of the nominal sentence has been served (in most cases) and then every two years	8 (applications)
Western Australia	<i>Sentencing Act 1995</i> (WA) s 98(1); <i>Sentencing Administration Act 2003</i> (WA) s 12A(5)	One year after the sentence has begun and then every three years	2
Northern Territory	<i>Sentencing Act</i> (NT) ss 65, 72, 74	No later than six months after 50 per cent of the nominal term has been served and then every two years	2 (applications)



These provisions are rarely used. The authors of the Sentencing Research consider that supervision and detention orders discussed in section 36.3.2 allow for a timely assessment of dangerousness and that jurisdictions may prefer them rather than nominal, reviewable sentences.<sup>1701</sup>

In his submission in response to the Consultation Paper, the Victorian DPP noted that, while there remains the legislative provision for indefinite sentences in Victoria, as a matter of practice, now that a continuing detention scheme is available, it is less likely that applications for indefinite sentences will be made.<sup>1702</sup>

### Detention of persons incapable of controlling their sexual instincts

Provisions in South Australia and Queensland permit the preventative detention of certain convicted sex offenders where it is shown that the offender is incapable of controlling (or unwilling to control) his or her sexual compulsions.<sup>1703</sup>

Detention is to take place in an ‘institution’, which in Queensland means a prison, a watch-house or an institution prescribed by regulation. It is defined in South Australia as a prison or any place declared by the Governor by proclamation. In relation to a young person, it also includes a training centre.<sup>1704</sup> In South Australia, the decision to retain the offender in custody must be reviewed every 12 months,<sup>1705</sup> and the offender may be released on licence. In Queensland, the detained offender must be examined every three months, with a report to be furnished to the director of mental health.<sup>1706</sup>

The South Australian provision allows the Attorney-General to apply to the Supreme Court for an order to detain a person while they are in prison serving their sentence or at the time they are being sentenced. At least two legally qualified medical practitioners must inquire into the mental condition of the person and report to the court on whether the person is incapable of controlling, or unwilling to control, his or her sexual instincts.

Section 23(5) of the *Criminal Law (Sentencing) Act 1988* (SA) provides:

The paramount consideration of the Supreme Court in determining whether to make an order that a person to whom this section applies be detained in custody until further order must be the safety of the community.

Based on information obtained by the Royal Commission under summons or notice, the Sentencing Research records that, in South Australia, in the 10-year period from 2004 to 2014, 26 applications were made under section 23, 17 (65 per cent) of which were for child sexual abuse offenders. Five orders were granted.<sup>1707</sup>

The Queensland provision appears to be used less than the South Australian provision. Queensland also has provisions enabling extended supervision and detention orders and nominal reviewable sentences, and they may be used instead of this provision. Based on information obtained by the Royal Commission under summons or notice, in the 10-year period from 2004 to 2014, no orders were made. However, during that period, three people who had been already been detained under the provision for child sexual abuse offending remained detained.<sup>1708</sup>

## Dangerous criminal declaration

The only provision regarding indefinite detention in Tasmania permits an offender, deemed by the court to be a ‘dangerous criminal’, to be held in custody after the term of his or her sentence.<sup>1709</sup> The offender must be reviewed every two years, and any discharge is unconditional – without licence or continued supervision.<sup>1710</sup>

The declaration is made in regard to some violent criminals<sup>1711</sup> and is not specific to sexual offenders. Based on the information obtained by the Royal Commission under summons or notice, the Sentencing Research records that, of the seven declarations currently in force, five relate to sex offenders (although the proportion of child sex offenders in this group is unknown).<sup>1712</sup>

### 36.3.4 What we were told in submissions

In his submission in response to the Consultation Paper, the Victorian DPP noted the practice in New South Wales of offenders being advised of the possibility of post-sentence supervision and/or detention at the outset of their sentence or at least within three years of the end of their sentence so that those offenders have the opportunity to participate in treatment and other rehabilitative activities leading up to the end of their sentence. The Victorian DPP expressed the view that the adoption of a similar process in Victoria would be beneficial.<sup>1713</sup>

The Victims of Crime Commissioner for the Australian Capital Territory expressed support for the introduction of an extended supervision and detention scheme in the Australian Capital Territory.<sup>1714</sup>

The Law Council of Australia submitted that it shares the human rights concerns that commentators have raised regarding continued supervision and detention orders. It also noted some comments from the judiciary regarding the accuracy of the risk assessment tools that are used in assessing whether a continued supervision or detention order is required.<sup>1715</sup> The Law Council of Australia recommended that the Royal Commission consider risk assessment methodologies to assess their validity, rigour and predictive power.

In its submission, Legal Aid NSW argued that sex offences committed as juveniles should not make an offender eligible to be considered for an extended supervision or detention order under the *Crimes (High Risk Offender) Act 2006* (NSW).<sup>1716</sup> Legal Aid NSW also raised concerns about the disproportionate impact of the high-risk offender provisions on Aboriginal and Torres Strait Islander offenders and those with a cognitive impairment.<sup>1717</sup>

Victoria Legal Aid submitted that the support and management of offenders subject to extended supervision and detention orders could be improved to support their rehabilitation.<sup>1718</sup> Victoria Legal Aid queried whether a subset of those subject to extended supervision or detention orders could be better managed under mental health or disability orders, with treatment more tailored to the needs of the offender.<sup>1719</sup>

In its submission, the Aboriginal Legal Service (NSW/ACT) expressed concern about the disproportionate impact of extended supervision and detention orders on Aboriginal and Torres Strait Islander people, submitting that the cost of implementing the regime would be better spent on supporting an offender's rehabilitation in the community.<sup>1720</sup>

### 36.3.5 Conclusions

Extended supervision and detention orders are used in relatively few cases to manage those sex offenders who continue to pose a risk beyond the term of their sentence. Given the limited use of such orders, we do not consider that there is sufficient evidence to justify making a recommendation on their broader adoption. We encourage all state and territory governments to consider their regimes for managing serious sex offenders beyond their imprisonment, including the use of the most accurate risk prediction methodologies available.

## 36.4 Risk management on release

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### 36.4.1 Introduction

This section discusses the ongoing risk management of child sex offenders at the end of their sentence, including at the end of their parole period or supervision order. Ongoing consequences of a conviction for a child sexual abuse offender include placement on a sex offender registry, with corresponding reporting obligations and an inability to work in child-related employment.

Our particular interest is in legal obligations that aim to protect children in institutional contexts from contact with a convicted child sexual abuse offender after his or her sentence or order has expired.

### 36.4.2 Child sex offender registries

New South Wales was the first jurisdiction to implement a child sex offender registration scheme, which commenced in 2000. An Australian Child Protection Offender Reporting scheme has since been established by legislation in each Australian state and territory. Each jurisdiction has a register, variously named the 'child protection register',<sup>1721</sup> 'sex offender register',<sup>1722</sup> 'community protection offender register',<sup>1723</sup> the 'register of child sex offenders',<sup>1724</sup> the 'child sex offenders register',<sup>1725</sup> and the 'child protection offender register'.<sup>1726</sup>

We will use 'sex offender register' to refer to registries in each jurisdiction.

This national scheme requires child sex offenders, and other defined categories of serious offenders against children, to keep police informed of their address and other personal details for a prescribed period of time after the expiry of their sentence.<sup>1727</sup>

At the time of sentence, a person convicted of a registerable offence will be given notice of their requirement to report. This means that they are placed on the sex offender register and have reporting obligations. A registerable offence generally covers all indictable child sexual offences, which are usually split into classes of seriousness.<sup>1728</sup> Registered offenders may be required to report to police for different periods of time depending upon the class of their offence. Repeated offences drawn from different incidences of offending attract a reporting obligation for life.<sup>1729</sup>

A person on a sex offender register must report to police certain personal information – and any changes to the information – such as name, date of birth, address, whether any child resides with them, work details, details of any club they participate in that has child membership, car details, any information regarding an intention to leave the state, and details of internet connectivity.<sup>1730</sup> Police are able to inspect properties to ensure that information on the register is correct and up to date.<sup>1731</sup>

A registerable person must report to any police station within seven days of release<sup>1732</sup> and usually annually thereafter<sup>1733</sup> (except where something changes within that year – a child commencing to reside with the person must be reported within 24 hours and everything else must be reported within seven days of the change).<sup>1734</sup> Failure to comply with the reporting obligations is a criminal offence.<sup>1735</sup>

In its submission in response to the Consultation Paper, the New South Wales Government noted that there are additional initiatives in New South Wales, linked to the sex offender register, to manage the risk posed by child sex offenders after their release.<sup>1736</sup>

Police can apply for child protection prohibition orders under the *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW). Child protection prohibition orders stop registrable persons engaging in activities that pose a risk to the safety of children, such as loitering near schools and other areas where children congregate or accessing certain websites.<sup>1737</sup>

An additional avenue for ongoing monitoring of sex offenders in the community is through the Child Protection Watch Teams convened by the NSW Police Force. To be eligible for management by a Child Protection Watch Team, an offender must be a registrable sex offender, and at least one of the following criteria must be met when deciding whether to refer an offender to a Child Protection Watch Team:

- the offender has been assessed as a high risk of child sexual offending, as defined by a rating of high on the Sex Offender Supervision Assessment
- the offender has been assessed by a psychologist as having high levels of dynamic risk factors
- the offender has a conviction for an offence of violence against children
- the offender is likely to attract, or has attracted, media attention
- information or intelligence indicates that the offender poses a current risk to children
- changes to the offender's circumstances have resulted in an increased risk to children.<sup>1738</sup>

Eligible offenders must be reviewed against the above criteria at the following times:

- prior to release from custody to parole supervision or at sentence expiry
- at the commencement of community supervision
- during supervision, if the offender's circumstances change
- each time the case plan is reviewed
- at expiry of a supervision order (offenders do not have to be under supervision to be managed by a Child Protection Watch Team).<sup>1739</sup>

We note that offender prohibition orders are also available in other jurisdictions.<sup>1740</sup>

After the publication of the Consultation Paper, Tasmanian enacted the *Community Protection (Offender Reporting) Amendment Act 2016* (Tas), which made a number of changes to the Tasmanian sex offender registration regime, including:

- tightening reporting requirements, including for travel to and from Tasmania by reportable offenders, including those from other states and territories
- allowing magistrates to make Community Protection Orders prohibiting or restricting certain conduct
- additional investigative powers for police
- provision for the Commissioner of Police to suspend or vary reporting obligations for reportable offenders who are under 18.<sup>1741</sup>

The Act will commence on proclamation.<sup>1742</sup>

A number of jurisdictions identify the objectives of the sex offender register as being to keep police informed of details so to reduce the likelihood of reoffending; and to facilitate the investigation and prosecution of any future offences.<sup>1743</sup> In Victoria, South Australia and the Australian Capital Territory, the relevant legislation also states that a key objective of the scheme is to prevent registered sex offenders from working in child-related employment.<sup>1744</sup>

In October 2016, the Commonwealth Minister for Justice announced the establishment of a joint working group of senior Australian police and justice officials, formed through the Law, Crime and Community Safety Council, to consider reforms to state and territory sex offender registration schemes. The reforms to be considered include:

- exploring the effectiveness of public notification schemes
- seeking a commitment from states and territories that their post-sentence court-ordered schemes can be applied to Commonwealth child sex offenders
- options for restricting overseas travel by convicted child sex offenders.

The working group was to report in the first half of 2017.<sup>1745</sup>

In November 2016, the Commonwealth Minister for Foreign Affairs and the Minister for Justice issued a joint media release announcing that the Australian Government would develop new measures to stop child sex offenders from travelling overseas.<sup>1746</sup>

### 36.4.3 Interaction with Working with Children Check schemes

As discussed in section 36.2.3, we made recommendations about WWCC schemes in our *Working with Children Checks report*.<sup>1747</sup> If these recommendations are implemented, there are likely to be relatively few categories of child sexual abuse offence that, when committed by an adult offender, do not trigger automatic disqualification from eligibility to hold a WWCC clearance.

However, under current WWCC, without the implementation of our recommendations, some WWCC schemes do not automatically disqualify people who are currently registered on the sex offender register or convicted of certain offences from obtaining a WWCC clearance. This may be because it is possible for, say, a teenager to be put on the sex offender registry because they conducted a sexual relationship with a person of similar age, who was below the age of the consent (for example, a 19-year-old and a 15-year-old in a consensual relationship that may also have involved 'sexting'). In these types of cases, an assessment of the 19-year-old person may be more appropriate than automatic disqualification.

In all jurisdictions, a person who is currently registered on the child sex offender registry will generally be unable to hold a WWCC clearance.

The legislative provisions reflect three different approaches:

- In Western Australia, while the legislation does not explicitly prohibit registered sex offenders from working in child-related employment, this is the practical effect of the WWCC legislation.
- In Victoria and Queensland, the WWCC provisions explicitly disqualify registered sex offenders from applying to work with children. In New South Wales the WWCC provisions explicitly disqualify an adult from being granted a clearance if they have committed a registrable offence.
- In the remaining jurisdictions, and in Victoria in addition to the provisions in the WWCC legislation, the sex offender registration legislation provides that it is an offence for registered sex offenders to work or to apply to work in child-related employment.

### 36.4.4 What we were told in submissions

In its submission in response to the Consultation Paper, Protect All Children Today expressed support for child sex offender registries and ongoing police inspections of offenders to maintain community safety.<sup>1748</sup>

CLAN expressed support for a public child sex offender register and provisions preventing registered child sex offenders from travelling interstate or overseas.<sup>1749</sup>

In his submission, Mr Reginald Little suggested that all WWCCs be subject to a national police check and, in the case of a person who has emigrated from another country, a police check in their country of origin.<sup>1750</sup> Mr Little also submitted that child sex offenders should not be allowed to change their name.<sup>1751</sup>

A number of submissions discussed the position of juveniles in relation to sex offender registration and WWCCs. We discuss these issues in Chapter 37.

In Case Study 50, we examined current policies and procedures of Catholic Church authorities in Australia in relation to child protection and child safety standards, including responding to allegations of child sexual abuse. In the public hearing in Case Study 50, Ms Andrea Musulin, Safeguarding Project Coordinator for the Perth Catholic Archdiocese, gave evidence about concerns she had in relation to the management of sex offenders in the community. Ms Musulin expressed concern that a person on the sex offender register may come back to a parish after their sentence, and the church may have very little information regarding how to manage that situation. Ms Musulin said:

So, for an example, the choirmaster, for want of a better word, has gone to prison because he has sexually offended against children in the parish. He has come out of prison, he has come back to Church, someone has recognised him and has told the parish priest or has come straight to my safeguarding officer; the safeguarding officer has brought that directly to me.

Sometimes, that's the only information we get. We know that he's a child sex offender or she's a child sex offender, but no other information is coming forward, yet we're expected to manage these people.<sup>1752</sup>

Ms Musulin indicated that, while she understood that there would be some information about the offender on the register that should not be shared, she thinks police should ask registered sex offenders if they are attending a church and then pass that information along to the church to assist them in mitigating any risks to children posed by the offender.<sup>1753</sup>

### 36.4.5 Conclusions

Implementation of our recommendations on WWCC schemes would strengthen some of the current provisions preventing convicted child sexual offenders – who would be on the sex offender registers – from seeking or obtaining WWCC clearances. However, it does not appear that there are significant gaps in the interaction between sex offender registration and current WWCC schemes, subject to the conduct and outcome of any risk assessments permitted under the current WWCC schemes.

If there is delay in implementing our recommendations on WWCC schemes, the interaction between sex offender registration and current WWCC schemes might possibly be strengthened in some jurisdictions by amending sex offender registration legislation to prohibit registered sex offenders from working or applying to work in child-related employment. We encourage state and territory governments to continue to review their sex offender registration and WWCC schemes to ensure that all registered sex offenders are prohibited from working or applying to work in child-related employment.

We note concerns that information on child sex offender registers should be made public, whether generally or in a targeted fashion. As discussed in section 36.4.2, the purpose of such registers is to keep police informed of offender details to assist police in reducing the likelihood of reoffending, facilitating the investigation and prosecution of any future offences, and, in some jurisdictions, preventing registered sex offenders from working in child-related employment.

We are satisfied that police are best placed to manage the supervision of registrable child sex offenders in the community. Where police have identified a risk due to the behaviour of a registered offender, they can seek a prohibition order to manage that risk. Where a member of the public identifies that a particular person, in their view, poses a risk to the safety of children, they should report the circumstances to police.

The issue of making child sex offender registers public has been a sensitive and controversial issue for some time and is currently under consideration in other forums. It has not been raised with us as an issue that has any particular significance in relation to child sexual abuse in an institutional context. We have not examined the issue in detail and we are satisfied that we should not make any recommendations in relation to it.



# PART IX JUVENILE OFFENDERS



## 37 Juvenile offenders

### 37.1 Introduction

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It is apparent that there is a significant level of sexual abuse committed by children on other children.

In our *Interim report*, we stated:

Some child sexual abuse occurs between peers. We are aware there is a range of complex factors that will influence whether a child shows abusive behaviours, including whether they have experienced prior abuse or maltreatment. We have heard – through submissions and discussions at our first roundtable, held in April 2014 – that this is an area of concern and could have significant implications in institutions and out-of-home care.

Australian police statistics from 2003–04 show that children under 17 committed 9 to 16 per cent of all the child sexual abuse offences recorded.<sup>1754</sup> [References omitted.]

Child-to-child sexual abuse may involve peers, but it can also involve sexual abuse committed by a child of a different age, particularly older children who abuse younger children.

We have heard from many victims and their families and survivors of their experiences of being sexually abused by other children in institutions.

For example, in Case Study 30 on the experiences of former child residents at Victorian youth training and reception centres between the 1960s and early 1990s, we heard evidence that some survivors who were placed in those residential institutions witnessed older child residents sexually abusing younger residents and experienced such abuse themselves on many occasions.<sup>1755</sup>

In Case Study 17 on the Retta Dixon Home, survivor AJA gave evidence about the sexual abuse inflicted on her by boys at the home. When she was as young as five, she said boys living at the home had sex with her. She said she did not report the abuse at the time because she did not understand it to be wrong. She thought it was normal behaviour and part of life. She said that, even if she had known the abuse was wrong, there was no-one she could trust to whom she could report it. She felt she would have been punished for lying.<sup>1756</sup>

We heard evidence in Case Study 45 of children being abused by other children in schools. We discuss some of the evidence that survivors gave in this case study in section 37.2.

We are conducting a separate project in relation to children with harmful sexual behaviours generally, including children whose behaviour would not attract a criminal justice response, whether because of the age of the child engaged in the behaviour, the capacity of that child to understand the criminal nature of that behaviour or otherwise. We will report on that work in our final report. In this chapter, we consider the criminal justice system's response to child sexual abuse committed by children.

The criminal justice system will only respond to child-to-child sexual abuse if the child perpetrating the abuse is old enough to be held criminally responsible for their actions. Children under 10 cannot be charged or prosecuted. For children between 10 and 13 years of age, the prosecution bears the burden of proving that they should be held criminally responsible for their actions.

Even for children over the age of criminal responsibility, different considerations may arise if the sexual offending is ‘consensual’ and between children of similar ages.

However, in institutional contexts, there may be a risk that child-to-child sexual abuse is not taken as seriously as it should be. Institutional staff, as well as parents or carers of the children, may not recognise or understand the seriousness of the behaviour and they may downplay the abuse.<sup>1757</sup>

If children are reported to the police and a criminal justice response is pursued, the criminal justice system typically treats juvenile offenders differently from adult offenders. Children are usually tried in different courts. If they are convicted, children are sentenced in accordance with different sentencing principles and they are eligible for different types of sentences. If children receive a custodial sentence, it will generally be served in a juvenile or youth detention facility rather than an adult prison.

However, not all juvenile offenders are treated differently from adults by the criminal justice system, particularly in circumstances where the offending is considered to be serious.

In the Consultation Paper we said that treatment is likely to be a significant priority for many children with harmful sexual behaviour. This may be particularly the case for children who are below the age at which they will be held criminally responsible for their actions. It might also be a consideration for some children who are dealt with in the criminal justice system.

In this chapter, we outline some of the pathways to treatment via the criminal justice system. The issue of treatment for children with harmful sexual behaviour will be considered in our separate project in relation to children with harmful sexual behaviour, and we will report on it separately to our work on criminal justice.

In this chapter, we discuss the data and research we have on juvenile child sexual abuse offenders and alleged offenders and how the criminal justice system responds to them. We also discuss the wide spectrum of sexual behaviour which may be considered criminal offending.

At the time of publishing the Consultation Paper, apart from the issue of treatment, the criminal justice system’s response to child-to-child sexual abuse had not been raised with us as a significant issue. Concerns had been expressed by some about what are considered to be inadequate responses to the issue by police as well as by institutions, child protection agencies and others. However, the response sought by those expressing those concerns has focused on

access to treatment and, if necessary, diversion from the criminal justice system rather than a traditional criminal justice response of investigation, charging and prosecution. These concerns will be considered in our separate project in relation to children with harmful sexual behaviour.

## 37.2 Defining juvenile offending

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In our separate project in relation to children with harmful sexual behaviours generally, including children whose behaviour would not attract a criminal justice response, we refer to children with ‘harmful sexual behaviours’. Children of all ages may exhibit harmful sexual behaviour. This behaviour may harm only the development of the child exhibiting the behaviour or it may cause harm to others.

Only some harmful sexual behaviour by children might potentially constitute criminal offending. In order potentially to constitute criminal offending:

- the child must be regarded by the law as having criminal responsibility for their actions – we discuss the age of criminal responsibility in section 37.4
- the behaviour must constitute the physical element of a criminal offence – for example, a young adolescent engaging in compulsive masturbation might raise concerns, but the behaviour will not constitute a criminal offence.

Harmful sexual behaviour by children might constitute criminal offending even if it is not considered to be particularly harmful. For example, where the age of consent is 16 years of age, two 15-year-olds having sexual intercourse will be committing a criminal offence. This is the case even where there is no force, coercion or manipulation and the children were equally willing participants.

In Case Study 45, we were told that there is no consistent terminology to describe the ‘sexually abusive’ behaviours of children.<sup>1758</sup>

In a 2010 report, *Australia’s response to sexualised or sexually abusive behaviours in children and young people*, undertaken for the Australian Crime Commission, Dr Wendy O’Brien urged caution in the choice of words used to describe children with harmful sexual behaviours. She stated:

Careful use of terminology is required to ensure that systems can respond appropriately, and with sensitivity, to the broad spectrum of sexualised behaviours and the conditions that are likely to have contributed to them.<sup>1759</sup>

In Australia, legislators, policymakers, practitioners and academics use various descriptors for children who sexually harm other children (and adults), including:

- ‘problematic’, ‘inappropriate’ or ‘concerning’ sexual behaviours for children under the age of 10<sup>1760</sup>
- ‘sexually abusive behaviours’ for children aged 10 to 17<sup>1761</sup>
- ‘juvenile sexual offending’ for children aged 10 to 17
- ‘sexually harmful behaviours’ or ‘harmful sexual behaviours’ for children of any age.<sup>1762</sup>

In our criminal justice work, we are considering only that ‘harmful sexual behaviour’ by children that might constitute juvenile sexual offending – and, of course, we are focusing on sexual offending against other children and not against adults.

We recognise that practitioners may prefer not to use terms such as ‘perpetrators’ or ‘sex offenders’ in relation to children because they argue that such labels are stigmatising, damaging and inaccurate for many children with lower-level sexual behaviour problems.<sup>1763</sup>

However, it must also be recognised that children are capable of committing the most serious sexual offences against other children (and adults). We consider it essential not to lose sight of the serious nature of sexual abuse committed by some children. Serious sexual abuse committed by children may have severe, possibly lifelong, consequences for the victims, and juvenile sex offenders can present serious threats against which the community requires protection.

Evidence of serious juvenile sexual offending was tendered in Case Study 45 in relation to children with problematic or harmful sexual behaviours. For example, a police statement by a student of Trinity Grammar School, CLA, was tendered during the course of the public hearing.<sup>1764</sup> In the police statement, CLA described being held down by two other students who forced a wooden dildo into his anus and he said that this kind of abuse occurred repeatedly.<sup>1765</sup> CLA did not give evidence in the hearing; however, other students gave evidence of being sexually abused by other students.<sup>1766</sup>

In Case Study 11 in relation to the Congregation of Christian Brothers in Western Australia response to child sexual abuse at Castledare Junior Orphanage, St Vincent’s Orphanage Clontarf, St Mary’s Agricultural School Tardun and Bindoon Farm School, a number of survivors gave evidence that they were sexually abused, or were threatened with sexual abuse, by other boys. For example, Mr John Hennessey said that another boy at Bindoon frequently raped him when they would ‘clear off into the bush after church’. The boy was the same age as Mr Hennessey but much bigger. Although it ‘started off as mutual masturbation’, the boy would track Mr Hennessey down in the bush, hold him down and anally penetrate him.<sup>1767</sup>

In Case Study 40 in relation to the experiences of survivors of child sexual abuse in institutions operated by the Australian Defence Force, some former junior recruits gave evidence of being sexually abused by other junior recruits. For example, CJA gave evidence that he was sexually abused by other junior recruits and witnessed the sexual abuse of other junior recruits.<sup>1768</sup> In his statement he said:

I was forced to take part in homosexual 'games'. This included being forced to perform sexual acts on junior recruits such as oral sex and masturbation. This mostly happened at night after rounds. Most of these attacks happened in the outside area concealed by trees and other times in our rooms or the bathrooms. Sometimes on the weekends, when there were fewer staff around, these attacks happened in broad daylight in open areas such as playing fields. Even when base staff did witness something suspicious, they just walked away. Sometimes base staff were involved.

On multiple occasions, I was snatched from my bed in the middle of the night by older recruits and dragged to a sports oval. I was forced to suck another junior recruit's penis or lick a junior recruit's anus. This was often after the junior recruit had been buggered by an older recruit and had been ejaculated into. Other times I was forced to have anal intercourse with other junior recruits, or I was raped by another junior recruit who was directed to do so by the older recruits or base staff. This happened repeatedly.<sup>1769</sup>

The potential severity of juvenile sex offending can also be demonstrated by considering sexual offending outside of an institutional context. Each of the most notorious 'gang rape' cases in the western and south western suburbs of Sydney in the early 2000s involved serious sexual offending by one or more juveniles as follows.

- In *R v AEM, R v KEM and R v MM*,<sup>1770</sup> in 2000, three teenagers (two brothers and a cousin), two of whom were 16 at the time of the attack, each pleaded guilty to two counts of aggravated sexual assault, and had one or more other matters taken into account on a 'Form 1', against two girls who were then 16.

The victims were forcibly detained at the home of the two brothers over a four-hour period. They were subjected to a series of 'sexual assaults of the most degrading kind' by AEM Snr, KEM and MM. The victims were kept separate from each other for a lengthy period of time and they were subjected to physical violence and numerous death threats. A knife was produced by two of the offenders (on separate occasions) in a way which could only have provoked fear of death or mutilation in the victims.<sup>1771</sup>

The sentencing judge described each offender as having 'indulged in a gross display of sexual misconduct, adopting a pack mentality whereby they exploited the victims' fear, vulnerability and isolation from each other' and stated, 'one can only guess at the victims' humiliation in being passed from one offender to the next, in circumstances which suggest that these young men placed their reputation for sexual conquest above the standards of ordinary human decency'.<sup>1772</sup>

A fourth juvenile, AEM Jnr, another brother who was 17 at the time, was also convicted and sentenced in respect of offences on the night.

We discuss this case further in section 37.8.

- The offending in the series of gang rapes involving various of the Skaf brothers and others included offending by Mohammed Skaf, who was 17 at the time of the offending, against 'Ms D',<sup>1773</sup> and against 'Ms C';<sup>1774</sup> and by Mohamed Ghanem, who was 17 at the time of the offending, against 'Ms F' and 'Ms P'.<sup>1775</sup> Bilal Skaf was 18 at the time of offending against all of these victims.<sup>1776</sup>
- The 'K brothers', MSK, MAK, MRK, MMK were all found guilty of a violent pack rape on two schoolgirls. They lured two girls, known as LS and HG, to their home. Two of the brothers, MRK and MMK, were younger than 18, as were both the victims.<sup>1777</sup> MMK was convicted on nine counts of sexual intercourse in company without consent.<sup>1778</sup> MRK was convicted on nine sexual assault charges on the basis that he participated in a joint criminal enterprise with four other offenders, three of whom were his brothers. The trial judge said of the offending: 'The rapes committed upon both LS and HG are, in my opinion, one and all clearly within the worst case category of that crime.'<sup>1779</sup>

These examples illustrate that it cannot be assumed that all juvenile sex offending is of a less serious nature than sex offending by adults.

## 37.3 Data on juvenile offending

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### 37.3.1 Data in the Consultation Paper

In the Consultation Paper we referred to a suggestion that there is a void in the literature when it comes to how juvenile sex offending is dealt with by the criminal justice system in Australia and overseas.<sup>1780</sup>

There are considerable difficulties in gauging the prevalence of child sexual abuse offences committed by children. There are the common problems of under-reporting of sexual abuse and child sexual abuse offences generally and high rates of attrition of reports within the criminal justice system.

There may also be additional difficulties with data about child sexual abuse offences committed by children. For example, the Australian Bureau of Statistics (ABS) definition of 'sexual abuse' in its 2012 Personal Safety Survey, which applied in relation to the sexual abuse of children aged 14 or younger, precluded the collection of data about juvenile offenders. The definition required an 'act *by an adult* involving a child (before the age of 15 years) in sexual activity' (emphasis added).<sup>1781</sup>

In the Consultation Paper we gave an overview of the data available in relation to the prevalence of child sexual offences committed by children and how the criminal justice system, particularly courts, responded to alleged juvenile offenders. Where possible, we have updated that data below.



Both Australian and international research over several decades has shown that, of the complaints of child sexual abuse that are reported to the police, only a small proportion result in prosecution and conviction (the most consistent figures range between 8 per cent and 15 per cent).<sup>1782</sup> The statistics are generally lower for juvenile offenders and show a decreasing trend over time in the number of prosecutions finalised.

A very small proportion of offences dealt with by Australian courts are juvenile sex offences. Of a total of 602,759 defendants for all criminal matters finalised in Australian criminal courts in 2015–16, only 684, or 0.1 per cent, were defendants in sexual assault and related matters finalised in Children’s Courts.<sup>1783</sup>

Sex offence matters also made up a very small proportion of the case load of Children’s Courts. In 2015–16, only 2.5 per cent of defendants finalised in the Children’s Courts were defendants in sex offence matters, compared with 0.9 per cent in Magistrates Courts and 18.7 per cent in the higher courts.<sup>1784</sup>

The ABS data on the finalisation of sex offence cases in the Children’s Courts in 2015–16 shows that prosecutions against juveniles were more likely to be withdrawn when compared with prosecutions for other offences. Of juveniles charged and prosecuted for sexual offences, 9.5 per cent resulted in an acquittal, 49.7 per cent were proven guilty and 20.5 per cent were withdrawn by the prosecution. The percentage of sex offence matters withdrawn by the prosecution was more than twice the percentage withdrawn for other matters prosecuted in the Children’s Courts (9.4 per cent).<sup>1785</sup>

The research report *The impact of delayed reporting on the prosecution and outcomes of child sexual abuse cases* (Delayed Reporting Research), by Professor Judy Cashmore, Dr Alan Taylor, Associate Professor Rita Shackel and Professor Patrick Parkinson AM, studied police and court data collections in New South Wales and South Australia.

In relation to the New South Wales data for the period 1994 to 2014, the Delayed Reporting Research found as follows:

- Between 1994 and 2014, 10.4 per cent of persons prosecuted for at least one sexual offence against a child were finalised in the New South Wales Children’s Court compared with 46.9 per cent in the Local Court and 42.6 per cent in the higher courts.<sup>1786</sup> In their analysis of the data, the researchers observed:

There has been considerable fluctuation in the number of defendants in the Children’s Court with finalised charges of sexual assault and indecent assault, the two most common charges of sexual offences against children and young persons in that court. The pattern for indecent assault matters broadly followed the trends for sexual assault matters, with steady increases in both from 2011 to 2014. Forty-eight young persons were committed to a higher court for the more serious offences of sexual assault and indecent assault.<sup>1787</sup>

- A slightly lower proportion of people were dealt with in the Children's Court through a defended hearing than in the higher courts (32.0 per cent in the Children's Court compared with 35.2 per cent in the higher courts) and fewer were sentenced after a plea of guilty (37.1 per cent compared with 47.1 per cent). The researchers observed that a higher proportion of matters in the Children's Court had all charges dismissed without hearing (27.4 per cent compared with 14.9 per cent), most commonly where no evidence was offered by the prosecution. Further, fewer than half of the sex offenders prosecuted in the Children's Court were convicted (47.9 per cent) compared with 62.3 per cent in the higher courts.<sup>1788</sup>

In relation to the South Australian data for the period 1992 to 2012, the researchers reported as follows:

- Between 1992 and 2012, 57.5 per cent of all charges of sexual offences in the Youth Court were dismissed prior to hearing (most commonly the Crown made applications for no further proceedings and with no evidence and no hearing).<sup>1789</sup>
- Of the cases of sexual offences heard in the Youth Court, only 9.7 per cent resulted in conviction of at least one charge, 3.3 per cent of cases resulted in a not guilty verdict or dismissal and 29.6 per cent were proven but with no conviction recorded.<sup>1790</sup>

Despite making up a very small proportion of matters finalised in the courts, recorded crime statistics show that juvenile offenders are responsible for a significant proportion of sexual offences, and they offend at a much higher rate than the general offender population. In 2014–15, for matters where the principal offence was sexual assault, the overall offender rate in Australia for people proceeded against by police was 36.6 per 100,000. The offender rate for juveniles was significantly higher than the overall rate, at 54.5 for 10- to 14-year-olds and 83.3 for 15- to 19-year-olds. All other age demographics recorded significantly lower offender rates.<sup>1791</sup>

During 2014–15, males between the ages of 10 and 17 were responsible for 17.4 per cent of all recorded sex offences by men, and females between the ages of 10 and 17 were responsible for 74.2 per cent of all recorded sex offences by females, with females between the ages of 13 and 15 responsible for 57.4 per cent of all recorded female sex offences.<sup>1792</sup>

The data shows that children between the ages of 10 and 14 commit sex offences at 1.5 times the rate of the general population and that those between the ages of 15 and 19 commit sex offences at more than twice the general population rate. Males between the ages of 10 and 17 were responsible for a significant proportion of all recorded sex offences and, while females in general commit far fewer sex offences, almost three-quarters of recorded sex offences by females in 2014–15 were attributed to females between the ages of 10 and 17.

Of course, this data includes sexual offending against adults. It also only counts sexual offending which was reported to police and in respect of which police initiated court or non-court proceedings.

We also undertook a much smaller data project in relation to multidisciplinary and specialist police data, discussed in section 7.5.4. That project sampled 100 matters accepted by the New South Wales Joint Investigation Response Team (JIRT) Referral Unit (JRU) where the initial report involved possible child sexual abuse. It found that 19 of the 100 matters sampled involved possible child sexual abuse in an institutional context. Of these 19 matters, 11 involved allegations against adults and eight involved allegations against children under 18 years of age.

### 37.3.2 Police Data Report

#### Introduction

Since publishing the Consultation Paper, we have received the report by the Centre for Population Health Research, Curtin University, *Police responses to child sexual abuse 2010–2014: An analysis of administrative data for the Royal Commission into Institutional Responses to Child Sexual Abuse* (Police Data Report). We discuss the Police Data Report in detail in Chapter 7.

One of the objectives of the Police Data Report was to undertake a more detailed statistical analysis of the extent and nature of child-to-child sexual abuse reported to police to determine:

- the number of reports involving child-to-child sexual abuse
- the nature of reported child-to-child sexual abuse, including characteristics of victims and offenders, location of incidents and severity of the alleged offences
- how police finalise reports involving child-to-child sexual abuse.

The Police Data Report analysed administrative data obtained on all actual and alleged incidents of child sexual abuse reported to police in each Australian state and territory from 1 January 2010 to 31 December 2014.<sup>1793</sup>

We discussed in section 7.4 the limitations of the police administrative data, and those limitations also apply to the discussion in this section.

As discussed in section 7.4.1, offender details (including age) were not provided in 41 per cent of reports included in the police administrative data, because most jurisdictions only enter offender details at the time a report is finalised and only if it is finalised by court proceedings.<sup>1794</sup> The reports that are able to be identified as involving a child offender are unlikely to be all reports that involved a child offender.

We discussed limitations that affect comparability across jurisdictions in section 7.4.2. In addition to the limitations discussed there, the differences in recording offender details across jurisdictions may particularly affect comparability of data in relation to child-to-child sexual abuse. The proportion of reports in which offender details were missing across jurisdictions ranged from 23 per cent of reports to 85 per cent of reports.<sup>1795</sup>

## Definitions of child-to-child sexual abuse

In the Police Data Report, a report of child sexual abuse was defined as ‘child-to-child’ sexual abuse if the age of the victim and the age of the offender were both known to be under 18 years of age at the time of the incident.

Within the ‘child-to-child’ classification, the following subcategories were developed:

- **Adolescent peer:** Cases where both the victim and the offender were known to be under 18 at the time of the incident, either the victim or the offender was over the age of 12 at the time of the incident and the age difference between the victim and the offender was less than two years.
- **Simple peer:** Cases where both the victim and the offender were known to be under 18 at the time of the incident, the age difference between them was less than one year and they were friends or otherwise known to each other.
- **Abuse by older child:** Cases where both the victim and the offender were known to be under 18 at the time of the incident and the offender was at least three years older than the victim (this category was developed later in the study and was not included in all tables in the Police Data Report).<sup>1796</sup>

Note that ‘abuse by older child’ focuses on the *relative* age difference between the victim and offender and it does not necessarily mean that the offender was older in absolute terms. That is, this category catches both a 17-year-old abusing a 13-year-old; and a seven-year-old abusing a three-year-old.

There is some overlap between the simple peer and adolescent peer categories, and the three subcategories do not include all cases of child-to-child sexual abuse.<sup>1797</sup> The relationship between the subcategories of child-to-child sexual abuse within the category of child-to-child sexual abuse is depicted in the Police Data Report.<sup>1798</sup>

## Reports of child-to-child sexual abuse

The Police Data Report included data on the prevalence of reported cases of child-to-child sexual abuse in all jurisdictions.<sup>1799</sup>

Table 37.1 sets out by jurisdiction and in total the number and rate per 1,000 children of:

- all reports of child-to-child sexual abuse
- reports of child-to-child sexual abuse classified as ‘simple peer’
- reports of child-to-child sexual abuse classified as ‘adolescent peer’
- reports of child-to-child sexual abuse classified as ‘abuse by older child’.

**Table 37.1: Reported cases of child-to-child sexual abuse, 2010–2014, all jurisdictions, reports received, categories of child-to-child sexual abuse<sup>1800</sup>**

Jurisdiction	Child-to-child total		Simple peer		Adolescent peer		Abuse by older child	
	Number	Rate per 1,000 children	Number	Rate per 1,000 children	Number	Rate per 1,000 children	Number	Rate per 1,000 children
New South Wales	8,733	5.3	856	0.5	2,757	1.7	3,959	2.4
Victoria	2,828	2.3	231	0.2	585	0.5	1,728	1.4
Queensland	5,784	5.3	511	0.5	1,035	1.0	1,968	1.8
Western Australia	1,005	1.8	28	0.0	145	0.3	462	0.8
South Australia	722	2.0	112	0.3	230	1.1	212	0.6
Tasmania	88	0.8	4	0.0	15	0.2	54	0.5
Australian Capital Territory	35	0.4	5	0.1	6	0.1	27	0.3
Northern Territory	266	4.2	19	0.3	72	1.1	122	2.0
<b>Total</b>	<b>19,461</b>	<b>3.8</b>	<b>1,766</b>	<b>0.3</b>	<b>4,845</b>	<b>0.9</b>	<b>8,532</b>	<b>1.7</b>

Table 37.1 shows that:

- 19,461 reports of child-to-child sexual abuse were made to police between 2010 and 2014 – representing 20 per cent of all reports of child sexual abuse
- 8,532 reports – approximately 44 per cent of all child-to-child sexual abuse reports – were reports of abuse by an older child, being a child of any age who is at least three years older than the victim – representing 9 per cent of all reports of child sexual abuse
- 4,845 reports – approximately 25 per cent of all child-to-child sexual abuse reports – were reports of adolescent peer abuse – representing 5 per cent of all reports of child sexual abuse.<sup>1801</sup>

The Police Data Report also found that the number of reports of child-to-child sexual abuse had increased from 2010 to 2014, at an average increase of 6 per cent per year. The largest increase occurred in the category of adolescent peer abuse.<sup>1802</sup>

### Cases of child-to-child sexual abuse that could be classified as institutional

We outlined the possible proxies for classifying reports of child sexual abuse as involving child sexual abuse in an institutional context in section 7.3.3.

As set out in section 7.3.3, the following four proxy measures of institutional child sexual abuse were used:

- ICSA\_1 – This is the broadest definition, based on the victim–offender relationship only. If the child sexual abuse is extra-familial (that is, the offender is known to the victim but not a family member) then this is categorised as ICSA\_1.
- ICSA\_2 – The child sexual abuse occurs in an institution.
- ICSA\_3 – The child sexual abuse occurs in an institution and is extra-familial.
- ICSA\_4 – The child sexual abuse occurs in an institution, is extra-familial and the relationship between victim and offender is not child-to-child.

As discussed in section 7.3.3, each of these measures has deficiencies for our purposes. ICSA\_1 would count some reports that are not institutional – for example, abuse by a family friend – but would not necessarily include some reports that are institutional within our Terms of Reference – for example, abuse by a foster parent or sibling may be classified as familial abuse.<sup>1803</sup>

The other proxy measures, ICSA\_2, ICSA\_3 and ICSA\_4, each count reports of abuse that is recorded as occurring in an institution. This is determined by reference to the location recorded in the data. Where the location was recorded, those locations that are considered

to be institutional premises, such as educational, religious or corrective facilities, consistent with classifications used by the ABS, were counted.<sup>1804</sup> However, this approach is likely to understate institutional child sexual abuse within the meaning of our Terms of Reference. For example, it would not include abuse committed by a child in residential premises against a child who is in foster care.

Table 37.2 sets out by jurisdiction and in total the number and rate per 1,000 children of reported cases of child-to-child sexual abuse that meet the criteria for ICSA\_3 – sexual abuse occurring in an institution and by an offender who is not a family member of the victim.

**Table 37.2: Reported cases of child-to-child sexual abuse, 2010–2014, all jurisdictions, reports received, ICSA\_3<sup>1805</sup>**

Jurisdiction	ICSA_3 (n)	Rate per 1,000 children
New South Wales	665	0.4
Victoria	237	0.2
Queensland	584	0.5
Western Australia	37	0.1
South Australia	83	0.2
Tasmania	≤ 3	0.0
Australian Capital Territory	5	0.1
Northern Territory	28	0.4
<b>Total*</b>	<b>1639</b>	<b>0.3</b>

\*The Total excludes the figure for Tasmania as a result of statistical disclosure controls applied in the Police Data Report.

Child-to-child sexual abuse reports that met the criteria for ICSA\_3 accounted for:

- 8 per cent of all reported child-to-child sexual abuse cases
- 2 per cent of all reported child sexual abuse.<sup>1806</sup>

## Characteristics of victims and offenders

### Gender of victims and offenders

The Police Data Report made the following findings in relation to the gender of victims and offenders in reported cases of child-to-child sexual abuse:

- Offenders are predominantly male (87 per cent), while victims are predominantly female (67 per cent).
- The proportion of female victims of child-to-child sexual abuse is lower than the proportion of female victims in child sexual abuse reports involving adult offenders.
- A slightly larger proportion of victims of reported sexual abuse by an older child are male, whereas more victims of reported peer abuse are female.<sup>1807</sup>

More detailed data in relation to the gender of the victim and offender in reported cases of child-to-child sexual abuse is set out in tables 37.3, 37.4 and 37.5.

**Table 37.3: Reported cases of child-to-child sexual abuse, 2010–2014, all jurisdictions, gender of the victim<sup>1808</sup>**

Gender	Adult-to-child n (%)	Child-to-child (total) n (%)	Simple peer n (%)	Adolescent peer n (%)	Abuse by older child n (%)	Child-to-child ICSA_3 n (%)
Male	7,913 (20%)	4,617 (24%)	406 (23%)	776 (16%)	2602 (30%)	477 (29%)
Female	29,862 (75%)	13,120 (67%)	1,359 (77%)	4,060 (84%)	5,909 (69%)	1,162 (71%)
Missing	1,983 (5%)	1,724 (9%)	1 (0%)	9 (0%)	21 (0%)	3 (0%)

**Table 37.4: Reported cases of child-to-child sexual abuse, 2010–2014, all jurisdictions, gender of the offender<sup>1809</sup>**

Gender	Adult-to-child n (%)	Child-to-child (total) n (%)	Simple peer n (%)	Adolescent peer n (%)	Abuse by older child n (%)	Child-to-child ICSA_3 n (%)
Male	38,090 (96%)	16,965 (87%)	1,535 (87%)	4,168 (86%)	7,970 (93%)	1,500 (91%)
Female	1,589 (4%)	2,480 (13%)	231 (13%)	674 (14%)	553 (6%)	141 (9%)
Missing	79 (0%)	16 (0%)	0	3 (0%)	9 (0%)	1 (0%)



**Table 37.5: Reported cases of child-to-child sexual abuse, 2010–2014, all jurisdictions, gender of the offender and victim in specific cases<sup>1810</sup>**

	Adult-to-child n (%)	Child-to-child (total) n (%)	Simple peer n (%)	Adolescent peer n (%)	Abuse by older child n (%)	Child-to-child ICSA_3 n (%)
Male offender – male victim	7,204 (18%)	3,918 (20%)	342 (19%)	557 (11%)	2,339 (27%)	432 (26%)
Male offender – female victim	28,493 (73%)	12,079 (62%)	1,192 (67%)	3,603 (74%)	5,610 (66%)	1,065 (65%)
Female offender – male victim	701 (2%)	697 (4%)	64 (4%)	219 (5%)	261 (3%)	45 (3%)
Female offender – female victim	850 (2%)	1,028 (5%)	167 (9%)	454 (9%)	292 (3%)	96 (6%)
Missing	2,510 (6%)	1,739 (9%)	1 (0%)	12 (0%)	30 (0%)	4 (0%)

In relation to child-to-child sexual abuse reports that met the criteria for ICSA\_3, tables 37.3, 37.4 and 37.5 show:

- 71 per cent of victims were female and 29 per cent of victims were male
- 91 per cent of offenders were male and 9 per cent of offenders were female
- the most common gender relationships were male offender with female victim (65 per cent) and male offender with male victim (26 per cent).

### Age of victims and offenders

The Police Data Report found that victims of reported cases of child-to-child sexual abuse by an older child (being a child at least three years older than the victim) tended to be younger than the victims of other forms of reported child-to-child sexual abuse, and nearly two-thirds were aged under 10 years.<sup>1811</sup>

More detailed data in relation to the age of victims and offenders in reported cases of child-to-child sexual abuse is set out in:

- Table 37.6 in relation to the age of the victim at the time of the incident
- Table 37.7 in relation to the age of the victim at the time of the report
- Table 37.8 in relation to the age of the offender at the time of the incident
- Table 37.9 in relation to the distribution of victim and offender ages at the time of the incident.

**Table 37.6: Reported cases of child-to-child sexual abuse, 2010–2014, all jurisdictions, age of the victim at the time of incident<sup>1812</sup>**

Age	Adult-to-child n (%)	Child-to-child (total) n (%)	Simple peer n (%)	Adolescent peer n (%)	Abuse by older child n (%)	Child-to-child ICSA_3 n (%)
Under 10	13,088 (32%)	6,435 (33%)	186 (11%)	n/a	5,505 (65%)	379 (23%)
10–14	15,663 (39%)	8,053 (41%)	923 (52%)	2,620 (54%)	3,023 (35%)	942 (57%)
15–17	8,789 (22%)	3,170 (16%)	657 (37%)	2,225 (46%)	n/a	308 (19%)

**Table 37.7: Reported cases of child-to-child sexual abuse, 2010–2014, all jurisdictions, age of the victim at the time of report<sup>1813</sup>**

Age	Adult-to-child n (%)	Child-to-child (total) n (%)	Simple peer n (%)	Adolescent peer n (%)	Abuse by older child n (%)	Child-to-child ICSA_3 n (%)
Under 10	7,219 (18%)	4,609 (24%)	170 (10%)	n/a	3,838 (45%)	339 (21%)
10–14	11,811 (30%)	7,563 (39%)	868 (49%)	2,364 (49%)	2,954 (35%)	903 (55%)
15–19	11,328 (28%)	4,060 (21%)	696 (39%)	2,410 (50%)	553 (6%)	350 (21%)
20+	7,330 (18%)	1,447 (7%)	32 (2%)	71 (1%)	1,187 (14%)	37 (2%)

**Table 37.8: Reported cases of child-to-child sexual abuse, 2010–2014, all jurisdictions, age of the offender at the time of incident<sup>1814</sup>**

Age	Child-to-child (total) n (%)	Simple peer n (%)	Adolescent peer n (%)	Abuse by older child n (%)	Child-to-child ICSA_3 n (%)
Under 10	1,301 (7%)	186 (11%)	n/a	382 (4%)	258 (16%)
10–14	9,454 (49%)	923 (52%)	2,377 (49%)	4,114 (48%)	895 (55%)
15–17	8,699 (45%)	657 (37%)	2,468 (51%)	4,036 (47%)	485 (30%)

**Table 37.9: Reported cases of child-to-child sexual abuse, 2010–2014, all jurisdictions, victim-offender age distribution**<sup>1815</sup>

	Victim			
	Age	0–4	10–14	15–17
Offender	<b>0–9</b>	357 (2%)	109 (1%)	19 (0%)
	<b>10</b>	158 (1%)	116 (1%)	4 (0%)
	<b>11</b>	185 (1%)	286 (1%)	18 (0%)
	<b>12</b>	231 (1%)	662 (3%)	67 (0%)
	<b>13</b>	242 (1%)	1,225 (6%)	192 (1%)
	<b>14</b>	206 (1%)	1,539 (8%)	357 (2%)
	<b>15</b>	153 (1%)	1,407 (7%)	755 (4%)
	<b>16</b>	101 (1%)	1,335 (7%)	898 (5%)
	<b>17</b>	80 (0%)	1,353 (7%)	863 (4%)

## Characteristics of offences

### Relationship between victim and offender

The Police Data Report found that:

- the most common relationship in reports of child-to-child sexual abuse was an offender who was known to the victim but was not a family member or a boyfriend or girlfriend of the victim
- 22 per cent of reported child-to-child sexual abuse involved abuse by a family member, which was lower than the 33 per cent of reported cases involving an adult offender which involved abuse by a family member
- in 39 per cent of reported cases of abuse by an older child, the offender was a family member.<sup>1816</sup>

More detailed data in relation to the relationship between the victim and offender in cases of child-to-child sexual abuse is set out in Table 37.10.

**Table 37.10: Reported cases of child-to-child sexual abuse, 2010–2014, all jurisdictions, relationship between victim and offender**<sup>1817</sup>

	Adult-to-child n (%)	Child-to-child (total) n (%)	Simple peer n (%)	Adolescent peer n (%)	Abuse by older child n (%)	Child-to-child ICSA_3 n (%)
Family	13,016 (33%)	4,276 (22%)	0	272 (6%)	3,298 (39%)	0
Boyfriend/ girlfriend	1,069 (3%)	824 (4%)	145 (8%)	349 (7%)	257 (3%)	0
Other known	13,479 (34%)	8,374 (43%)	1,621 (92%)	2,612 (54%)	3,392 (40%)	1,642 (100%)
Stranger	2,150 (5%)	562 (3%)	0	189 (4%)	228 (3%)	0
Missing	10,044 (25%)	5,425 (28%)	0	1,423 (29%)	1,357 (16%)	0

## Location

Table 37.11 sets out the location at which reported cases of child-to-child sexual abuse were recorded as having occurred. It shows that reported cases of child sexual abuse occurred:

- in the home in 65 per cent of reports (compared to 74 per cent of reports where the offender was an adult)
- on institutional premises in 15 per cent of reports (compared to three per cent of reports where the offender was an adult)
- in community settings in 11 per cent of reports.

The Police Data Report identified that child-to-child sexual abuse by a peer (whether simple peer or adolescent peer) occurred on institutional premises in approximately one-quarter of all such reports, and 79 per cent of reports of abuse by an older child occurred in the home.<sup>1818</sup>

**Table 37.11: Reported cases of child-to-child sexual abuse, 2010–2014, all jurisdictions, location of reported child to child sexual abuse<sup>1819</sup>**

Premise type	Adult-to-child n (%)	Child-to-child (total) n (%)	Simple peer n (%)	Adolescent peer n (%)	Abuse by older child n (%)	Child-to-child ICSA_3 n (%)
Residential	29,288 (74%)	12,638 (65%)	805 (46%)	2,387 (49%)	6,716 (79%)	0
Institutional	1,342 (3%)	2,959 (15%)	569 (32%)	1,279 (26%)	372 (4%)	1,642 (100%)
Community	4,632 (12%)	2,135 (11%)	250 (14%)	739 (15%)	727 (9%)	0
Retail/other	1,711 (4%)	437 (2%)	43 (2%)	148 (3%)	180 (2%)	0
Missing	2,785 (7%)	1,292 (7%)	99 (6%)	262 (6%)	537 V(6%)	0

### Offences by ANZSOC classification

In section 7.3.1 we explained how child sexual abuse offences are identified in accordance with the Australian and New Zealand Standard Offence Classification (ANZSOC).

As discussed in section 7.3.1, jurisdictions adopted different practices in relation to classifying child sexual abuse offences, and the offences are not necessarily consistently classified. The Police Data Report found considerable differences between jurisdictions in the classification of offences in reports of child-to-child sexual abuse. For example:

- In Victoria, almost 80 per cent of reports of child-to-child sexual abuse involved offences that were classified as aggravated sexual assault, whereas in South Australia the figure was 52 per cent.
- In New South Wales, Queensland, Western Australia and South Australia, a substantial proportion of reports of child-to-child sexual abuse involved non-assaultive offences, including offences relating to child pornography.<sup>1820</sup>

Table 37.12 sets out a breakdown of offences by ANZSOC division in reported cases of child-to-child sexual abuse.

In relation to the categories of offences, the Police Data Report found:

- 60 per cent of reports of child-to-child sexual abuse relate to offences classified as aggravated offences for the purposes of the ANZSOC classification

- a further 17 per cent of offences were classified as non-aggravated offences
- in approximately three-quarters of reports of abuse by an older child, the offence was classified as an aggravated offence and approximately 90 per cent of reports of abuse by an older child were assaultive offences
- in approximately half of reports of adolescent peer abuse, the offence was classified as an aggravated offence and a further 15 per cent of adolescent peer abuse involved child pornography offences.<sup>1821</sup>

**Table 37.12: Reported cases of child-to-child sexual abuse, 2010–2014, all jurisdictions, offence type**<sup>1822</sup>

Offence category	Adult-to-child n (%)	Child-to-child (total) n (%)	Simple peer n (%)	Adolescent peer n (%)	Abuse by older child n (%)	Child-to-child ICSA_3 n (%)
<b>Sexual assault</b>						
Aggravated sexual assault	23,836 (60%)	11,635 (60%)	1,073 (61%)	2,426 (50%)	6,266 (73%)	882 (54%)
Non-aggravated sexual assault	8,581 (22%)	3,374 (17%)	516 (29%)	1,066 (22%)	1,460 (17%)	633 (39%)
<b>Non-assaultive sexual offences</b>						
Non-assaultive sexual offences against a child	2,408 (6%)	529 (3%)	44 (2%)	125 (3%)	263 (3%)	40 (2%)
Child pornography	2,161 (5%)	2,698 (14%)	111 (6%)	749 (15%)	102 (1%)	57 (3%)
Non-assaultive sexual offences, not elsewhere classified	2,745 (7%)	1,225 (6%)	22 (1%)	479 (10%)	441 (5%)	30 (2%)

Note: Information on attempted offences was not available nationally.

## Finalisation of cases of child-to-child sexual abuse

### Time taken to finalise cases of child-to-child sexual abuse

The Police Data Report did not present a national table of finalisation results for child-to-child sexual abuse due to significant inter-jurisdictional variations in both finalisation rates and finalisation methods. However, it noted that across jurisdictions, compared to reported child

sexual abuse involving an adult offender, a higher proportion of reported child-to-child cases were finalised within 180 days. The Police Data Report also noted that, owing to small counts for some subcategories of child-to-child abuse, some caution should be exercised in interpreting finalisation results for smaller jurisdictions.<sup>1823</sup>

Table 37.13 sets out:

- the proportion of child-to-child sexual abuse cases finalised within 180 days
- the median number of days taken to finalise reported cases of child-to-child sexual abuse.

**Table 37.13: Reported cases of child-to-child sexual abuse, 2010–2014, all jurisdictions, cases finalised within 180 days, median number of days taken to finalise<sup>1824</sup>**

Jurisdiction	Number of cases n	Finalised within 180 days n (%)	Median days taken to finalise n
New South Wales	8,733	7,340 (84)	25
Victoria	2,828	1,592 (56)	63.5
Queensland	5,784	5,338 (92)	10
Western Australia	1,005	891 (89)	26
South Australia	722	672 (93)	1
Tasmania	88	82 (93)	6
Australian Capital Territory	35	33 (94)	38
Northern Territory	266	204 (77)	17.5

The comparatively short time taken to finalise reported cases of child-to-child sexual abuse is likely to relate to the method by which these cases were finalised, which is discussed below.

### How cases of child-to-child sexual abuse were finalised

Table 37.14 sets out the methods by which cases of child-to-child sexual abuse were finalised within 180 days by jurisdiction.

This data is particularly likely to be affected by the practice in some jurisdictions of recording offender details, including age, only if the case is finalised by the initiation of court proceedings. For example, in South Australia, all cases that could be identified as child-to-child cases were finalised by the initiation of court proceedings. It seems likely that this reflects recording practices rather than how all child-to-child sexual abuse cases are finalised in South Australia.

**Table 37.14: Reported cases of child-to-child sexual abuse, 2010-2014, all jurisdictions, finalised within 180 days, method of finalisation**<sup>1825</sup>

Jurisdiction	Initiation of court proceedings n (%)	Initiation of other proceedings n (%)	Resolved/no action n (%)	Unresolved n (%)
New South Wales	772 (11)	676 (9)	4,251 (58)	1,319 (18)
Victoria	887 (56)	121 (8)	97 (6)	487 (31)
Queensland	822 (15)	3,406 (64)	760 (14)	350 (7)
Western Australia	474 (53)	374 (42)	43 (5)	0 (0)
South Australia	672 (100)	0 (0)	0 (0)	0 (0)
Tasmania	51 (62)	30 (34)	≤ 3	0 (0)
Australian Capital Territory	28 (85)	5 (15)	0 (0)	0 (0)
Northern Territory	66 (32)	30 (15)	49 (24)	59 (29)

Note: No percentage figures are provided where the number of cases was equal to or less than three as a result of statistical disclosure controls applied in the Police Data Report.

In addition to recording practices, the methods of finalising child-to-child sexual abuse cases are likely to be influenced by the availability of diversionary options for juvenile offenders. We discuss diversion from the criminal justice system in section 37.6.

## Differences in types of child-to-child sexual abuse

The Police Data Report identified that the subcategory of abuse by an older child – being a child (of any age) who is at least three years older than the victim – and the subcategory of adolescent peer abuse had very different features.<sup>1826</sup>

Compared to other subcategories of child-to-child sexual abuse, abuse by an older child was more likely to:

- involve a male victim – although male victims were still a minority, as 70 per cent of victims of abuse by an older child were female
- occur in the home
- be committed by a family member
- include offences classified as aggravated sexual assault offences
- be finalised through the initiation of court proceedings.<sup>1827</sup>



Compared to other subcategories of child-to-child sexual abuse, adolescent peer abuse was:

- more likely to involve a male offender and female victim – this was the predominant gender relationship in all subcategories of child-to-child sexual abuse, but it was even more dominant in adolescent peer abuse
- more likely to occur on institutional premises
- less likely to include offences classified as aggravated sexual assault offences
- less likely to be finalised through the initiation of court proceedings.<sup>1828</sup>

## 37.4 Age of criminal responsibility

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### 37.4.1 Outline of the current law on *doli incapax*

In all Australian jurisdictions, the minimum age of criminal responsibility of a child is 10 years. That is, children under the age of 10 cannot be charged or prosecuted for acts which would – with the required mental element – constitute crimes.

From the age of 10 until a child turns 14, there is a common law presumption against criminal responsibility. That is, it is presumed – unless the prosecution proves otherwise – that a child in this age group does not possess the necessary knowledge or capacity to know that his or her conduct was wrong.

These principles are often referred to by the common law term *doli incapax*, meaning ‘incapable of crime’.

The principles apply across all Australian jurisdictions, either in legislation or as part of the common law. Table 37.15 sets out the basis for the rules in each jurisdiction.

**Table 37.15: Legal basis for age of criminal responsibility by jurisdiction**

Jurisdiction	Legal basis for age of criminal responsibility
Commonwealth	Under 10 years: <i>Crimes Act 1914</i> (Cth) s 4M; <i>Criminal Code Act 1995</i> (Cth) sch 1 ( <i>Criminal Code</i> (Cth)) s 7.1 10 to under 14 years: <i>Crimes Act 1914</i> (Cth) s 4N; <i>Criminal Code</i> (Cth) s 7.2
New South Wales	Under 10 years: <i>Children (Criminal Proceedings) Act 1987</i> (NSW) s 5 10 to under 14 years: common law <sup>1829</sup>
Victoria	Under 10 years: <i>Children, Youth and Families Act 2005</i> (Vic) s 344 10 to under 14 years: common law <sup>1830</sup>
Queensland	Under 10 years: <i>Criminal Code Act 1899</i> (Qld) sch 1 ( <i>Criminal Code</i> (Qld)) s 29(1) 10 to under 14 years: <i>Criminal Code</i> (Qld) s 29(2)
Western Australia	Under 10 years: <i>Criminal Code Act Compilation Act 1913</i> (WA) Appendix B, sch 1 ( <i>Criminal Code</i> (WA)) s 29 10 to under 14 years: <i>Criminal Code</i> (WA) s 29
South Australia	Under 10 years: <i>Young Offenders Act 1993</i> (SA) s 5 10 to under 14 years: common law <sup>1831</sup>
Tasmania	Under 10 years: <i>Criminal Code Act 1924</i> (Tas) sch 1 ( <i>Criminal Code</i> (Tas)) s 18(1) 10 to under 14 years: <i>Criminal Code</i> (Tas) s 18(2)
Australian Capital Territory	Under 10 years: <i>Criminal Code 2002</i> (ACT) s 25 10 to under 14 years: <i>Criminal Code 2002</i> (ACT) s 26
Northern Territory	Under 10 years: <i>Criminal Code Act</i> (NT) sch 1 ( <i>Criminal Code</i> (NT)) s 38(1) 10 to under 14 years: <i>Criminal Code</i> (NT) s 38(2)

The presumption against criminal responsibility for children from the age of 10 until they turn 14 varies slightly between the jurisdictions that have established the presumption by legislation. It is generally based on either the child's actual knowledge that his or her conduct was wrong or on the capacity to know.<sup>1832</sup> The burden of proof is on the prosecution to prove that knowledge or capacity.

An example of the requirement of actual knowledge is found in the Commonwealth legislation:

- (1) A child aged 10 years or more but under 14 years old can only be liable for an offence against the law of the Commonwealth if the child knows that his or her conduct is wrong.
- (2) The question whether a child knows that his or her conduct is wrong is one of fact. The burden of proving this is on the prosecution.<sup>1833</sup>

An example of the statutory presumption based on the child's capacity to know is found in the Queensland legislation:

A person under the age of 14 years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission the person had *capacity to know* that the person ought not to do the act or make the omission.<sup>1834</sup> [Emphasis added.]

The test to be applied by the prosecution to rebut the presumption of *doli incapax* was recently considered by the High Court of Australia in *RP v The Queen*.<sup>1835</sup> The majority of Kiefel, Bell, Keane and Gordon JJ referred to a number of earlier decisions, including the decision of the House of Lords in *C v Director of Public Prosecutions*,<sup>1836</sup> discussed below, and stated:

From the age of 10 years until attaining the age of 14 years, the presumption may be rebutted by evidence that the child knew that it was morally wrong to engage in the conduct that constitutes the physical element or elements of the offence. Knowledge of the moral wrongness of an act or omission is to be distinguished from the child's awareness that his or her conduct is merely naughty or mischievous. This distinction may be captured by stating the requirement in terms of proof that the child knew the conduct was 'seriously wrong' or 'gravely wrong'. No matter how obviously wrong the act or acts constituting the offence may be, the presumption cannot be rebutted merely as an inference from the doing of that act or those acts ... The prosecution must point to evidence from which an inference can be drawn beyond reasonable doubt that the child's development is such that he or she knew that it was morally wrong to engage in the conduct. This directs attention to the child's education and the environment in which the child has been raised ...

... What suffices to rebut the presumption that a child defendant is *doli incapax* will vary according to the nature of the allegation and the child. A child will more readily understand the seriousness of an act if it concerns values of which he or she has direct personal experience. For example, a child is likely better able to understand control of his or her own possessions and the theft of others' property compared to offences such as damaging public property, fare evading, receiving stolen goods, fraud or forgery. Answers given in the course of a police interview may serve to prove the child possessed the requisite knowledge. In other cases, evidence of the child's progress at school and of the child's home life will be required. It has been said that the closer the child defendant is to the age of 10 the stronger must be the evidence to rebut the presumption. Conversely, the nearer the child is to the age of 14, the less strong need the evidence be to rebut the presumption. The difficulty with these statements is that they are apt to suggest that children mature at a uniform rate. The only presumption which the law makes in the case

of child defendants is that those aged under 14 are *doli incapax*. Rebutting that presumption directs attention to the intellectual and moral development of the particular child. Some 10-year-old children will possess the capacity to understand the serious wrongness of their acts while other children aged very nearly 14 years old will not.<sup>1837</sup> [References omitted.]

In *RP v The Queen*, the appellant had been convicted of two counts of sexual assault with a child under the age of 10 years. At the time of the relevant offences, the complainant (the appellant's younger brother) was aged six years and nine months, and the appellant was approximately 11 and a half years old.<sup>1838</sup>

The facts of the relevant offences were described by Kiefel, Bell, Keane and Gordon JJ as follows:

The offence charged in count two occurred on an occasion when the appellant had been left in charge of the complainant and two other younger siblings while their father was at work. The complainant and another brother were fighting over who could play with the brother's 'stuff'. The appellant locked the complainant in a room as punishment. The complainant demanded to be let out. The appellant went into the room and said 'if you wanna come out, you gotta let me do this to ya'. He put a condom on his penis, took hold of the complainant and threw him onto a bed, pulled the complainant's pants and underpants down and inserted his penis into the complainant's anus and commenced intercourse. The complainant was crying and protesting, saying 'no, [RP], no'. The appellant put his hand over the complainant's mouth. When the appellant heard the sound of an adult returning to the home, he withdrew his penis and said to the complainant 'don't say nothin'.

The offence charged in count three took place a few weeks later. The appellant and the complainant had been left alone at their father's workplace. The appellant took the complainant to an office where the appellant exposed his penis. The complainant 'went to run away' but the appellant was blocking the door. The complainant 'went to call out for' his sister, but the appellant took hold of him and put him face down on a pile of clothing on the floor. The appellant then pulled the complainant's pants down and commenced to have anal intercourse with him. This continued for two or three minutes until the appellant heard their father returning to the office.<sup>1839</sup>

One of the grounds of appeal was whether the conviction of the appellant was unreasonable because the evidence did not establish, to the criminal standard, that the presumption that the appellant was *doli incapax* had been rebutted.<sup>1840</sup>

Apart from the inferences that could be drawn from the circumstances of the relevant offences, the only evidence concerning the appellant's intellectual and moral development at the date of the offences were two reports tendered by the prosecution (at the request of the appellant's counsel) describing the appellant's IQ and an assessment by a clinical psychologist,

Mr Champion. The assessments in the reports were made some years after the offending, when the applicant was 17 and 18 years of age. The reports contained findings that the appellant was of 'borderline range of intellectual functioning' and Mr Champion reported 'turmoil and dysfunction' in his upbringing, including an exposure to family violence and possibly being a victim of molestation.<sup>1841</sup>

The High Court found that the prosecution did not adduce any evidence apart from the circumstances of the offences to establish that, despite the appellant's intellectual deficits, the applicant's development was such that he understood the moral wrongness of his acts, and that the prosecution had not rebutted the presumption of *doli incapax*.<sup>1842</sup> In relation to the circumstances themselves and what evidence could have been adduced to rebut the presumption, Kiefel, Bell, Keane and Gordon JJ stated:

It is common enough for children to engage in forms of sexual play and to endeavour to keep it secret, since even very young children may appreciate that it is naughty to engage in such play. The appellant's conduct went well beyond ordinary childish sexual experimentation, but this does not carry with it a conclusion that he understood his conduct was seriously wrong in a moral sense, as distinct from it being rude or naughty.

The evidence of the appellant's use of the condom is significant. Given the way the appeal was conducted, it was an error for Davies and Johnson JJ to disregard it in determining whether, upon the whole of the evidence, it was open to the trial judge to be satisfied that the presumption had been rebutted and the appellant's guilt of the offence charged in count two established beyond reasonable doubt. The fact that a child of 11 years and six months knew about anal intercourse, and to use a condom when engaging in it, was strongly suggestive of his exposure to inappropriate sexually explicit material or of having been himself the subject of sexual interference. Mr Champion's report did not serve to allay the latter suggestion. Mr Champion referred to comments made by the appellant and the appellant's father which he considered to be indicative of unsatisfactory aspects of the appellant's upbringing. Mr Champion considered it possible that the appellant was the victim of sexual molestation. Despite this possibility, which was plainly pertinent to the only issue at the trial, the prosecution did not call the father or other persons responsible for the appellant's care to give an account of the environment in which he was raised.

The conclusion drawn below that the appellant knew his conduct, in having sexual intercourse with his younger sibling, was seriously wrong was largely based on the inferences that he knew his brother was not consenting and that he must have observed his brother's distress. It cannot, however, be assumed that a child of 11 years and six months understands that the infliction of hurt and distress on a younger sibling involves serious wrongdoing. While the evidence of the appellant's intellectual limitations does not preclude a finding that the presumption had been rebutted, it does point to the need for clear evidence that, despite those limitations, he possessed the requisite understanding ...

... In relation to the offences charged in counts two and three, there was no evidence about the environment in which the appellant had been raised or from which any conclusion could be drawn as to his moral development. The circumstance that at the age of 11 years and six months he was left at home alone in charge of his younger siblings does not so much speak to his asserted maturity as to the inadequacy of the arrangements for the care of the children, including the appellant. No evidence of the appellant's performance at school as an 11-year-old was adduced. In the absence of evidence on these subjects, it was not open to conclude that the appellant, with his intellectual limitations, was proved beyond reasonable doubt to have understood that his conduct, charged in counts two and three, in engaging in sexual intercourse with his younger brother was seriously wrong in a moral sense.<sup>1843</sup>

In the Consultation Paper, we outlined the case of *R v CRH*<sup>1844</sup> in the New South Wales Court of Criminal Appeal. One of the grounds of appeal in that case was whether the trial judge correctly rejected a claim that the appellant was *doli incapax* at the relevant time. The appellant (who was either 12 or 13 at the time of the offence) was found guilty of having sexual intercourse with a six-year-old child.

The evidence relied on by the Crown in rebuttal of the presumption of *doli incapax* was the complainant's evidence of the episodes of sexual abuse, including her evidence that during one of the episodes of abuse, when the appellant heard the complainant's sister walk into the room, he pulled a blanket over the complainant's head and told the sister that the complainant was hiding. The appellant had made no admissions to the police or anybody that he had committed any of the acts for which he stood charged, and evidence was not called from the complainant's sister.

The trial judge accepted that the behaviour of covering the complainant's head during the act of sexual abuse indicated the appellant's knowledge that what he was doing at the time was wrong, and the judge refused the application of *doli incapax* on that basis.

Justice Newman in the New South Wales Court of Criminal Appeal quoted the following passage from the then recent decision of the House of Lords in *C (A Minor) v Director of Public Prosecutions*:<sup>1845</sup>

A long and uncontradicted line of authority make two propositions clear. The first is that the prosecution must prove that the child defendant did the act charged and that when doing the act he knew that it was a wrong act as distinct from an act of mere naughtiness or childish mischief. The criminal standard of proof applies. What is required has been variously expressed, as in *Blackstone*, 'strong and clear beyond all doubt or contradiction,' or, in *Rex v Gorrie* (1918) 83 JP 136, 'very clear and complete evidence' or, in *B v R* (1958) 44 Crim App R 1, 3 per Lord Parker CJ, 'it has often been put this way, that ... "guilty knowledge must be proved and the evidence to that effect must be clear and beyond all possibility of doubt."' ...

The second clearly established proposition is that evidence to prove the defendant's guilty knowledge, as defined above, must not be the mere proof of the doing of the act charged, however, horrifying or obviously wrong that act may be. As Erle J said in *Reg v Smith (Sydney)* (1845) 1 Cox CC 260: 'a guilty knowledge that he was doing wrong – must be proved by the evidence, and cannot be presumed from the mere commission of the act ...'.<sup>1846</sup>

Justice Newman then reviewed 'such Australian authority as exists' and concluded that it was consistent with the law as expressed by Lord Lowry in *C v Director of Public Prosecutions*.<sup>1847</sup> Justice Newman, with Smart and Hidden JJ agreeing, held that the trial judge ought to have accepted the application for *doli incapax* made on behalf of the appellant, as the evidence was insufficient to rebut the presumption of *doli incapax* beyond reasonable doubt.<sup>1848</sup>

The prosecution can rely on evidence to rebut the presumption of *doli incapax* that may be considered highly prejudicial or inadmissible in other circumstances.<sup>1849</sup> Evidence that may rebut the presumption of *doli incapax* includes the following types of evidence:

- admissions by the accused during police interviews, including admissions in relation to earlier acts of misconduct
- evidence of previous criminality (if it is admissible) or previous warnings about similar conduct sufficient to give the child knowledge from the time of the warning that the conduct was wrong
- if there are no admissions, evidence of surrounding circumstances from which such consciousness may be inferred, such as attempts to run from police or to hide facts (although such actions may be consistent with naughtiness as much as wickedness)
- in more serious cases, expert psychiatric assessments of a child's mental development may be conducted
- evidence of the child's home background and upbringing
- statements from teachers.<sup>1850</sup>

### 37.4.2 A presumption specific to children committing sexual abuse

In his submission in response to the Consultation Paper, Judge Berman SC of the New South Wales District Court, drew our attention to an additional matter that was not raised in the Consultation Paper. It is a presumption that boys under the age of 14 are incapable of having sexual intercourse.

Judge Berman submitted:

There is one related aspect of the criminal law which has not been mentioned in the Consultation Paper. It concerns juvenile offenders, in particular boys under the age of 14. Although the common law presumption that a boy under the age of 14 was incapable of

having sexual intercourse has been abolished, the presumption remains for offences committed before its abolition. An illustration of the application of the presumption can be found in another judgment of mine, *R v RL (No 1)* [2016] NSWDC 162 at [69] – [74].

That the presumption remains for offences committed in New South Wales before 1988 is surprising to many, even to many lawyers. The presumption is, of course, completely inappropriate and capable of causing injustice. Might I respectfully suggest therefore that the Commission examine whether the presumption remains for historical offences in any other Australian jurisdiction and recommend legislative change so that the presumption is abolished with retrospective affect [sic].<sup>1851</sup>

The origin of the presumption can be traced to English common law. In *Hale's pleas of the Crown* the presumption was described as follows:

An infant under the age of 14 years is presumed by law unable to commit a rape and therefore it seems cannot be guilty of it, and tho in other felonies *militia supplet aetatem* in some cases hath be shewn, yet it seems as to this fact the law presumes him impotent, as well as wanting discretion.<sup>1852</sup>

This 'rule of law' has its origins in English case law. In the 1892 case of *R v Waite*,<sup>1853</sup> the accused, aged 13, was convicted of the felony of carnal knowledge of a girl under 13 years of age (the complainant was eight years of age). The Queen's Bench unanimously found that the conviction should be quashed and upheld the presumption. Lord Coleridge CJ stated:

The rule at common law is clearly laid down by Lord Hale, that in regard to the offence of rape *militia non supplet aetatem*; a boy under fourteen is under a physical incapacity to commit the offence. That is a *presumptio juris et de jure*, and judges have time after time refused to receive evidence to shew that a particular prisoner was in fact capable of committing the offence. That is perfectly clear, and therefore, unless the Criminal Law Amendment Act has altered the common law, which cannot be successfully contended, this prisoner has not committed the felony charged.<sup>1854</sup>

In New South Wales, section 61S of the *Crimes Act 1900 (NSW)* was inserted by Schedule 1 of the *Crimes Amendment Act 1989 (NSW)* as follows:

- (1) For the purposes of any offence, a person is not, by reason only of age, to be presumed incapable of having sexual intercourse with another person or of having an intent to have sexual intercourse with another person.
- (2) Subsection (1) does not affect the operation of any law relating to the age at which a child can be convicted of an offence.

The section is not expressed to have retrospective application, as noted by Judge Berman in his submission in response to the Consultation Paper. An Act is presumed not to operate retrospectively in the absence of clear contrary intention.<sup>1855</sup> Amending Acts are *prima facie* to



be construed as having prospective operation only and as not attaching new legal consequences for facts which occurred before its enactment.<sup>1856</sup>

With the exception of Tasmania and the Northern Territory, states and territories abolished the presumption in the late 1970s or 1980s following criticism at that time by the legislature and judiciary.<sup>1857</sup> In Tasmania, there is a legislated presumption that a male under seven years of age is conclusively presumed to be incapable of having sexual intercourse. In the Northern Territory, the presumption never formed part of the Criminal Code. Further details of the legislative changes across Australian jurisdictions are provided in Table 37.16 below.

**Table 37.16: Legislation abolishing the presumption**

Jurisdiction	Current legislation	Amending legislation	Retrospective effect
New South Wales	<i>Crimes Act 1900</i> (NSW) s 61S	<i>Crimes Amendment Act 1989, No 198</i> (NSW) sch 1(3)	No
Victoria	<i>Crimes Act 1958</i> (Vic) s 62	<i>Crimes (Sexual Offences) Act 1980, No 9509</i> (Vic) s 5	No
Queensland	Presumption deleted from s 29 of the <i>Criminal Code Act 1899</i> (Qld)	<i>The Criminal Code, Evidence Act and Other Acts Amendment Act 1989 No 17</i> (Qld) s 9	No
Western Australia	Presumption deleted from s 29 of <i>Criminal Code Compilation Act 1913</i> (WA)	<i>Acts Amendment (Sexual Assaults) Act 1985, No 74</i> (WA) s 4	No
South Australia	<i>Criminal Law Consolidation Act 1935</i> (SA) s 73(2)	<i>Criminal Law Consolidation Act Amendment Act (No 83 of 1976)</i> (SA) s 12	No
Tasmania	Presumption exists for male under 7 years of age in s 18(3) of the <i>Criminal Code Act 1924</i> (Tas)	<i>Criminal Code Amendment (Sexual Offences) Act 1987 (No 71 of 1987)</i> (Tas)	N/A
Australian Capital Territory	<i>Crimes Act 1900</i> (ACT) s 68	<i>Crimes (Amendment) Act No 62 1985</i> (ACT) s 4 inserted previous s 92Q, now renumbered as s 68 of the <i>Crimes Act 1900</i> (ACT)	No
Northern Territory	Never formed part of the Criminal Code in NT		

In *R v RL (No 1)*,<sup>1858</sup> the case cited by Judge Berman, the complainant alleged that the accused committed a number of offences against her when she was aged between five and 15 years. She was 62 at the time of the hearing, so the offences were alleged to have occurred well before 1989, when the presumption was abolished in New South Wales under section 61S of the *Crimes Act 1900* (NSW). The complainant was the younger sister of the accused.<sup>1859</sup> Counts 1 and 3 on the indictment were for ‘carnal knowledge’ or what would now be known as ‘penile/vaginal’ intercourse.<sup>1860</sup> Those two incidents were alleged to have occurred when the accused was under 14. As the presumption had not been abolished at the time of the alleged offending, the accused was conclusively presumed to be incapable of being guilty of the offence, and he was found not guilty on those counts.<sup>1861</sup> In his reasons, Judge Berman stated:

I want to therefore emphasise that the failure of the Crown to prove counts 1, 3 5 and 6 beyond reasonable doubt is not because I do not believe the complainant. It is because of the operation of 2 legal rules, one now repealed, which govern the criminal liability of children, and the application of those rules to the evidence called in this trial by the Crown.<sup>1862</sup>

### 37.4.3 What we were told in submissions

Some submissions in response to the Consultation Paper from legal bodies and representative groups expressed the view that the age of criminal responsibility should be raised from 10 years to at least 12 years of age, to be consistent with child rights principles stated by the United Nations Committee on the Rights of the Child (CRC) in its General Comment No 10.<sup>1863</sup> The CRC stated that:

Rule 4 of the Beijing Rules recommends that the beginning of MACR [minimum age of criminal responsibility] shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity. In line with this rule the Committee has recommended States parties not to set a MACR at a too low level and to increase the existing low MACR to an internationally acceptable level. From these recommendations, it can be concluded that a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable. States parties are encouraged to increase their lower MACR to the age of 12 years as the absolute minimum age and to continue to increase it to a higher age level.<sup>1864</sup>

Some of those submissions also suggested that raising the minimum age of criminal responsibility would reflect research on child development and intellectual capability.<sup>1865</sup> Legal Aid NSW submitted:

It is the experience of Legal Aid NSW that children aged 10 and 11 fall far short of knowledge that an act charged is seriously wrong in the criminal sense. This was demonstrated recently when Legal Aid NSW acted on behalf of a 10 year old child in Grade 5 who failed to appear in court and was subsequently arrested and held overnight

in custody. A child of this age is likely to lack the requisite knowledge to be held criminally responsible, as well as lack a proper understanding of the court process and practical skills needed to get to a particular court at a particular time. While other factors contributed to the child's arrest and detention, such a situation would not have arisen if the age of criminal responsibility was raised to 12 years.

This would reflect most research into child development and intellectual capability and most closely align with the age most children transition into high school and further develop their intellect.<sup>1866</sup> [References omitted.]

While recommending that the minimum age of criminal responsibility be raised, most of the submissions to the Consultation Paper from the legal profession expressed support for recognition of the importance of the principle of *doli incapax* and for retaining it in the Australian criminal justice system.<sup>1867</sup>

#### 37.4.4 Discussion and conclusions

The issue of what should be the minimum age for criminal responsibility has been the subject of debate over a number of years within the legal profession, and it has been considered by various law reform commissions.<sup>1868</sup> The issue arises generally across all categories of crime and extends considerably beyond our Terms of Reference. We have not heard evidence or received submissions to the effect that children aged under 12 are being inappropriately caught in the criminal justice system in relation to conduct involving institutional child sexual abuse. We do not see that raising the age of criminal responsibility would contribute to the prevention of child sexual abuse in an institutional context.

As the decision in *R v RL (No 1)*<sup>1869</sup> illustrates, the presumption that a boy under the age of 14 was incapable of having sexual intercourse has the potential to cause real injustice to a complainant and to protect an alleged perpetrator from being charged or convicted. The operation of the presumption is similar to the effect of limitation periods in this respect, where the complainant is denied the opportunity to have the alleged perpetrator charged and to have the charges determined on the evidence.

When governments introduced legislation to abolish the presumption in the 1970s and 1980s, they did not legislate to give the abolition of the presumption retrospective operation. However, they would not then have known what we now know about the delay in reporting child sexual abuse, including institutional child sexual abuse. While the presumption is likely to operate in fewer cases over time, it is not unusual for offences still to be charged in respect of periods before the abolition of the presumption, which occurred between 1976 (in South Australia) and 1989 (in New South Wales and Queensland).

However, we also recognise that retrospectively extending criminal liability – even to correct a presumption made by the law which is factually incorrect – is a significant step. It is likely to attract some concern that it is unfair to a perpetrator to expose them to criminal liability in circumstances where, because of the operation of the presumption, they could not have been convicted of the offence at the time they engaged in sexual intercourse. We also recognise that, even if the abolition of the presumption was given retrospective operation, the principle of *doli incapax* would still apply. This means that the prosecution would need to disprove the presumption against criminal responsibility if a man was charged in respect of conduct alleged to have occurred when he was a child aged between 10 and 13 years.

Apart from the Northern Territory, which never adopted the presumption, we consider that each state and territory government should now give consideration to whether the abolition of the presumption should be given retrospective effect and any immunity which has already arisen for a perpetrator as a result of the operation of the presumption up until the time it was abolished should be abolished.

#### **Recommendation**

83. State and territory governments (other than the Northern Territory) should give further consideration to whether the abolition of the presumption that a male under the age of 14 years is incapable of having sexual intercourse should be given retrospective effect and whether any immunity which has arisen as a result of the operation of the presumption should be abolished. State and territory governments (other than the Northern Territory) should introduce any legislation they consider necessary as a result of this consideration.

## **37.5 Reporting and investigating juveniles**

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### **37.5.1 Encouraging reporting**

In the Consultation Paper, we suggested that the introduction of mandatory reporting laws, discussed in section 16.2.1, have encouraged the reporting of sexual activity by children in institutional contexts. For example, where teachers are mandatory reporters, they may be obliged to report underage sexual activity between children.

It is possible that some adults do not recognise harmful sexual behaviour by children towards other children as possibly involving a criminal offence or being sufficiently serious to warrant reporting to police.

In the Consultation Paper, we stated that it was not clear to us that, beyond mandatory reporting, there is a need for special steps to be taken to encourage reporting to police of allegations of child sexual abuse made against children – who are or may be old enough to be criminally responsible for their actions – beyond the steps discussed in section 8.3 of this report in relation to reporting generally.

In Chapter 16, we discussed criminal offences for failure to report. The current Victorian offence of failing to disclose a sexual offence committed against a child under the age of 16 years applies only to offences committed by adults.<sup>1870</sup> As discussed in section 16.3.3, the appropriate ages for the sexual offence – both in relation to the person allegedly committing the sexual offence and the alleged victim – have been subject to some debate and discussion.

### 37.5.2 Police investigations

In June 2016, we convened a public roundtable on multidisciplinary and specialist policing responses. At the roundtable, some police representatives provided information about how they approached investigations of alleged child sexual abuse where the alleged offender may be a child.

Acting Detective Superintendent Garry Watts, Child Safety and Sexual Crime Group, State Crime Command, Queensland Police Service, told the roundtable that the police response would depend on the age of the children involved and the foreseeable action that would be taken against the child, such as whether a caution would be appropriate in the circumstances.<sup>1871</sup> Where a juvenile sex offender had previous convictions for similar offences, or where the case involved multiple victims, the police investigation would follow the same course as investigations where allegations are made against adults.<sup>1872</sup>

Detective Senior Sergeant Craig Gye, Dandenong Sexual Offences and Child Abuse Investigation Team, Victoria Police, explained that the Victorian approach would be similar to Queensland, where the investigation would not differ significantly from investigations involving adult suspects, although considerations specific to juvenile offending would be kept in mind. These considerations include matters such as the therapeutic treatment orders that are available in Victoria for offenders under the age of 15 and defences available in that jurisdiction for consensual activity by children where there is no more than a two-year difference in ages.<sup>1873</sup>

Detective Superintendent Greig Newbery, Commander, Child Abuse Squad, NSW Police Force, told the roundtable that JIRT does not investigate consensual adolescent peer sex; these matters are referred to the relevant Local Area Command and generally do not proceed to a charge.<sup>1874</sup> However, JIRT does receive a number of referrals for child-to-child sexual assault, sometimes in a school context.<sup>1875</sup>

Where allegations are made against juveniles, we heard that there may be differences in how police provide information to others connected with the institution. In relation to providing information, Detective Inspector Mark Twamley, Sex Crime Division, Western Australia Police, told the roundtable:

When there's an incident where the alleged perpetrator is a person in authority, like a teacher, then there's obviously a high public interest in those sorts of matters, so we would devolve a communication plan relevant to that level of interest.

When it comes down to juvenile-on-juvenile, peer-on-peer, in a consensual environment obviously there's very little public interest in that, and so our communication on it would be very limited, if at all, certainly communication with the school and within the school environment, because there are obviously educational and welfare impacts that need to be considered.

But certainly where there are elements of non-consensual sexual behaviour and elements of violence, then that ups the ante again and we would develop a further communication plan that may involve the broader school community, if the perpetrator was unknown. If the perpetrator was known, well, then obviously the level of communication would probably be lesser.<sup>1876</sup>

The referral by a police investigator of a juvenile offender to treatment or other diversionary methods is discussed in section 37.6.

### 37.5.3 What we were told in submissions

Some submissions in response to the Consultation Paper expressed concern that consensual sexual activity between two children may constitute criminal offences in some jurisdictions.<sup>1877</sup>

The Commission for Children and Young People Victoria submitted:

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.<sup>1878</sup>

The Law Society of New South Wales set out the variations between jurisdictions in relation to whether and on what terms they allow a similar-age consent defence to child sexual offences.<sup>1879</sup> The relevant provisions are summarised in Table 37.17.

**Table 37.17: Provisions on similar-age consent defence**

Jurisdiction	Similar-age consent defence	Legislation
New South Wales	No similar-age consent defence	n/a
Victoria	The defence is available if the complainant was at least 12 years of age and the accused is not more than two years older	<i>Crimes Act 1958</i> (Vic) s 45(4)
Queensland	No similar-age consent defence	n/a
Western Australia	No similar-age consent defence	n/a
South Australia	The defence is available if the complainant was at least 16 years of age and the accused was under 17 years of age or the accused believed on reasonable grounds that the complainant was 17 years of age or older	<i>Criminal Law Consolidation Act 1935</i> (SA) s 49(4)
Tasmania	<ul style="list-style-type: none"> <li>A child between 12 and 14 years of age can consent to sex with a person not more than three years older.</li> <li>A child between 15 and 16 years of age can consent to sex with a person not more than five years older.</li> </ul>	<i>Criminal Code Act 1924</i> (Tas) s 124(3)
Australian Capital Territory	The defence is available if the complainant is at least 10 years of age and the accused is not more than two years older	<i>Crimes Act 1900</i> (ACT) s 55(3)
Northern Territory	No similar-age consent defence	n/a
Commonwealth	No similar-age consent defence	n/a

The Law Society of New South Wales stated that the Model Criminal Code contains a similar-age consent defence, which specifies an age difference of up to two years.<sup>1880</sup>

The Law Society of New South Wales submitted that all jurisdictions should adopt a similar-age consent defence and that it should be available in circumstances involving a child who is under the age of consent:

- where the intercourse is consensual
- where the difference in age between the offender and the victim is three years or less.<sup>1881</sup>

Some submissions in response to the Consultation Paper expressed concern about the potential criminal consequences of peer sexual activity in jurisdictions where there is no similar-age defence.

For example, Legal Aid NSW expressed concern that people who engage in ‘sexting’ may inadvertently commit child sexual abuse offences, even where the sexting is consensual.<sup>1882</sup> Legal Aid NSW gave the following example:

For instance, under NSW law, consensual sexting between two children under 16 is a criminal offence because the images would be categorised as ‘child abuse material.’ Further, if convicted, a child may be classed as a registrable person under the *Child Protection (Offenders Registration) Act 2000* (NSW) (CPOR Act). Similarly, two young people under 18 engaged in consensual sexting may be captured by child pornography offences under Commonwealth law.<sup>1883</sup> [References omitted.]

Legal Aid NSW submitted that the Royal Commission should consider sexting in the context of our criminal justice work, including alternative legislative approaches to sexting where no exploitation is involved.<sup>1884</sup>

Legal Aid NSW also stated that there is inconsistency across Australian jurisdictions with respect to the definition of a child for the purpose of child pornography offences. It recommended that there should be consistency across the Australian jurisdictions and that the age of a child should be set at under 16 years, except for child prostitution and commercial child pornography, where the age should be under 18 years. It submitted that this would be consistent with the recommendations of the Australian Law Reform Commission and the New South Wales Law Reform Commission, in their report *Family violence: A national legal response*,<sup>1885</sup> regarding the age of consent for sexual offences.<sup>1886</sup>

Some submissions also raised sex offender registration and expressed the view that it is an unjust consequence of criminalising consensual sexual activity between children.<sup>1887</sup> Risk management issues, including child sex offender registries, are discussed in section 37.9.

### 37.5.4 Discussion and conclusions

We discussed similar-age consent defences in Chapter 10. There we stated that, apart from the Law Society of New South Wales submission, it has not been suggested to us that children are currently being charged and prosecuted inappropriately for institutional child-to-child sexual abuse. We concluded that, as this issue has not emerged in any detail during our inquiry, we do not consider that we should make any recommendations in relation to it. We expressed no view in favour of or against the defence proposed by the Law Society of New South Wales.

The issue of ‘sexting’ is considerably broader than child sexual abuse in an institutional context. Again, this issue has not emerged in any detail during our inquiry and we do not consider that we should make any recommendations in relation to sexting. We anticipate that governments will keep this issue under review.



## 37.6 Diversion from the criminal justice system

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### 37.6.1 The role of diversion

There are a number of reasons why formal court proceedings are not the only option for dealing with offences committed by children. Although diversionary measures are available for adult offenders, diversion from the criminal justice system is generally considered to be a more important priority for juveniles than for adults.<sup>1888</sup> Diversion may occur at different points within the system, such as police contact, pre-court meetings and court-ordered alternatives to detention.<sup>1889</sup> We outline the jurisdiction of Children's Courts in section 37.7.2.

In an Australian Institute of Criminology publication in 2011, Richards stated:

many juveniles grow out of crime and adopt law-abiding lifestyles as young adults. Many juveniles who have contact with the criminal justice system are therefore not 'lost causes' who will continue offending over their lifetime. As juveniles are neither fully developed nor entrenched within the criminal justice system, juvenile justice interventions can impact upon them and help to foster juveniles' desistance from crime. Conversely, the potential exists for a great deal of harm to be done to juveniles if ineffective or unsuitable interventions are applied by juvenile justice authorities.<sup>1890</sup>

Richards also identified that many juvenile justice measures are designed to address juveniles' criminogenic needs by addressing drug use, mental health problems, educational or employment issues or family problems.<sup>1891</sup>

Richards referred to the recognised need to avoid 'peer contagion' and the risk of juvenile offenders being 'contaminated' by contact with persistent criminals.<sup>1892</sup> Richards stated:

It is widely recognised that some criminal justice responses to offending, such as incarceration, are criminogenic; that is, they foster further criminality. It is accepted, for example, that prisons are 'universities of crime' that enable offenders to learn more and better offending strategies and skills, and to create and maintain criminal networks. This may be particularly the case for juveniles, who, due to their immaturity, are especially susceptible to being influenced by their peers.<sup>1893</sup>

Richards discussed Canadian research that found that intervention by the juvenile justice system greatly enhanced the likelihood of adult criminality among the cohort of boys studied. The research found that the more restrictive the juvenile justice system's intervention was, the greater the negative impact on the boys later in life, 'with juvenile detention being found to exert the strongest criminogenic effect'.<sup>1894</sup>

In October 2014, Australasian Juvenile Justice Administrators adopted *Principles of youth justice in Australia*, a number of which appear to be applicable to diversion. Drawing on the principles, diversionary methods may be particularly useful as follows:

- Diverting children from the criminal justice system can be important to inhibit young people's offending trajectories and to rehabilitate them.<sup>1895</sup>
- Allowing young people to restore relationships and develop or maintain community connections may help them to become accountable for their offending behaviour.<sup>1896</sup>
- Enabling young people to continue education, training and employment is also likely to help prevent future offending.<sup>1897</sup>

Diversionary methods may be set out in legislation or organisational initiatives, such as police guidelines or pilot projects.<sup>1898</sup>

An example of a pilot project is the 'Ropes' program in Victoria. The program was developed by the Children's Court and Victoria Police to provide a diversion option for children appearing in the Children's Court for the first time, at the stage between police charging and the formal court hearing. The one-day course involves the young person being paired with an adult (usually their police informant or other available police person) to complete rope challenges, instructed and supervised by a trained outdoor expert, followed by a discussion session. The challenges are intended to encourage teamwork and help the child develop confidence and test their limits.<sup>1899</sup>

Warner and Bartels observe that:

In accordance with article 40.3 of the Convention on the Rights of the Child and rule 11 of the Beijing Rules, which create a preference for diversion over formal judicial proceedings, there is a strong emphasis on diversion in each of the Australian jurisdictions.<sup>1900</sup>

Most Australian jurisdictions set out these juvenile justice principles in their legislation, which we discuss below. For example, in Queensland, legislation provides:

If a child commits an offence, the child should be treated in a way that diverts the child from the courts' criminal justice system, unless the nature of the offence and the child's criminal history indicate that a proceeding for the offence should be started.<sup>1901</sup>

Typically, diversion is used for less serious offences, and it is not available in most jurisdictions for serious indictable offences, including serious sexual offences.

One of the main methods used to divert young people away from formal court proceedings is police cautioning. Cautioning may be informal or formal and may be regulated by legislation or administrative guidelines. Typically, a formal caution involves the young person admitting the conduct and then the police officer giving the young offender a warning at the police station in the presence of a family member.<sup>1902</sup> Typically, cautioning is only available for minor offences at the discretion of the police officer, with few exceptions.<sup>1903</sup>

Another method used to divert young people is juvenile or youth justice conferencing. Conferencing may occur at the stage of the police investigation or as a sentencing option in a Children's Court. Typically, a conference will occur if the juvenile admits the offending and agrees to participate in a conference. The victim is usually invited to attend a conference, although their participation in or agreement to the conference is generally not required. The conference is generally organised by a trained youth conference facilitator. If the conference has been ordered by a court, the facilitator will generally report back to the court on the recommendations of the conference.

Conferencing is generally available in all states and territories for juvenile offending, although it may not be available for sexual offences by juveniles. However, family conferences are used for sexual offences in the juvenile justice system in New Zealand and we outline the system in New Zealand in section 37.6.2.

Young people may also be diverted from the criminal justice system into therapeutic treatment programs. In the period before a child is charged and subject to criminal court proceedings, diversion into these programs appears to be a largely discretionary practice by police and community services. Victoria is the only jurisdiction with legislation directed at diverting children with sexually abusive behaviours from the criminal justice system by encouraging or requiring them to participate in therapeutic treatment programs. We are considering the issue of treatment for children with harmful sexual behaviour in our separate project in relation to children with harmful sexual behaviour, and we will report on it in our final report.

### 37.6.2 Options for diversion

In this section, we outline the different approaches to diverting children from the criminal justice system in New South Wales, Victoria and South Australia. We also outline the use of family conferences in New Zealand because they are used in New Zealand for sexual offending. These examples illustrate a range of different approaches.

#### New South Wales

The *Young Offenders Act 1997* (NSW) (YOA) applies to all children and young people over 10 years of age suspected of committing a crime in New South Wales. Under the YOA police may give a child an informal warning or a formal caution or refer them to a youth justice conference. The purpose of the YOA is to divert young people away from formal court processes and to encourage them to take responsibility for their offending, while meeting the needs of victims and emphasising restitution by the offender and the offender accepting responsibility for their behaviour. It is also a mechanism for addressing the over-representation of Aboriginal and Torres Strait Islander children in the criminal justice system.<sup>1904</sup> However, sexual offences are largely excluded from coverage under the Act. Only if the alleged offences are relatively minor, or the charges are downgraded to an eligible offence, could they result in YOA diversion.<sup>1905</sup>

Under section 8 of the YOA, the following sexual offences under the *Crimes Act 1900* (NSW) are excluded from diversion under the YOA:

- indecent assault<sup>1906</sup> and its aggravated offence<sup>1907</sup>
- act of indecency<sup>1908</sup> and its aggravated offences<sup>1909</sup>
- sexual intercourse with a child between 10 and 16 years of age<sup>1910</sup>
- attempting, or assaulting with intent to have, intercourse with a child between 10 and 16 years of age<sup>1911</sup>
- attempting to commit bestiality.<sup>1912</sup>

The relevant summary sexual offences that are currently eligible for YOA diversion are:

- offensive conduct<sup>1913</sup>
- obscene exposure<sup>1914</sup>
- loitering by convicted child sexual offenders near premises frequented by children<sup>1915</sup>
- filming a person engaged in a private act<sup>1916</sup>
- filming of another's private parts for sexual arousal or gratification.<sup>1917</sup>

Only non-violent summary offences are eligible for warnings.<sup>1918</sup>

## Warnings

A warning is given by the investigating official at any place, including where the child is found.<sup>1919</sup> No conditions can be attached to a warning and no additional sanctions can be imposed.<sup>1920</sup> If an investigating official is of the opinion that it is not in the interests of justice to deal with a matter by warning a child and that it is appropriate to deal with it by other means, he or she must consider whether to deal with the matter by way of a caution or youth justice conference.<sup>1921</sup>

## Cautions

In considering whether it is appropriate to deal with a matter by caution, investigating officials must consider:

- the seriousness of the offence
- the degree of violence involved
- the harm caused to any victim
- the number and nature of any offences committed by the child
- the number of times the child has been dealt with under the YOA.

The investigating official can also take into account any other matter they consider appropriate in the circumstances.<sup>1922</sup>

The caution is usually given at a police station<sup>1923</sup> by a police officer or an authorised specialist youth officer.<sup>1924</sup> Alternatively, it may be given by a respected member of the community at the request of an officer if he or she thinks it appropriate to do so (for example, a caution may

be given by a respected member of the Aboriginal community if the child is a member of that community).<sup>1925</sup> The person giving the caution must take steps to ensure the child understands the purpose, nature and effect of the caution<sup>1926</sup> and must ensure that the child is accompanied by an adult responsible for or chosen by the child as far as practicable.<sup>1927</sup> The police officer may choose to read out some or all of a written statement from a victim<sup>1928</sup> and may request that the child being cautioned provide a written apology to the victim/s of the alleged offence.<sup>1929</sup> No other conditions or additional sanctions can be attached to a caution,<sup>1930</sup> and no further proceedings can be taken for the offence for which the child has been cautioned.<sup>1931</sup>

If the investigating official is of that opinion that an eligible matter should not be dealt with by way of caution, he or she must refer the matter to a specialist youth officer to consider whether a youth justice conference is appropriate.<sup>1932</sup>

### Youth justice conferences

A conference may be arranged for a child who is alleged to have committed an offence if the offence is covered by the YOA, the child admits the offence and the child consents to the holding of the conference.<sup>1933</sup> A matter may also be referred for a conference by a court: YOA section 40(1A).

The principles to guide conferences, sanctions and measures for dealing with children are set out in section 34(1) of the YOA. The purpose of a conference is stated to be ‘to make decisions and recommendations about, and to determine an outcome plan in respect of, the child who is the subject of the conference’: section 34(2). The matter may also be diverted and finalised by way of a Youth Justice Conference Order by the Children’s Court.<sup>1934</sup>

Outcomes of conferences are recorded in an outcome plan. The outcomes can be tailored to any recommendations or decisions that the participants see fit as long as they are realistic and appropriate and the sanctions are not more severe than those that may have been imposed in a court proceeding for the offence concerned.<sup>1935</sup> The outcome plan may include participation in an appropriate program, including counselling programs or educational programs, whether conducted by a government agency, an educational institution or a community organisation (such as a Police and Community Youth Club).<sup>1936</sup>

Following a conference, no further criminal proceedings may be taken against the child for an offence arising out of the same conduct.<sup>1937</sup> If a court refers a child to a conference without making a finding that the child was guilty of an offence, and the court approves the outcome plan from the conference under section 54 of the YOA, the court must dismiss the original charge against the child once notified that the child has completed an outcome plan.<sup>1938</sup>

A record of cautions and conferences is kept.<sup>1939</sup> These appear on the child’s ‘court alternatives history’ which will be tendered to the Children’s Court by prosecutors in proceedings relating to any subsequent charges. However, there is no criminal conviction, and details of cautions and conferences will not be provided to an adult court.<sup>1940</sup>

## Treatment

The Ministry of Health (NSW Health) provides specialised, community-based early intervention programs for young people who have demonstrated sexually harmful behaviours where criminal charges are not being pursued. For example, the New Street Program caters for young people aged 10 to 17 years and provides counselling services specific to sexually abusive behaviour. The program is restricted to children with sexually abusive behaviour, where that behaviour has been investigated and confirmed by JIRT or the New South Wales Department of Family and Community Services, and the child must not be currently engaged with the juvenile justice system.<sup>1941</sup>

More information about treatment options available to children with sexually harmful behaviours in New South Wales will be discussed in our final report.

We have been told by the NSW Police Force, and by legal professionals who undertake defence work in relation to juvenile offenders, that police divert juvenile offenders to treatment on a case-by-case basis.<sup>1942</sup> Police may decide – in conjunction with NSW Health and the Department of Family and Community Services – that no further police action is required. The child, and in some cases the child's family, may need support from the other agencies.

## Victoria

There is no legislative framework for police to divert children from the criminal justice system in Victoria. The Sentencing Advisory Council released a report entitled *Sentencing children and young people in Victoria* (Sentencing Advisory Council Report) which states that:

Victoria Police has the 'lowest rate of diversion of all Australian police jurisdictions' and puts this down to 'a general lack of knowledge ... within the operational environment regarding the long-term benefits of effective diversion processes'.<sup>1943</sup> It is also possible that Victoria's diversion statistics are misleading. In other Australian jurisdictions, police generally have the power to divert children to group conferencing programs at an earlier stage in proceedings, whereas in Victoria only the Children's Court can refer children to the Group Conferencing Program, and therefore this does not formally count as diversion. Victoria Police has identified 'increasing effective diversion processes' as one of five objectives in its Child and Youth Strategy ...

Despite this strong support within the Victorian criminal justice system for diverting young people, diversion for this age group – apart from police cautioning – appears to be somewhat ad hoc. The main program available to young offenders is 'Ropes' ... In addition to 'Ropes' there are a number of smaller (often pilot) diversion programs operating throughout the state, as well as several locally established programs. However, these are usually restricted to certain geographic regions, they are only suitable for particular offenders and they have no funding.<sup>1944</sup> [Some references omitted.]

However, there are also a number of ‘sentencing’ options for the Children’s Court to effectively divert children by applying the sentencing principles we discuss in section 37.8.1.

### Cautions

Police use their discretionary power to caution young people for some offences in Victoria. The Sentencing Advisory Council Report stated:

Generally police will not caution offenders in situations where the offence involves more than five victims, or five separate incidents against the one victim. Cautions are most often issued to first-time offenders; however, it is open to police to issue more than one caution to an individual. Cautions in Victoria are unconditional, that is, police cannot attach any conditions such as program attendance to the caution. The young person in question must admit guilt and there must be sufficient evidence to prove guilt before police may issue a caution. Police cannot allege cautions in court.<sup>1945</sup> [References omitted.]

Warner and Bartels observed that Victoria operates differently when cautioning young offenders because cautions are governed by operational instructions rather than legislation. Victoria Police will only consider a caution for sexual or related offences in exceptional circumstances and will obtain advice as to suitability from the manager of the Sexual Crimes Squad.<sup>1946</sup>

### Conferencing

A group conference is only available as an option at the court stage. A court may defer sentencing to enable a child to participate in a group conference if the court is considering placing the child on probation or a youth supervision order, convicting the child and making a youth attendance order or ordering that the child be detained.<sup>1947</sup> Police cannot refer a child to a conference.

The *Children, Youth and Families Act 2005* (Vic) sets out the purpose of a group conference in section 415(4) as follows:

The purpose of a group conference is to facilitate a meeting between the child and other persons (including, if they wish to participate, the victim or their representative and members of the child’s family and other persons of significance to the child) which has the following objectives –

- (a) to increase the child’s understanding of the effect of their offending on the victim and the community;
- (b) to reduce the likelihood of the child re-offending;
- (c) to negotiate an outcome plan that is agreed to by the child.

An outcome plan is described as ‘a plan designed to assist the child to take responsibility and make reparation for his or her actions and to reduce the likelihood of the child re-offending’: section 415(5).

A group conference must be attended by the child, the child's lawyer, the relevant police officer (or another police officer) and the convenor of the conference, who must be appointed by a service that has been approved by the Department of Health and Human Services to operate group conferences: sections 415(2) and 415(6).

A group conference may also be attended by members of the child's family or persons of significance to the child, and the victim or a representative of the victim. The convenor may also permit other people to attend the conference: section 415(7).

The convenor is required to prepare a group conference report for the court, which must include an outcome plan if the child has agreed to an outcome plan: section 415(8).

## Treatment

Victoria is the only jurisdiction in which legislation expressly provides for the diversion of children who are or may be charged with sexual offences to therapeutic treatment.

In 2004 the Victorian Law Reform Commission recommended that the Children's Court be given the power to make orders in respect of a child displaying sexually abusive behaviour to ensure that the child gains access to or attends an appropriate therapeutic service.<sup>1948</sup> The recommendation in part reflected a concern that access to many treatment programs was through the criminal justice system but only a small proportion of sexually abusive behaviour by children was reported to police.<sup>1949</sup>

Provisions in the *Children, Youth and Families Act 2005* (Vic) enable a child aged 10 to under 15 years with sexually abusive behaviour to be referred to therapeutic treatment when the child does not voluntarily seek help, without relying on criminal prosecution.<sup>1950</sup> Any person who believes on reasonable grounds that the child is in need of therapeutic treatment (because they are in the age category and have exhibited sexually abusive behaviours) may report to the Secretary of the Department of Health and Human Services, which means that police can refer a child with sexually abusive behaviours to the department as an alternative to charging.<sup>1951</sup>

The *Victoria Police manual, Guidelines on protecting children* states:

- VPMP Protecting children and the Protecting Children Protocols identify that, where during the course of their duties members form a belief on reasonable grounds that a child is in need of therapeutic treatment, that is:
  - the child is aged between 10 and under 15 years
  - the child has exhibited sexually abusive behaviours
  - a directly related criminal prosecution is not being pursued
  - and the child's parent or guardian has not agreed to voluntarily engage the child in therapeutic treatment they must make a report to Child Protection.



- A child has exhibited sexually abusive behaviours when they have used their power, authority or status to engage another party in sexual activity that is either unwanted or where, due to the nature of the situation, the other party is not capable of giving informed consent (for example, children who are younger or who have a cognitive impairment). Physical force and/or threats are sometimes involved. Sexual activity may include exposure, peeping, fondling, masturbation, oral sex, penetration of a vagina or anus using a penis, finger or object, or exposure to pornography. This is not an exhaustive list.<sup>1952</sup>

The Victorian Royal Commission into Family Violence recommended that the therapeutic treatment orders regime be extended to include young people aged 15 to 17 years.<sup>1953</sup>

In our public roundtable on multidisciplinary and specialist policing responses, Detective Senior Sergeant Gye, Dandenong Sexual Offences and Child Abuse Investigation Team, Victoria Police, explained how the Victorian police may investigate an allegation of child-to-child sexual abuse. He said:

If it was two young people that were living perhaps in a DHHS [Department of Health and Human Services] residential care unit, we would be consulting pretty closely with DHHS about our response. Generally speaking, it wouldn't be much different, what we would do. We'd investigate the same. There are therapeutic treatment orders available in Victoria for offenders under 15. There's a number of different ways we can approach that, to get the person under a therapeutic treatment order, whether we interview them and look to prepare a brief or whether it's done directly by DHHS ...<sup>1954</sup>

... If it's non-consensual, then there's a reasonable chance that we would either be charging someone or making a recommendation for a therapeutic treatment order. That would, again, depend on the level of the offending.<sup>1955</sup>

If the Secretary of the Department of Health and Human Services receives a report from police, the matter must be referred to the Therapeutic Treatment Board for advice.<sup>1956</sup> The board is made up of members of Victoria Police, Victorian child protection representatives, the Victorian Office of Public Prosecutions and health services providers. The board advises on the appropriateness, or otherwise, of making an order for treatment in each case.<sup>1957</sup> In doing so, the board is required to consider various matters, including the seriousness and scale of the offence.<sup>1958</sup> After considering this advice, the Secretary can apply to the court for a therapeutic treatment order (TTO).<sup>1959</sup> The court can make a TTO if it is satisfied that the child has exhibited sexually abusive behaviours and that the order is necessary to ensure the child's access to or attendance at the appropriate therapeutic treatment program.<sup>1960</sup>

Where it is determined to pursue criminal charges, a different procedure applies. If a child appears as an accused in a criminal proceeding in the Children's Court and the court considers that there is prima facie evidence that grounds exist to apply for a TTO, the court may refer the matter to the Secretary of the Department of Health and Human Services for investigation.<sup>1961</sup>

The Secretary must then refer the matter to the Therapeutic Treatment Board for advice, and the board must advise the Secretary on the appropriateness of seeking a TTO for the child.<sup>1962</sup> The Secretary is required to report back to the court within three weeks, informing the court whether the Secretary has applied for a TTO in respect of the child.<sup>1963</sup>

If the Secretary reports that a TTO has been made in respect of the child, and the court has not yet made a finding in the criminal proceedings, the court must adjourn the criminal proceedings while the TTO is in force.<sup>1964</sup> The court may also adjourn criminal proceedings against a child aged between 10 and under 15 if it is satisfied that the child has exhibited sexually abusive behaviours that would justify referring the matter to the Secretary and that the child will attend and participate voluntarily in an appropriate therapeutic treatment program.<sup>1965</sup>

On the adjourned hearing date, if the court is satisfied that the child has voluntarily attended and participated in an appropriate therapeutic treatment program, it must discharge the child without any further hearing of the criminal proceedings.<sup>1966</sup> If the child is not discharged, the court may determine what (if any) further proceedings in the Criminal Division in respect of the child are appropriate.<sup>1967</sup>

Victoria Police provided us with a copy of a presentation made by the Department of Health and Human Services in relation to TTOs and the Therapeutic Treatment Board.<sup>1968</sup> The presentation included a case study involving a 13-year-old boy, 'Ben', who committed acts of anal and oral penetration on his male cousin, who was aged three. The case study was not a real case, but was prepared to illustrate how the TTO system works.

In the case study, police investigated and charged Ben with three counts of penetration of a child under 16 years. According to the presentation, police charged Ben for the following reasons:

- Seriousness of the sexual offences was such that a legally sanctioned requirement to attend treatment was required
- Strength of the evidence and other factors in line with the Victoria Police Prosecutions guidelines (discretion to prosecute)
- Police were not convinced that Ben's family would commit to treatment over the long term without the 'threat' of criminal proceedings not being discharged (s. 354(4)) if the family disengaged their child from treatment.<sup>1969</sup>

The criminal division of the Children's Court referred Ben to the Department of Health and Human Services' child protection services, which investigated and worked with the family. Ben's family agreed to treatment as court ordered treatment via a TTO would mean the subsequent dismissal of the charges (s.354(4)) – Ben's parents did not want their son to have a criminal conviction.<sup>1970</sup> The Therapeutic Treatment Board agreed to child protection services' recommendation of a TTO. According to the presentation:

The board agreed [to a TTO] citing the following:

- Behaviours are serious and are unlikely to stop without treatment
- Charges unlikely to be found proved in court due to Ben's age and the young age of the victim
- Ben acknowledging the behaviours and wanting treatment
- Order necessary to ensure Ben and family's ongoing participation in treatment.<sup>1971</sup>

Child protection services then secured a TTO in the family division of the Children's Court, the criminal charges were adjourned for 12 months, Ben met the requirements of treatment and the criminal charges were dismissed without any further hearing, as the court was satisfied that Ben had attended and participated in the treatment program under the TTO.<sup>1972</sup>

The Department of Health and Human Services funds 12 agencies across 14 locations to provide therapeutic treatment for children aged 10 to 17 years who have engaged in 'problem sexual behaviour' (under 10) or 'sexually abusive behaviours' (10 years and over). Children subject to a TTO access the same services as those accessing them on a voluntary basis.<sup>1973</sup>

Victoria also uses another diversionary approach for children charged with sexual offences through the Children's Court's Sexual Offences List. Cases may be referred to the Children's Court Clinic for assessment or counselling if the prosecution may have difficulties proving its case. The referral is made on the basis that the young person who has been charged will attend for assessment and/or counselling and will comply with any recommended treatment and, if they do so, the prosecution will withdraw the charges. This process is adopted only with the agreement of the prosecutor and the complainant or the complainant's family.<sup>1974</sup>

The Victorian Royal Commission into Family Violence quoted the submission from the Magistrates' Court of Victoria and the Children's Court of Victoria in relation to their specialist sex offence lists:

A deliberate effort was made to reduce the number of children, especially the very young, giving evidence. Related to this was the aim, except in cases of very serious offending, to direct offenders into appropriate sex offender treatment or education at the earliest stage.<sup>1975</sup>

More information about treatment options available to children with sexually harmful behaviours in Victoria will be discussed in our final report.

## South Australia

South Australia has a number of diversionary options under the *Young Offenders Act 1993* (SA).

### Informal caution

If a youth admits the commission of a minor offence, and a police officer is of the opinion that the matter does not warrant any formal action under the *Young Offenders Act 1993* (SA), the officer may informally caution the youth against further offending and proceed no further against the youth.<sup>1976</sup>

A minor offence means an offence (covered by the *Young Offenders Act 1993*) that, in the opinion of the police officer in charge of the investigation of the offence, should be dealt with as a minor offence because of all of the following factors:

- the limited extent of the harm caused through the commission of the offence
- the character and antecedents of the alleged offender
- the improbability of the youth reoffending
- where relevant—the attitude of the youth’s parents or guardians.<sup>1977</sup>

If a youth is informally cautioned under the Act, no further proceedings may be taken against the youth for the offence in relation to which the youth was cautioned.<sup>1978</sup> Any record of an informal caution does not constitute a criminal record and may not be used for the purpose of a criminal record check or in any judicial proceedings.<sup>1979</sup>

### Formal cautions

If a police officer decides to deal with a minor offence with a formal caution, he or she may do so together with the youth giving an undertaking to pay compensation to the victim; undertake community service (not exceeding 75 hours); or apologise to the victim.<sup>1980</sup>

Before a formal caution is administered, the police officer must explain to the youth the nature of the caution and the fact that, if the youth is subsequently dealt with for an offence, evidence of the caution may be treated as evidence of commission of the offence in respect of which the caution is administered. If practicable, the caution must be administered in the presence of a guardian or an adult person nominated by the youth who has had a close association with the youth or has been counselling, advising or aiding the youth. The caution must be put in writing and acknowledged in writing by the youth.<sup>1981</sup>

### Family conference

Under the *Young Offenders Act 1993* (SA), if a youth admits the commission of a ‘minor offence’, the police officer may refer the matter for a family conference to be convened. Referrals may also be made by the Youth Court.

Under section 11, a family conference will include:

- the youth justice coordinator as chair
- the youth and their legal representative if they have one
- a representative of the Commissioner of Police
- any persons who were invited and who attend the conference.

Under section 10, the youth justice coordinator will invite to the conference:

- the youth's guardians and any other relatives that the police nominate
- any other person who has a close association with the youth who the police nominate
- the victim of the offence and, if the victim is a youth, the victim's guardians.

The victim is also invited to bring along a person of their choice to provide assistance and support.

Under section 12, a family conference has a number of powers, including to:

- administer a formal caution
- require the youth to undertake to apologise and/or pay compensation to the victim
- require the youth to undertake to carry out community service.

Section 11 provides that, if possible, a family conference should act by consensus and that a decision by a family conference is not to be regarded as validly made unless the youth and the representative of the Commissioner of Police concur in the decision.

According to the Courts Administration Authority of South Australia, the statutory guidelines and philosophy of family conferences in South Australia are as follows:

In exercising its powers, the family conference is bound by the object of the Young Offenders Act to secure for youths who offend against the criminal law the care, correction and guidance necessary for their development into useful members of the community and the proper realisation of their potential. The conference is also required to balance the issues of the youth being made aware of their legal obligations, with outcomes being sufficiently deterrent and the community being protected.

The *Young Offenders Act* requires a particular commitment to preserving and strengthening family relationships, not unnecessarily interrupting the youth's education and employment, and not impairing a youth's sense of racial, ethnic or cultural identity.

The aims of a family conference are to:

- divert young offenders from the court system
- make young offenders aware of the consequences of their behaviour
- make young offenders accept responsibility for their behaviour

- provide victims with the opportunity to participate actively in the process of seeking reparation
- arrange compensation, where appropriate, for material damage
- involve the family and close friends of the young person in the process of dealing with the consequences of their behaviour
- allow all participants to deal with the issues surrounding the offence at all levels including the legal and emotional issues
- to set the scene for future restoration of trust between the young offender, people close to him or her, and others affected by the offence.<sup>1982</sup>

## Treatment

Dr Marshall Watson, a Child and Adolescent Forensic Psychiatrist at the Women's and Children's Health Network in South Australia, gave evidence in Case Study 57 in relation to the nature, cause and impact of child sexual abuse, about children who may be referred for assessment after they have been charged with a sexual offence.

Dr Watson told the public hearing that the Youth Court may refer a child who has been charged with a sexual offence for assessment of ongoing risk. Following assessment, the service may recommend that the child enter into the adolescent sexual abuse prevention program, which is a treatment program, and the court may mandate or advise that the young person needs to undertake the treatment program.<sup>1983</sup> Dr Watson told the public hearing that this is the only public service available in South Australia, although he said that there are also private providers.<sup>1984</sup> Dr Watson said that the public service is able to see people quite quickly and is able to meet demand.<sup>1985</sup> Dr Watson also outlined the types of treatment the service uses.<sup>1986</sup>

The Youth Court may also refer a child for treatment as a method of diversion in connection with a family conference or following conviction.<sup>1987</sup>

## Family group conferences in New Zealand

The *Children, Young Persons and Their Families Act 1989* (NZ) requires a family group conference to be held before criminal proceedings can be instituted against a juvenile offender, with limited exceptions that do not exclude sexual offending.<sup>1988</sup>

Family group conferences are required at various points of contact with the criminal justice system as a mechanism to divert young offenders from the criminal justice system. Family group conferences are required for matters within the jurisdiction of the Youth Court, which is a specialist division of the District Court.<sup>1989</sup> The Youth Court has broad jurisdiction to hear and determine an alleged offence against a 'young person',<sup>1990</sup> with a few exceptions, such as murder, manslaughter and minor traffic offences.<sup>1991</sup>

Where the Youth Court has jurisdiction to hear and determine a matter (and the alleged offences do not involve murder, manslaughter or relevant traffic offences), a family group conference must be convened at the following points of contact with the criminal justice system:

- Where a young person is alleged to have committed an offence and the police intend to lay charges (unless the person has been arrested), no charging document can be filed until the matter has been considered by a family group conference.<sup>1992</sup>
- Where a young person is arrested for an offence and is brought before the Youth Court to answer the charge (and enters a plea other than a denial of the charge), the court will adjourn the proceedings until a family group conference has been held.<sup>1993</sup>
- Where a charge is admitted or proved in the Youth Court, the court is not to make any orders (for example, discharging the proceedings) unless a family group conference has had an opportunity to consider the ways in which the court might deal with the young person.<sup>1994</sup>
- The court also has the discretion to direct a family conference be held at any stage of any proceedings.<sup>1995</sup>

The family group conference is convened by a youth justice coordinator and follows a similar format to the family conferences described in the Australian jurisdictions outlined above.<sup>1996</sup> For example, the alleged offender and his or her representative, the alleged offender's family, the victim or his or her representative, and the prosecutor are some of the people entitled to attend the family group conference.<sup>1997</sup> The family group conference may make decisions and recommendations and formulate plans in relation to the young person – for example, recommending that proceedings should be commenced or discontinued or that the young person make reparation to any victim of the offence.<sup>1998</sup>

### 37.6.3 What we were told in submissions and in the hearing

Some submissions in response to the Consultation Paper expressed support for diverting children from the criminal justice system where appropriate.<sup>1999</sup> For example, in its submission in response to the Consultation Paper, the Law Council of Australia submitted:

The Victorian Bar considers that evidence suggests that children in the 10–14 age group who come to the attention of the criminal law are predominantly from the most vulnerable families in our community, and that the earlier a child enters the formal criminal justice system, the worse the outcomes are for that child, and consequently, the community.

Further, Victorian Bar has identified that research has also shown that diverting young children away from the criminal law system has the most beneficial results in terms of reducing recidivism, and it follows that society benefits more from keeping young children away from the criminal law system than putting them into it.<sup>2000</sup> [References omitted.]

Some submissions in response to the Consultation Paper raised particular concern that Aboriginal and Torres Strait Islander people were over-represented in the juvenile criminal justice system.<sup>2001</sup>

For example, in its submission in response to the Consultation Paper, the Victorian Aboriginal Legal Service (VALS) submitted:

VALS would like to see diversionary programs made available that were based in cultural processes, and were specifically run by and for young offenders in the community. This would include linking in local Aboriginal language learning, reconnecting with cultural practice, including land management and a focus on the family.

VALS strongly believes that diversionary programs for young offenders – including sex offenders – that are based in cultural practice, are at an advantage in reducing offending as adults.

VALS believes that a healthy culture and healthy community reduces offending, and that diversionary programs for young offenders are vital for reducing imprisonment rates for Aboriginal and Torres Strait Islander people across all jurisdictions.<sup>2002</sup>

In Case Study 46, Mr Alister McKeich, representing VALS, explained some of the advocacy work VALS is doing in relation to diversion options for Aboriginal and Torres Strait Islander people:

In Victoria at the moment we're advocating, particularly in a youth justice situation, for better therapeutic treatments and therapeutic sentencing options. So how VALS would envision that would be working with the community where the individual is from and potentially having greater access to cultural processes and cultural knowledge and understanding, so that person starts to learn about their culture as a source of strength ...

One of the models that VALS is advocating for at the moment with DHHS [the Department of Health and Human Services], who runs youth justice down in Victoria, is to have, for want of a better word, like a prison farm, for example. One of the examples that our CEO, Wayne Muir, has given is, could you not have a less punitive environment but for a longer period of time – this is just an example – where instead of three months in a very punitive environment, potentially you could have the individual in there for nine months where they could complete some education, where elders could come and visit on a regular basis to be able to conduct some kind of cultural training, cultural understanding.

So the individual leaves that area and instead of being retraumatised by their experience in a short period of time, they walk out of there with an understanding of who they are, where they come from and aim towards being rehabilitated, so we don't see them in Ararat prison 10 years down the track.<sup>2003</sup>



In its submission in response to the Consultation Paper, the Aboriginal Legal Service (NSW/ACT) (ALS) submitted:

the ALS is concerned about the unavailability of diversionary options (such as conferencing) for minor sexual offences committed by juveniles, although the ALS notes that diversionary options are less likely to be used for cases involving Aboriginal or Torres Strait Islander young people.<sup>2004</sup> [References omitted.]

The Law Society of New South Wales submission also raised the issue that sexual offences committed by juveniles are largely excluded from the New South Wales YOA and are therefore incapable of being diverted.<sup>2005</sup> It submitted:

We note that there is a wide range of sexual offences that are capable of being committed, and that other jurisdictions provide more opportunities for young offenders to be diverted for sexual offences. We also note that there are some sexual offences that are eligible to be dealt with under the YOA, but the police have been inconsistent about whether to divert.

For example, an offence under s 66C (Sexual intercourse – child between 10 and 16) of the *Crimes Act 1900* (NSW) is not eligible to be dealt with under the YOA. This means that consensual sex between 15 year olds cannot be dealt with through a caution or conference.

The Law Society considers that appropriate sexual offences should be capable of being dealt with under the YOA, and not automatically excluded.<sup>2006</sup>

In the public hearing in Case Study 46, Mr Aaron Tang, representing the Law Society of New South Wales, outlined the views of the Law Society of New South Wales that appropriate sexual offences should be capable of being diverted away from the juvenile justice system.<sup>2007</sup> He said:

The benefits of the Young Offenders Act are that it's a way of diverting young offenders away from the formalised court system; it's a way that police can deal with matters expeditiously; it's a form of restorative justice as well, so a lot of victims get a benefit out of that that they wouldn't normally get if they were going through the court system – they have less participation. And also not to be understated is that it leads to some longer-term consequences insofar as it avoids children from getting records, which might affect them later in life, which they might get if they went through the more formalised court system.<sup>2008</sup>

In its submission in response to the Consultation Paper, Legal Aid NSW submitted:

Legal Aid NSW recommends that there be greater opportunity to divert children charged with child sexual offences from prosecution. In NSW there is very limited scope to use either cautioning or conferencing for sexual offences under the *Young Offenders Act 1997* (YOA). For example, consensual sex between 15 year olds cannot be dealt with through a

caution or conference because sexual intercourse with a child between 10 and 16 cannot be dealt with under the YOA. Further, even though some sexting offences can be dealt with under the YOA, police practice in this area has been inconsistent.

The Children's Legal Service regularly provides advice to children facing police action for consensual sexting. Even where such matters are dealt with under the YOA, the child may suffer long term consequences. While the child will not have a criminal record, they will get a police record which can affect future employment and will attract risk assessment under the Working with Children Check. Police may also use sexting to apply for an Apprehended Violence Order, with the further risk of criminalisation of the child.

This area of police discretion may therefore benefit from greater guidance.<sup>2009</sup>  
[References omitted.]

In its submission in response to the Consultation Paper, the Victorian Commission for Children and Young People gave information about the TTO system in Victoria and submitted:

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.<sup>2010</sup>

Mr James McDougall, representing the Victorian Commissioner for Children and Young People, told the public hearing in Case Study 46 of Victoria's approach to the youth justice system:

It's fortunate that we have a youth justice system that has a distinct framework that is set aside from the criminal justice system, because that allows us the opportunity to produce more moderated responses, responses that look at the opportunities for rehabilitation while still focusing on the safety of individuals. But I think it's an area that is still developing and requires further attention, and perhaps as we all learn lessons around child sexual offending behaviours, both from a victim's perspective and also from an offender's perspective, there are still further lessons we can learn on what is an appropriate regulatory package and treatment and rehabilitation package at the same time.<sup>2011</sup>

### 37.6.4 Discussion and conclusions

It seems clear that some children who may have committed child sexual abuse offences should be diverted from the criminal justice system. Most states and territories appear to do this without requiring the child to participate in the criminal justice system beyond the stage of investigation by police or child protection services. In Victoria, diversion to treatment also often occurs at the Children's Court stage after criminal proceedings have been commenced against the child and the charges will be dismissed if the treatment is completed satisfactorily.

At present, we have no evidence to suggest that one approach is better than the other. We also have no evidence to suggest that children who have committed child sexual abuse offences are being prosecuted through the criminal justice system in circumstances where they should be diverted from it.

In what circumstances and by what procedures children should be diverted from the criminal justice system are questions that arise much more broadly than in relation to child sexual abuse, or institutional child sexual abuse. While we do not recommend any reforms in relation to these issues, as Victoria appears to be pursuing quite a different approach from that adopted in other states and territories, Victoria's experiences and any evaluation of its approach should be of ongoing interest to other states and territories.

## 37.7 Prosecution of juveniles

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### 37.7.1 Decision to prosecute

As discussed in section 37.6, diversion is generally not available for serious juvenile sexual offending. Charges will be laid where the allegation is not considered appropriate for diversion. Generally, the primary responsibility for investigating and charging offences lies with police.<sup>2012</sup> Police may seek advice from the prosecution agency in relation to appropriateness of charges or sufficiency of evidence.

Prosecution guidelines exist to assist police and public prosecutors to decide if the suspected criminal offence will be the subject of prosecution. We discussed the decision to prosecute in section 20.5.3.

In most states and territories, there are prosecution guidelines and policies which set out special considerations that apply to the prosecution of juveniles.

For example, the Western Australian *Statement of prosecution policy and guidelines 2005* states:

34. Special considerations may apply to the prosecution of juveniles. The longer term damage which can be done to a juvenile because of an encounter with the criminal law early in his or her life should not be underestimated. Consequently, in some cases prosecution must be regarded as a severe measure with significant implications for the future development of the juvenile concerned. The welfare of the child must therefore be considered when prosecutorial discretion is exercised.
35. Further special considerations apply to the prosecution of juveniles and decisions to continue a prosecution of a juvenile should have regard to –
  - (a) the seriousness of the alleged offence;
  - (b) the age and apparent maturity of the juvenile;
  - (c) the available alternatives to prosecution and their efficacy;
  - (d) the juvenile's family circumstances, particularly where the parents of the juvenile appear able and prepared to exercise effective discipline and control over the juvenile;
  - (e) whether a prosecution would be likely to be harmful to the juvenile or be inappropriate, having regard to such matters as the personality of the juvenile and his or her family circumstances;
  - (f) the sentencing options available to the relevant Children's Court if the matter were prosecuted;
  - (g) the interests of the victim and the victim's family;
  - (h) the capacity of the juvenile, if under 14, to know that at the time of doing an act, or making an omission, the juvenile knew that he or she ought not to do the act or make the omission;
  - (i) the capacity of the child at the time of the intended prosecution to have matured;
  - (j) the juvenile's antecedents; and
  - (k) any other special factor.
36. Under no circumstances should a young offender be prosecuted solely to secure access to the welfare powers of the court.<sup>2013</sup>

The *Prosecution guidelines* in the Northern Territory and the *Statement of prosecution policy and guidelines* in South Australia set out similar considerations to the Western Australian guidelines.<sup>2014</sup> The *Prosecution guidelines* in New South Wales state that ‘Prosecutors shall use their best efforts to take prosecutory action against juveniles only to the extent strictly necessary’.<sup>2015</sup>

### 37.7.2 Relevant jurisdiction of the Children’s Courts

All states and territories make provision for treating children who are prosecuted for criminal offences as juveniles rather than as adults. While the terminology and definitions vary, in each state and territory other than Queensland, children under 18 years of age are treated as juveniles in the criminal justice system.<sup>2016</sup> In Queensland, children under 17 years of age are treated as juveniles in the criminal justice system.<sup>2017</sup>

The Australian Institute of Criminology’s overview of the juvenile court system explains:

In all States and Territories, there are specialised children’s courts that have jurisdiction over offences committed by young people. The courts may be constituted by a specialised children’s court magistrate or judge, or by a magistrate constituting a children’s court and exercising the powers under the relevant legislation. In most jurisdictions, they are modified courts of summary jurisdiction with enlarged powers to deal with matters summarily.<sup>2018</sup>

The Children’s Courts have broad jurisdiction to hear and determine sexual offences committed by children; however, it will depend on the specific offence or charge, and some jurisdictions refer the most serious sexual offences to an adult court.

In New South Wales, the Children’s Court has jurisdiction to hear and determine any offence by a child other than a serious children’s indictable offence.<sup>2019</sup> It can determine cases of sexual assault, aggravated indecent assault and indecent assault. However, it cannot determine cases involving the most serious sexual offences, such as aggravated sexual assault (unless the circumstance of aggravation is that the victim was between 10 and 16 years of age<sup>2020</sup>). Children charged with serious sexual offences are generally referred to the District Court of New South Wales.<sup>2021</sup> The District Court is to deal with a child found guilty of a serious indictable offence according to law,<sup>2022</sup> and alternatives to sentencing, such as cautions and conferences, are not available for those serious offences.<sup>2023</sup>

In Victoria, the Children’s Court has jurisdiction over all sexual offences<sup>2024</sup> unless the court considers that the charge is unsuitable by reason of exceptional circumstances to be determined summarily.<sup>2025</sup> Such an occurrence is rare.<sup>2026</sup> In his submission to the Consultation Paper, the Victorian Director of Public Prosecutions (DPP) explained the exceptional circumstances in which a prosecution against a juvenile offender may be uplifted to a higher court.<sup>2027</sup> This is discussed further in section 37.7.3.

In Queensland, the Children's Court has jurisdiction for all indictable offences involving a child generally.<sup>2028</sup>

The Western Australian Children's Court has exclusive jurisdiction to hear and determine offences alleged to have been committed by a child.<sup>2029</sup>

In South Australia, the Youth Court has broad jurisdiction to hear and determine cases of child sexual abuse by a youth, with some exceptions.<sup>2030</sup> A youth charged with an indictable offence can be dealt with in the same manner as an adult if he or she chooses to be so treated after obtaining legal advice, or if the Youth Court or Supreme Court determines the youth should be dealt with in the same manner as an adult because of the gravity of the offence or because the offence is part of a pattern of repeat offending.<sup>2031</sup> However, it appears that offences by children are rarely transferred from the Youth Court to an adult court: from 1999 to 2004, no sexual offences were transferred to an adult court.<sup>2032</sup>

In Tasmania, the Youth Justice Division of the Magistrates Court has jurisdiction to hear and determine a charge against a youth under the age of 18 years.<sup>2033</sup> Where an offender is at least 14 years of age and under 18 years, serious sexual offences (such as rape and aggravated sexual assault) must be dealt with in the Supreme Court.<sup>2034</sup>

In the Australian Capital Territory, the jurisdiction of the Children's Court includes any offence not carrying a maximum penalty of life imprisonment.<sup>2035</sup>

The Northern Territory Youth Justice Court has exclusive jurisdiction over all charges in respect of summary or indictable offences allegedly committed by a youth.<sup>2036</sup>

Warner and Bartels observe that, regardless of the jurisdiction of the children's courts, a child may elect to have some indictable offences determined by a jury, although it seems that this rarely happens.<sup>2037</sup>

Courts that exercise criminal jurisdiction with respect to children are required by legislation to adhere to principles specific to the sentencing of children in most circumstances other than serious offences in some jurisdictions.

For example, in Western Australia, section 7 of the *Young Offenders Act 1994* (WA) sets out 13 principles in performing functions under the Act (including the functions of courts in criminal court proceedings). Principles most relevant to the prosecution stage of the criminal justice system are as follows:

- There should be special provision to ensure the fair treatment of young persons who have, or are alleged to have, committed offences.
- A young person who commits an offence is to be dealt with, either formally or informally, in a way that encourages the young person to accept responsibility for his or her conduct.

- A young person who commits an offence is not to be treated more severely because of the offence than the person would have been treated if an adult.
- The community must be protected from illegal behaviour.
- Victims of offences committed by young persons should be given the opportunity to participate in the process of dealing with the offenders to the extent that the law provides for them to do so.
- Responsible adults should be encouraged to fulfil their responsibility for the care and supervision of young persons and be supported in their efforts to do so.
- A young person who is dealt with for an offence should be dealt with in a time frame that is appropriate to the young person's sense of time.
- In dealing with a young person for an offence, the age, maturity and cultural background of the offender are to be considered.
- A young person who commits an offence is to be dealt with in a way that:
  - strengthens the family and family group of the young person
  - fosters the ability of families and family groups to develop their own means of dealing with offending by their young persons
  - recognises the right of the young person to belong to a family.

While there are differences between states and territories, generally court processes may be modified where a juvenile is being prosecuted. The court may have an obligation to explain the proceedings to the child, and proceedings will generally follow the simpler procedures applying in the lower courts (magistrates or local courts), even for more serious offences. The proceedings may take place in a closed court and there may be greater restrictions on publishing the proceedings.<sup>2038</sup>

### 37.7.3 What we were told in submissions

In his submission in response to the Consultation Paper, the Victorian DPP stated that his role in the prosecution of juveniles is limited because most prosecutions of juveniles are conducted in the Children's Court by specialist police prosecutors. However, he submitted that he can and does take over Children's Court prosecutions, including those which involve serious sexual offences, either to conduct them in the Children's Court or to apply to have them 'uplifted' to a higher court.<sup>2039</sup>

The Victorian DPP explained the criminal jurisdiction of the Children's Court in Victoria and the application process to uplift a matter to the higher courts. He referred to the criminal jurisdiction of the Children's Court under section 516 of the *Children, Youth and Families Act 2005* (Vic) to:

- hear all charges against children for summary offences
- hear all charges against children for indictable offences other than those offences in section 516(1)(b) – the excluded offences are murder, attempted murder, manslaughter, child homicide, arson causing death and culpable driving causing death
- conduct committal proceedings into all charges against children for indictable offences.<sup>2040</sup>

The Victorian DPP described the ‘exceptional circumstances’ in which indictable offences could be ruled as unsuitable for hearing by the Children’s Court as follows:

Pursuant to s. 356(3)(b) other indictable offences falling outside those listed in s.516(1)(b) can be ruled by a Children’s Court Magistrate as unsuitable for hearing in the Court by reason of ‘exceptional circumstances’.

On a Magistrate making such a ruling, the charges must first proceed by way of a committal proceeding in the Children’s Court, and then if committed for trial, to be heard in the County or Supreme Court.

*The meaning of the words ‘exceptional circumstances’*

The words ‘exceptional circumstances’ are not defined in s.356(3)(b) CY & F Act 2005. The definitive test is set out by Vincent J in *D.L (A minor by his Litigation Guardian) v a Magistrate of the Children’s Court* VSC 9-8-1994 as follows:

‘It is only where very special, unusual or exceptional circumstances exist of a kind which render unsuitable the determination of a case in the jurisdiction specifically established with this difference in mind, that the matter should be removed from that jurisdiction to the adult courts.’

Further, the judgment of Forrest J in *K v Children’s Court & Anor* [2015] VSC 645 at paragraph 26 summarises the relevant principles for a Magistrate of the Children’s Court when considering whether ‘exceptional circumstances’ exist as follows:

- (a) ‘the Children’s Court should relinquish its embrative jurisdiction only with great reluctance;
- (b) the gravity of the conduct and the role ascribed to the accused are important matters but are not the only factors to be considered;
- (c) other factors for consideration may include the maturity of the offender, the degree of planning or its complexity, and the antecedents of the alleged offender or particular features peculiar to him or her;
- (d) the most important criterion is the overall administration of justice – that is, justice as it affects the community as well as the individual;



- (e) the nature of the evidence to be called may render a matter unsuitable for summary determination – evidence about political motivation, forensic or scientific evidence, may fall within this class;
- (f) “exceptional” in this statutory context means more than special, it means unusual.’

That is the extent of judicial guidance on what the words ‘exceptional circumstances’ in the statute mean and the factors which the Magistrate can consider when exercising their discretion to uplift a matter to the higher courts.<sup>2041</sup>

In relation to when an application will be made to uplift a matter to the higher courts, the Victorian DPP submitted:

There is no blanket rule as to which cases I will decide to apply to uplift from the Children’s Court jurisdiction. Past rulings assist to some extent however each case is assessed according to its particular facts.

Guidance as to the criteria to be used to consider whether to apply to uplift a matter is contained within my Policy on DPP Takeovers. Paragraphs 14 – 20 of that Policy outline the factors that are to be considered by me in deciding whether to take over the prosecution of a matter from the police, or apply to uplift.

Whilst no one factor has more weight than another generally the most important factors to consider are:

- (a) Seriousness of the offending, including the nature of the injuries to the complainant – for instance, serious permanent injuries suffered;
- (b) The accused’s role in the offending;
- (c) Novel legal issues or legal complexity of the issues – for instance, complex DNA evidence;
- (d) Adequacy of the available sentencing options;
- (e) Prior convictions;
- (f) The age of the accused – how close to 18 years of age was the accused when the offences are alleged to have occurred;
- (g) Any known factors personal to the accused.

In addition to those general factors I will also consider in sex offences cases whether the charges involve rapes on strangers, multiple victims, rapes in public places or rapes with extreme violence, cases where mental impairment is likely to be raised or high publicity cases where the public interest requires that the VPPS should conduct the prosecution.

These factors mirror the considerations that a magistrate has to consider as generally we take over matters where it is likely that the court will find exceptional circumstances do exist and run the trial in the higher courts.

Some factors that I generally do not take into account include:

- (a) Fragmentation of proceedings – for instance, where there is an adult accused and child co-offender;
- (b) Parity of sentences between the adult and child co-offenders;
- (c) Whether the matter is likely to be appealed if there is a conviction in the Children’s Court.<sup>2042</sup>

The Victorian DPP also submitted that the uncertainty about when a matter will or will not be uplifted can create difficulties when making a decision on whether to apply to uplift.<sup>2043</sup> He referred to unsuccessful applications ‘in very serious cases one might expect would be uplifted, for example a gang rape on an intellectually handicapped child victim’.<sup>2044</sup>

He also identified potential difficulties for child complainants in cases where there is an adult co-accused and an application to uplift is not made or an uplift is not granted. He stated:

If there are adult and child co-accused in a matter, then the child complainant may need to give evidence on more than one occasion, depending on how the matter proceeds. For example, if the adult accused matter proceeds in one jurisdiction and the child accused matter proceeds summarily in the Children’s Court then the complainant would have to give evidence once in the proceeding involving the adult accused (because the complainant cannot be cross-examined at committal) and once in the matter involving the child accused, as the matter would proceed summarily. However if there were adult and child co-accused and the complainant was not a child or cognitively impaired, then the complainant would potentially give evidence twice in relation to the adult accused and once in relation to the child accused. The potential for child complainants having to give evidence multiple times is a significant factor in my decision whether to seek to uplift a Children’s Court prosecution.<sup>2045</sup>

In its submission in response to the Consultation Paper, the Law Society of New South Wales stated:

NSW is the most permissive jurisdiction in allowing higher courts to deal with children accused of committing sexual offences. Many sexual offences are ‘serious children’s indictable offences’ and must ‘be dealt with according to law’. Magistrates can also send indictable matters to higher courts under s 31 of the CCPA [*Children (Criminal Proceedings) Act 1987* (NSW)].<sup>2046</sup> [References omitted.]

Having regard to the statements by the UN Committee on the Rights of the Child in its General Comment No 10 on special rules for diversion and special measures for different treatment of juvenile offenders, the Law Society of New South Wales submitted that:

children accused of committing sexual offences who are over the minimum age of criminal responsibility should be dealt with under the juvenile justice system – that is, by the Children’s Court or under the *Young Offenders Act 1997* (YOA) in NSW (as appropriate) rather than under an adult system.

If this recommendation is not accepted, the Law Society would support allowing for judicial discretion as to whether a matter is dealt with by a higher court, which is consistent with the approach in other jurisdictions.<sup>2047</sup>

Similarly, Legal Aid NSW expressed support for reform to give the New South Wales Children’s Court jurisdiction over all offences committed by children, including all sexual offences, and subject to appropriate discretion in the Children’s Court to refer particularly serious matters to higher courts to be dealt with at law. It submitted that this position, adopted by many other Australian jurisdictions, is consistent with international child justice principles.<sup>2048</sup>

In its submission in response to the Consultation Paper, the New South Wales Office of the Director of Public Prosecutions (ODPP) submitted that reform was required in New South Wales in relation to committal proceedings involving child sexual abuse offences. The New South Wales ODPP submitted that, while sections 91 and 93 of the *Criminal Procedure Act 1986* (NSW) operate to severely limit the circumstances in which a court can require a complainant to attend a committal for the purposes of giving evidence, they do not apply where the alleged offender is a juvenile. The New South Wales ODPP submitted:

where the alleged offender is a juvenile, section 31(3) of the *Children (Criminal Proceedings) Act 1987* operates to deny a complainant including a child complainant these important protections. That section states that if, in the opinion of the Children’s Court Magistrate, an indictable charge is too serious to be dealt with in the Children’s Court, it will be committed for trial. Yet, regrettably, section 31(3) only permits the Children’s Court Magistrate dealing with such an indictable offence (which is not a ‘serious children’s indictable offence’) to commit the young person for trial ‘after all the evidence for the prosecution has been taken’. This effectively means that before any such committal for trial in the Children’s Court can occur, the complainant has to attend to give evidence. Thus, if such an offence goes to trial, the child will end up giving evidence twice. This issue is of some moment because there are numerous child sexual assault offences which fall into this category i.e. offences which are indictable offences but which are not ‘serious children’s indictable offences’.<sup>2049</sup>

### 37.7.4 Discussion and conclusions

States and territories have adopted different approaches to determining which court should deal with juveniles who are charged with child sexual abuse offences. We have no evidence to suggest that one approach is better than the other. We also have no evidence to suggest that juveniles charged with child sexual abuse offences are being dealt with in a lower court when they should be dealt with in a higher court or vice versa.

Given what we have learned about how difficult it is for complainants of child sexual abuse to give evidence, we consider that state and territory governments should review their legislation to ensure that complainants in child sexual abuse prosecutions do not have to give evidence on an additional occasion in any circumstance where the alleged offender is a juvenile, including where:

- there are co-accused and one or more of the co-accused is a juvenile – in which case, in the absence of reform, the complainant may have to give evidence once against the adult accused(s) and again against the juvenile accused(s)
- a Children’s Court magistrate must hear the prosecution evidence before committing a charge for trial in a higher court – in which case, in the absence of reform, the complainant may have to give evidence at what is effectively a committal in the Children’s Court and then again at the trial if the matter is committed for trial.

There may be a number of ways in which such problems can be addressed. For example, where necessary, legislation could be amended to allow juveniles charged with child sexual abuse offences to be dealt with in the adult courts where there are co-accused, and legislation could be amended to prevent a Children’s Court magistrate from hearing any evidence from the complainant other than a prerecorded police interview before committing a charge for trial in a higher court. Alternatively, it might be possible to address the issue by ensuring that the complainant can prerecord evidence on one occasion which is allowed to be used for the purposes of any proceedings in both the higher courts and the Children’s Court.

#### **Recommendation**

84. State and territory governments should review their legislation – and if necessary introduce amending legislation – to ensure that complainants in child sexual abuse prosecutions do not have to give evidence on any additional occasion in circumstances where the accused, or one of two or more co-accused, is a juvenile at the time of prosecution or was a juvenile at the time of the offence.

## **37.8 Sentencing of juveniles**

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### **37.8.1 Principles of sentencing**

We discussed the purposes and principles of sentencing generally in Chapter 34.

While these purposes and principles are relevant to sentencing for both adult and child offenders, certain elements are given greater or lesser weight in sentencing juveniles.

Historically, under the common law, the rehabilitation of a young offender was given more weight than considerations such as punishment and general deterrence.<sup>2050</sup> However, the circumstances of a case, such as the seriousness of the offence or the adult-like behaviour of the child,<sup>2051</sup> could operate to bring the balance of these principles closer to their application to adult offenders.

Article 40(1) of the United Nations *Convention on the Rights of the Child* (CROC) requires parties to recognise the right of every child who is accused or convicted of a criminal offence to be treated in a manner consistent with ‘the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society’.

Rehabilitation of the offender is the central focus of juvenile sentencing provisions in Australia. Some jurisdictions establish this principle in legislation. For example, in the Australian Capital Territory, section 133C(1) of the *Crimes (Sentencing) Act 2005* (ACT) states:

in sentencing a young offender, a court must consider the purpose of promoting the rehabilitation of the young offender and may give more weight to that purpose than it gives to any of the other purposes...<sup>2052</sup>

In New South Wales, section 6(f) of the *Children (Criminal Proceedings) Act 1987* (NSW) states that a person exercising functions under the Act is to exercise those functions having regard to the principle that ‘it is desirable that children who commit offences be assisted with their reintegration into the community so as to sustain family and community ties’.<sup>2053</sup>

In Victoria, section 362(1) of the *Children, Youth and Families Act 2005* (Vic) requires the court, as far as practicable, to have regard to the following factors in determining which sentence to impose on a child:

- the need to strengthen and preserve the relationship between the child and the child’s family
- the desirability of allowing the child to live at home
- the desirability of allowing the education, training or employment of the child to continue without interruption or disturbance
- the need to minimise the stigma to the child resulting from a court determination
- the suitability of the sentence to the child
- if appropriate, the need to ensure that the child is aware that he or she must bear a responsibility for any action by him or her against the law
- if appropriate, the need to protect the community, or any person, from the violent or other wrongful acts of the child.

In Western Australia, the principles set out in section 7 of the *Young Offenders Act 1994* (WA) include the following principles relevant to sentencing or detention (in addition to the principles discussed in relation to prosecution in section 37.7.1):

- Detaining a young person in custody for an offence, whether before or after the person is found to have committed the offence, should only be used as a last resort and, if required, is only to be for as short a time as is necessary.
- Detention of a young person in custody, if required, is to be in a facility that is suitable for a young person and at which the young person is not exposed to contact with any adult detained in the facility, although a young person who has reached the age of 16 years may be held in a prison for adults but is not to share living quarters with an adult prisoner.
- Punishment of a young person for an offence should be designed so as to give the offender an opportunity to develop a sense of social responsibility and otherwise to develop in beneficial and socially acceptable ways.

The different purpose and emphasis in sentencing juveniles is reflected in the different options that are available to courts when sentencing juvenile offenders.

Article 37(b) of the CROC states that ‘the detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time’.

As we discussed in section 37.6.1 in relation to diversion, there are a number of policy considerations underlying the requirement that detention be a last resort for juveniles, including the view that incarceration increases the chances of recidivism – and reduces the prospects of rehabilitation – by placing juvenile offenders who may have committed less serious offences in an environment with more serious offenders. Detention is also regarded as being more stressful for children than adults, due to their greater vulnerability to both physical and emotional harm, and can have serious social and developmental consequences.<sup>2054</sup>

Legislation in each state and territory provides that detention is to be viewed as a measure of last resort when sentencing a juvenile offender.<sup>2055</sup>

Courts may be required to balance sentencing principles aimed at juveniles with other sentencing principles when sentencing juveniles who have committed serious sexual offences. For example, in Victoria, the County and Supreme Courts may sentence a child under section 7(1) of the *Sentencing Act 1991* (Vic), taking into account the purposes, principles and factors set out in section 5 of that Act. Higher courts sentencing children under the *Sentencing Act 1991* (Vic) may also be guided by principles set out in section 362 of the *Children Youth and Families Act 2005* (Vic), which we listed above.

The Victorian Sentencing Advisory Council Report stated that:

The sentencing frameworks contained in the *Sentencing Act 1991* (Vic) and the CYF Act are ‘strikingly different’,<sup>2056</sup> with the principles set out in section 362 of the CYF Act differing ‘in kind and emphasis’<sup>2057</sup> from those set out in section 5 of the *Sentencing Act 1991* (Vic).

Section 5 instructs courts of adult jurisdiction that the purposes for which a sentence may be imposed are punishment, deterrence, rehabilitation, denunciation and protection of the community. The section 362 principles, on the other hand, ‘are all directed at an assessment of the particular offending, and of the particular offender’<sup>2058, 2059</sup> [Some references omitted.]

However, we understand that it is rare in Victoria for sexual offences to be dealt with other than by the Children’s Court.

The decision of the New South Wales Court of Criminal Appeal in *R v AEM Snr; R v KEM; R v MM*<sup>2060</sup> illustrates the different principles of sentencing that apply to juvenile and adult offenders in New South Wales. It also illustrates the extent to which the principles that apply to juvenile offenders may be modified if the juvenile is sentenced for a serious indictable offence in New South Wales.

*R v AEM Snr; R v KEM; R v MM* were Crown appeals arguing that the sentences imposed on the respondents for a series of sexual assaults committed against two 16-year-old female victims were inadequate. Two of the respondents were juveniles at the time they committed the offences. The crimes were very serious – the victims were forcibly detained at the home for a four-hour period and were subjected to a series of sexual assaults of the ‘most degrading kind’ by the offenders.<sup>2061</sup>

Each respondent had pleaded guilty to two counts of aggravated sexual assault, which carried a maximum penalty of 20 years imprisonment.<sup>2062</sup> In addition, each respondent had one or more offences committed against the same victims taken into account under section 33 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (the Form 1 offences). The sentences imposed by the sentencing judge in respect of the juvenile offenders were:

- KEM, who was aged 16 years and 10 months at the time of the commission of the offences – five years and seven months, to be served concurrently with a non-parole period in each case of three years and six months
- MM, who was aged 16 years and 3 months at the time of the commission of the offences:
  - count 1: five years and six months with a non-parole period of four years
  - count 2: six years with a non-parole period of four years.

The sentencing judge directed that the whole of KEM and MM’s term of imprisonment be served in a Juvenile Justice Centre.

The New South Wales Court of Criminal Appeal held that the sentencing judge had erred in a number of respects in applying the principles of sentencing. The Court of Criminal Appeal observed that although KEM and MM were both juveniles at the time of the commission of the offences:

as the offences were ‘*serious indictable offences*’ within s 17 of the *Children (Criminal Proceedings) Act*, each was required to be sentenced according to law, that is, according to the principles ordinarily applied by the courts to adult offenders: see *R v WKR* (1993) 32 NSWLR 447 at 449; *R v Bus and AS*; rather than under the less harsh provisions of Div 4 of Pt 3 of the *Children (Criminal Proceedings) Act*.

However, the provisions of that Act continued to be relevant in two respects. First, the Court was required on sentence to have regard to the provisions of s 6 of the Act which provide:

A court, in exercising criminal jurisdiction with respect to children, shall have regard to the following principles:

- (a) that children have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard, and a right to participate, in the processes that lead to decisions that affect them,
- (b) that children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance,
- (c) that it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption,
- (d) that it is desirable, wherever possible, to allow a child to reside in his or her home,
- (e) that the penalty imposed on a child for an offence should be no greater than that imposed on an adult who commits an offence of the same kind.

[The sentencing judge] referred to s 6 in sentencing KEM and noted, in respect of MM that the same principles in sentencing a juvenile as applied in KEM’s case applied to him.<sup>2063</sup>

In considering whether to resentence the juvenile offenders KEM and MM, the Court of Criminal Appeal weighed up those principles against other relevant sentencing principles such as the following:

- The principle of totality required the sentence imposed upon the offender represent a proper period of incarceration for the total crime involved.<sup>2064</sup> The Court of Criminal Appeal found that the sentences imposed by the sentencing judge wholly failed to address the seriousness of the offences and that she failed to apply the principle of totality.<sup>2065</sup>



- The interrelationship between general deterrence and the youth of an offender. The Court of Criminal Appeal stated:

It is well accepted that in the case of youth, general deterrence and public denunciation usually play a subordinate role to the need to have regard to individual treatment aimed at rehabilitation ... However, important as that principle is, it cannot defeat the primary purpose of punishment nor, in circumstances where young offenders conduct themselves in a way which an adult does, can it stand in the way of the need to protect society.<sup>2066</sup> [References omitted.]

The Court of Criminal Appeal held that:

the sentences imposed were so low as to lead to the conclusion that, notwithstanding her expressed view as to the approach she had taken, [the sentencing judge] failed to give adequate weight to the principles of deterrence and denunciation when sentencing the respondents.<sup>2067</sup>

Taking these factors and other factors into account, the Court of Criminal Appeal set aside the existing sentences, confirmed the convictions and resented the juvenile respondents as follows:

- KEM, who was aged 16 years and 10 months at the time he committed the offences, effectively received an overall sentence of 14 years imprisonment with a non-parole period of 10 years, with a portion of that period to be served in a Juvenile Justice Centre so as to maximise KEM's rehabilitation prospects.
- MM, who was aged 16 years and three months at the time he committed the offences, effectively received an overall sentence of 13 years imprisonment with a non-parole period of 10 years, with a portion of that period to be served in a Juvenile Justice Centre so as to maximise MM's rehabilitation prospects.<sup>2068</sup>

### 37.8.2 Sentencing options

Where a child is tried and sentenced in the Children's Court jurisdiction (or a higher court exercising the Children's Court's jurisdiction), there are usually sentencing options available to the Children's Court under separate legislation to the relevant jurisdiction's sentencing legislation for adults (and juvenile offenders that fall within the adult jurisdiction). The different sentencing options for eligible juvenile offenders are discussed below.

Where a juvenile offender is tried in a higher court because the charged offences are excluded from summary jurisdiction, or otherwise because of the severity of the offences committed, the relevant higher court may have more sentencing options available to it. For example, in Victoria, higher courts with jurisdiction (generally the County and Supreme Courts) may sentence a child under

either the *Children, Youth and Families Act 2005* (Vic) (CYFA) (with some sentencing restrictions) or the *Sentencing Act 1991* (Vic) (Sentencing Act).<sup>2069</sup> More severe sanctions are available under the Sentencing Act – for example, a sentence of up to the adult statutory maximum (life) is available, depending on the offence charged, whereas, under the CYFA, three years detention is the most severe sanction.<sup>2070</sup>

The sentencing of the juveniles in *R v AEM Snr; R v KEM; R v MM*,<sup>2071</sup> discussed in section 37.8.1, is an example of the approach to sentencing juveniles in the higher courts in New South Wales.

## Non-custodial sentencing options

As discussed in Chapter 34, there are a number of non-custodial sentencing options available to courts. These options are generally available for juvenile offenders as well as for adult offenders.

However, there may be additional restrictions on the extent of some of these options when sentencing a juvenile offender. For example, in New South Wales, adult offenders can be sentenced to perform a maximum of 500 hours of community service,<sup>2072</sup> while the maximum number of hours for juvenile offenders ranges from 100 to 250 hours depending on the age of the offender and the seriousness of the offence.<sup>2073</sup> Similar restrictions on community service hours apply in other jurisdictions.

Similarly, in all jurisdictions except Queensland and the Northern Territory there is a limit on the maximum fine that can be imposed on a juvenile offender,<sup>2074</sup> and all jurisdictions require courts to consider the child's financial circumstances before imposing a fine.<sup>2075</sup>

In addition, some jurisdictions have additional sentencing options that can only be imposed on juvenile offenders.

We discussed cautions and conferences as alternatives to prosecution to divert young offenders from the criminal justice system in section 37.6.

In some jurisdictions, courts may also use conferences as an alternative to sentencing or as a quasi-sentencing option. For example, in Tasmania, after the guilt of a young offender has been established through a successful prosecution, it is open to the court to order the offender to attend a community conference rather than proceeding to sentence.<sup>2076</sup> The effect of a successfully completed community conference, including the offender completing all undertakings, is a dismissal of the charge. If the conference is unsuccessful then the matter will return to court for sentencing.<sup>2077</sup>

Probably the most important non-custodial sentencing option for juvenile offenders sentenced for sexual offences is community service and supervision orders. In 2015–16, community service and supervision orders were the most commonly imposed form of sentence for juvenile sex offenders, accounting for 37 per cent of sentences imposed for sex offences, compared with 25.3 per cent of sentences for all offences.<sup>2078</sup>

Community service and supervision orders are regarded as the most onerous sentencing option after a detention (or custodial) order. Their comparatively high rate of use in relation to sexual offences suggests that juvenile sexual offending is treated more seriously than many other offences committed by juveniles.

Sanctions that are commonly imposed on both adult and young offenders, such as good behaviour bonds, probation, and community service, are all examples of community service and supervision orders. In some jurisdictions there are also community-based supervision orders that can only be imposed on juvenile offenders. The focus on rehabilitation in sentencing juvenile offenders is most apparent in these orders, which combine the punitive effect of restrictions on liberty with elements focused on rehabilitation, such as attendance at specified programs.

These orders provide courts with alternatives to detention that may offer significant benefits for juvenile offenders in terms of their reintegration into society.<sup>2079</sup>

Examples of community-based supervision orders are the Youth Supervision Order (YSO) and Youth Attendance Order (YAO) in Victoria. In Victoria, after a finding of guilt, the court may release a young offender, with or without conviction, on a YSO.

Under a YSO, offenders must:

- report to a youth justice unit (for up to six hours per week)
- not reoffend
- not leave Victoria without written permission from a youth justice worker
- report changes such as change of address, school or employment
- participate in community service or other programs if so directed.<sup>2080</sup>

If an offender breaches a YSO, the court may vary, add, or substitute conditions, direct compliance with the order, or replace the order with any sentence the court thinks fit.<sup>2081</sup>

For more serious juvenile offenders, the court may impose a YAO. A YAO is a direct alternative to detention. It may be ordered against convicted offenders who are over the age of 15 and who would otherwise be sentenced to detention as a result of the gravity or habitual nature of their offending.<sup>2082</sup> The legislation specifies that the objects of a YAO are to provide the person with activities and requirements which:

- take into account the gravity of the person's behaviour
- penalise the person by imposing restrictions on liberty
- require the person to make amends for the offence through community service
- provide opportunities for rehabilitation.<sup>2083</sup>

Mandatory conditions under a YAO are comparable to those under a YSO but include more onerous attendance requirements: the person must attend at a youth justice unit for a period not exceeding 52 weeks, for no more than three attendances totalling 10 hours each week, of which no more than four hours can be spent on community service.<sup>2084</sup>

Breach of a YAO can result in the court imposing additional conditions on the YAO or revoking the YAO and replacing it with any sentence the court thinks just.<sup>2085</sup> Given that the YAO is the most serious non-custodial sentencing option, the most likely outcome where a court revokes a YAO is an order for detention.

Another two examples of community-based supervision orders are the Youth Community-Based Order (YCBO) and Intensive Youth Supervision Order (IYSO) in Western Australia. In Western Australia, a court may impose a YCBO on a young offender, under which the offender is required to attend education or rehabilitation courses, perform community service work and report for supervision not more than once per week.<sup>2086</sup>

For more serious juvenile offenders, the court may impose an IYSO. There are two key differences between an IYSO and a YCBO. First, offenders may be required to report for supervision more frequently under an IYSO. Secondly, an IYSO can be made in conjunction with a custodial sentence, effectively serving as a form of suspended sentence.

Where an IYSO is made alongside a custodial sentence, it becomes known as a Conditional Release Order (CRO). If an offender successfully completes the CRO, the offender is not liable to serve the sentence of detention unless proceedings are commenced for another offence within six months after the end of the CRO and the proceedings result in a finding of guilt.<sup>2087</sup>

We discussed the referral of a child aged between 10 and under 15 to therapeutic treatment by the court in Victoria in section 37.6.2. In eligible criminal proceedings where the court has not yet made a finding of guilt, the criminal proceeding may be adjourned if the court is satisfied that the child has exhibited sexually abusive behaviours that would justify referring the matter to the Secretary of the Department of Health and Human Services and that the child will attend and participate voluntarily in an appropriate therapeutic treatment program.<sup>2088</sup>

In New South Wales, after a finding of guilt has been made, section 33(1)(c2) of the *Children (Criminal Proceedings) Act 1987* (NSW) allows the Children's Court to make an order adjourning proceedings for up to 12 months for a number of purposes, including:

- to assess the person's capacity and prospects for rehabilitation
- to allow the person to demonstrate that rehabilitation has taken place
- for any other purpose the Children's Court considers appropriate in the circumstances.

This provision would appear to be sufficiently broad to enable the court to allow a juvenile offender to undertake a therapeutic treatment program before being sentenced, with completion of the program likely to have a positive impact on sentence.

## Custodial sentencing options

In all Australian jurisdictions it is open to the courts to sentence juvenile offenders to a period of detention in a juvenile correctional facility.

Custodial sentences are imposed on juvenile offenders when no other sentencing option is considered appropriate.

A custodial sentence is more likely to be imposed for juvenile sexual offenders than for juvenile offenders generally. In 2011–12, 15.7 per cent of juvenile sexual offenders were sentenced to custody in a detention centre compared with 6.1 per cent of juvenile offenders in general.<sup>2089</sup>

In some jurisdictions, as an alternative to full-time custody in a correctional facility, courts may have the option of sentencing a young offender to forms of detention such as custody in the community<sup>2090</sup> and periodic detention.<sup>2091</sup> In 2011–12, 5.9 per cent of juvenile sexual offenders were sentenced to custody in the community compared with 1.9 per cent of juvenile offenders generally.<sup>2092</sup>

Juvenile offenders may be sentenced to detention in different facilities depending on their age. In some jurisdictions, juveniles may be ordered to serve their detention in an adult correctional facility.

## Juvenile or youth detention

In general, young offenders under 18 are detained in separate facilities to adult detainees, although there are variations across jurisdictions.

For example, in New South Wales, a court may order that a person under the age of 21 who has been sentenced to a term of imprisonment serve the sentence as a juvenile offender.<sup>2093</sup> There are similar provision in Victoria, which apply if the court is satisfied that there are reasonable prospects for the rehabilitation of the offender or that the offender is particularly impressionable, immature or likely to be subjected to undesirable influences in an adult prison.<sup>2094</sup>

In Victoria, children between the ages of 10 and 14 may be sentenced to be detained at a youth residential centre, while offenders between the ages of 15 and 21 may be detained in a youth justice centre.<sup>2095</sup>

While community-based supervision may be considered to be more effective for rehabilitation purposes, there is also supposed to be a significant focus on rehabilitating young offenders who are sentenced to full-time detention.

Juvenile justice agencies in states and territories may provide case management services that are intended to enhance rehabilitation by having a caseworker provide individual attention to an offender. The stated aim of these services is to involve the child in decisions about suitable educational, vocational and recreational programs tailored to the needs of the child.<sup>2096</sup> Offence-specific rehabilitation programs, including those that target sexual offending, may be provided in detention centres.<sup>2097</sup> For example, in Victoria, MAPPS (Male Adolescent Program for Positive Sexuality) is an intensive group treatment program for adolescent males who have been found guilty of a sexual offence and are subject to court orders supervised by Youth Justice.<sup>2098</sup> We are considering the issue of treatment for children with harmful sexual behaviour in our separate project, and we will report on it in our final report.

The conditions in detention facilities are also of relevance to the rehabilitation of young offenders. The Australian Law Reform Commission has stated:

The well-being and rehabilitation of young people in detention depend to a large extent on the living conditions, services and programs provided for them. Living conditions encompass the physical standard of buildings and other facilities, levels of hygiene, food and clothing, classification of detainees, contact with family and friends and privacy.<sup>2099</sup>

The *National standards for juvenile custodial facilities* (AJJA Standards) were developed by the Australasian Juvenile Justice Administrators group in 1999. They contain 46 broad standards which deal with areas such as safety, respect, privacy, health, recreation and leisure, and family and community contacts. Each standard is backed by reference to relevant United Nations rules as well as sample indicators which might indicate whether a standard is being met.

Table 37.18 sets out examples of some of the standards and sample indicators.

**Table 37.18: Examples of national standards for juvenile custodial facilities and sample indicators**

Standard	Sample indicators
Abuse-free environment: The centre provides an environment in which young people, staff and others feel safe, secure and not threatened by any form of abuse or harassment.	<ul style="list-style-type: none"> <li>• Young people, staff and visitors report that they are satisfied that the environment of the centre is free of physical, psychological and emotional abuse or harassment.</li> <li>• During sleeping hours there is regular, unobtrusive supervision of all sleeping areas, including individual rooms and group dormitories.</li> </ul>
Regard to age and gender: The centre provides age-appropriate and gender-appropriate services in recognition of the differing needs of young people at different stages of development and the specific needs of young females.	<ul style="list-style-type: none"> <li>• The centre interprets policies, follows procedures, delivers programs, and generally provides services with due regard to the age and gender of the young people in its care.</li> <li>• There is an appropriate policy or established method of responding to the needs of pregnant young females and young mothers.</li> <li>• There is an appropriate policy or established method of responding to the needs of transgender and other young people who do not fit traditional gender categories.</li> </ul>
Clothing and grooming: Young people are provided with a sufficient quantity and reasonable choice of clean clothing in good condition, and their choices in matters of personal grooming are maximised.	<ul style="list-style-type: none"> <li>• Observation of variety, cleanliness and condition of clothing.</li> <li>• Young people report satisfaction with clothing and grooming choices available to them.</li> <li>• Young people have regular access to a hairdresser.</li> <li>• Level of complaints relating to clothing and grooming.</li> </ul>
Food and nutrition: Young people are provided with a variety of foods of satisfactory quality in sufficient quantities; meals are nutritious and meet special dietary needs; and their choice and preparation is influenced by young people's preferences.	<ul style="list-style-type: none"> <li>• Policy, procedure and practices in relation to food preparation and nutrition are consistent and reflect the standard.</li> <li>• Food services comply with applicable sanitation and health codes.</li> <li>• Young people report satisfaction with the centre's food services.</li> <li>• Culturally- and age-appropriate diets are provided, and religious requirements are observed.</li> </ul>

The AJJA Standards do not have any regulatory force, and the operational aspects of juvenile or youth detention facilities are regulated by state and territory legislation and policy.

In some jurisdiction, the AJJA Standards may be considered by independent inspectors of juvenile or youth detention facilities. For example, Inspectors of Custodial Services in New South Wales and Western Australia, or Official Visitors working on their behalf, may provide post-inspection reports to the relevant Minister about a facility's performance in accordance with the AJJA Standards.<sup>2100</sup>

We will report on principles for child safe organisations and institutions that provide juvenile or youth detention facilities in our final report.

### **Adult detention**

Article 37(c) of CROC states that every child deprived of liberty 'shall be separated from adults unless it is considered in the child's best interest not to do so'. Australia currently has a reservation to article 37(c) of CROC in the following terms:

Australia accepts the general principles of article 37. In relation to the second sentence of paragraph (c), the obligation to separate children from adults in prison is accepted only to the extent that such imprisonment is considered by the responsible authorities to be feasible and consistent with the obligation that children be able to maintain contact with their families, having regard to the geography and demography of Australia. Australia, therefore, ratifies the Convention to the extent that it is unable to comply with the obligation imposed by article 37(c).<sup>2101</sup>

Typically, juvenile offenders sentenced to a period of detention will be detained in separate facilities to adult offenders. However, juvenile offenders may be detained in adult prisons in certain situations.

In addition to situations where a court sentences a juvenile to serve a custodial sentence in an adult prison, in some jurisdictions the legislation may permit detainees under the age of 18 to be transferred to adult prisons in certain circumstances. For example, in Victoria the Youth Parole Board may transfer a detainee aged 16 or older to an adult prison where the person has engaged in conduct that threatens the good order and safe operation of the youth justice centre and cannot be properly controlled in a youth justice centre.<sup>2102</sup>

Young offenders may also be detained in adult prisons due to practical considerations.<sup>2103</sup>



### 37.8.3 What we were told in submissions

In relation to the principles applicable to sentencing juveniles, the Victorian DPP submitted that the focus of the *Children, Youth and Families Act 2005* in relation to sentencing of juvenile offenders is predominantly welfare oriented and rehabilitative. He submitted:

Unlike s.5(1) *Sentencing Act* 1991, s.362 CY & F Act 2005 does not expressly include the sentencing principle of general deterrence. The question of whether nevertheless general deterrence is a relevant sentencing consideration when sentencing children has been the subject of a number of decisions.

In *R v Evans* [2003] VSCA 223 Vincent JA said at paragraph [44]

‘whilst broadly speaking, normal sentencing principles can be said to remain applicable when dealing with youthful offenders as a matter of law and practice it is recognised that the respective weight to be given to relevant factors will vary. In addition the *Children and Young Persons Act* 1989 sets out a number of matters to which a sentence in the Children’s Court must have regard and which differ in kind and emphasis from roughly similar provision in s.5 *Sentencing Act* 1991. .... These considerations can and do lead to dispositions which would be regarded as entirely inappropriate in the case of older and presumably more mature individuals.’

Section 139 of the *Children and Young Persons Act* 1989 was the precursor to s.362 CY & F Act 2005.<sup>2104</sup>

Legal Aid NSW submitted that principles in the *Children (Criminal Proceedings) Act* 1987 (NSW) and the *Young Offenders Act* 1997 (NSW) reflect the right approach but have been eroded. They submitted that:

[The legislation,] as originally enacted, reflected the right approach to offending by children and young people. That legislation focused on diversion and recognised detention as an option of last resort. However, there has been a gradual erosion of the original intention of both Acts with subsequent legislative amendments introducing a more punitive approach to dealing with children and young people.<sup>2105</sup>

In relation to sentencing options, Protect All Children Today (PACT) submitted:

*PACT strongly believe that a child does not become an adult until the age of 18, so should be treated as such in all their dealings with the criminal justice system.* This is extremely important in relation to the decisions as to where they serve their punishment in a Youth Detention Centre or Adult Prison. The potential long-term negative impacts on a young person being exposed to adult perpetrators is significant and should be strongly considered during sentencing.<sup>2106</sup> [Emphasis original.]

Similarly, the Law Society of New South Wales submitted that:

in NSW, children sentenced according to law for serious children's indictable offences, or for other indictable offences dealt with in higher courts, can be sentenced to imprisonment. The sentencing court may make an order under s 19 of the CCPA [*Children (Criminal Proceedings) Act 1987* (NSW)] directing that the whole or any part of the term of the sentence of imprisonment be served as a juvenile offender. However, for serious children's indictable offences, the court must be satisfied that there are special circumstances justifying detention of the person as a juvenile offender, and the person's youth alone is not a special circumstance. Despite any s 19 order, Juvenile Justice NSW can also still administratively transfer a juvenile offender to an adult prison.

The Law Society notes that inmates who serve sentences in adult prison for child sexual offences are often at risk and put in protection. We submit that there is increased vulnerability for juvenile offenders in prison for child sexual offences.

The Law Society notes that children, by virtue of their unique vulnerability, are entitled to special protections in international law, requiring that the deprivation of liberty of a child be used only as a last resort and for the 'shortest appropriate period of time' or 'minimum necessary period', and be limited to exceptional cases.

The Law Society recommends that, consistent with international human rights standards, children should not be subject to adult sentences, including detention in an adult prison. We submit that if custody is warranted as a last resort, a child should be held in a juvenile justice centre, and not an adult prison.<sup>2107</sup> [References omitted.]

The Law Society of New South Wales also stated that there are fewer sentencing options available for children than for adults – that is, a child who turns 18 and is dealt with according to law can access home detention or intensive corrective orders (ICOs), whereas a child who is dealt with in the Children's Court cannot. It submitted that:

children should have access to the same sentencing options available to them as adults, and that consideration should be given to exploring further options that are relevant and appropriate to children. We consider that orders that take into account the child's age, individual circumstances and the offence, and that focus on rehabilitation rather than punishment, should be available to judicial officers responsible for sentencing children in NSW. We consider that child-appropriate counselling, treatment and support should be attached to any ICO imposed on a child.<sup>2108</sup>

### 37.8.4 Discussion and conclusions

The issue of sentencing juveniles is a much broader issue than sentencing juveniles who commit child sexual abuse offences.

However, focusing on child sexual abuse offences – and sexual offences more generally – committed by juveniles demonstrates that juveniles can commit the most serious, violent offences and that the offences can have a devastating impact on their victims. We have no difficulty in recognising that punishment, general and specific deterrence and the protection of the community should play a part in sentencing juveniles who commit such serious, violent offences. As the New South Wales Court of Criminal Appeal stated in *R v AEM Snr; R v KEM; R v MM*.<sup>2109</sup>

It is well accepted that in the case of youth, general deterrence and public denunciation usually play a subordinate role to the need to have regard to individual treatment aimed at rehabilitation ... However, important as that principle is, it cannot defeat the primary purpose of punishment nor, in circumstances where young offenders conduct themselves in a way which an adult does, can it stand in the way of the need to protect society.<sup>2110</sup>

Of course, we also recognise that juveniles may commit child sexual abuse offences in a variety of circumstances, many of which may warrant a focus on rehabilitation rather than punishment. Some offending by juveniles – such as adolescent peer consensual sex – may not warrant the attention of the criminal justice system at all.

We are satisfied that the sentencing principles and sentencing options that can be applied to juveniles who commit child sexual abuse offences should be broad enough to respond to the spectrum of juvenile offending.

## 37.9 Risk management issues

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Risk management issues may arise for child sexual offenders at the end of their sentence. As discussed in the Consultation Paper, ongoing consequences of conviction for a child sexual abuse offender include placement on a sex offender registry, with corresponding reporting obligations and an inability to work in child-related employment.

### 37.9.1 Child sex offender registries

In some jurisdictions, the registration of a child sexual abuse offender involves the exercise of judicial discretion, especially when dealing with a juvenile offender. In other jurisdictions, registration for juveniles is mandatory upon conviction for a registrable offence, but there are provisions which exclude registration for offences involving a low level of criminality. Only one jurisdiction – Western Australia – has mandatory registration for juvenile offenders.

In Victoria, South Australia and the Northern Territory, the registration of a juvenile offender requires the exercise of judicial discretion. That is, a juvenile offender will only be registered if the court is satisfied that the registration is necessary.

For example, in Victoria, a person is not a registrable offender merely because they committed a registrable offence as a child.<sup>2111</sup> In order for a juvenile offender to be registered, the court must make a sex offender registration order upon being satisfied beyond reasonable doubt that the person poses a risk to the sexual safety of one or more persons in the community.<sup>2112</sup> Similar provisions exist in South Australia and the Northern Territory, although the courts in those jurisdictions need not be satisfied beyond reasonable doubt that registration is warranted.<sup>2113</sup>

In Tasmania, no exceptions are made for juvenile offenders. However, the court has the discretion in all matters not to make a registration order if satisfied that the person does not pose a risk of committing a reportable offence in the future.<sup>2114</sup>

In addition to judicial discretion, some jurisdictions have sentencing thresholds which apply before sex offender registration provisions are enlivened. In New South Wales, Queensland, the Australian Capital Territory and the Northern Territory, there is no mandatory registration where the offender is sentenced to certain non-conviction orders.<sup>2115</sup> In Queensland, South Australia and the Australian Capital Territory, there is also no mandatory registration where a person is sentenced for a single offence and the sentence does not include a term of imprisonment or supervision, although in South Australia and the Australian Capital Territory this exception only applies to certain offences.<sup>2116</sup>

New South Wales, Queensland, Western Australia and the Australian Capital Territory have some form of mandatory registration for juvenile offenders. However, each jurisdiction also has a limited exception to registration requirements for juveniles convicted of a single prescribed offence of a minor nature. In Western Australia, the exception is limited to offences involving child pornography.<sup>2117</sup> In New South Wales, Queensland and the Australian Capital Territory, the exception applies to offences involving indecency as well as child pornography offences.<sup>2118</sup>

In 2012, the Law Reform Commission of Western Australia (WALRC) reviewed the *Community Protection (Offender Reporting) Act 2004* (WA). The review focused on the Act's application to juvenile offenders and to adult offenders who commit offences in exceptional circumstances, such as consensual sexual activity with the honest and reasonable belief that the person was over the age of consent at the time of the offence.

The WALRC recommended that the Act be amended to introduce judicial discretion of the kind that exists in Victoria, South Australia and the Northern Territory so that a juvenile offender would only be required to register if the court is satisfied that the offender poses a sexual safety risk to the community. The WALRC stated that the failure of the Western Australian legislation to differentiate between juvenile and adult offenders was of concern given that, in general, the criminal justice system treats juvenile offenders and adult offenders differently.<sup>2119</sup> The WALRC also stated that the stigma of being registered as a sex offender may undermine the rehabilitation of a juvenile offender.<sup>2120</sup>

### 37.9.2 Working with Children Check schemes

As discussed in the Consultation Paper, we made recommendations about WWCC schemes in our *Working with Children Checks report*.<sup>2121</sup>

In our *Working with Children Checks report*, we recommended that the complete and unabridged criminal history of applicants, including offences committed as juveniles, should be available for review by screening agencies.<sup>2122</sup> We noted that no state or territory laws exclude juvenile records from being checked, but these types of records are not expressly included in all jurisdictions' statutory definitions of criminal history.<sup>2123</sup>

In recommendation 17, we recommended as follows:

State and territory governments should amend their WWCC laws to include a standard definition of criminal history, for WWCC purposes, comprised of:

- a. convictions, whether or not spent
- b. findings of guilt that did not result in a conviction being recorded
- c. charges, regardless of status or outcome, including:
  - i. pending charges – that is, charges laid but not finalised
  - ii. charges disposed of by a court, or otherwise, other than by way of conviction (for example, withdrawn, set aside or dismissed)
  - iii. charges that led to acquittals or convictions that were quashed or otherwise over-turned on appeal

for all offences, *irrespective of whether or not they concern the person's history as an adult or a child* and/or relate to offences outside Australia.<sup>2124</sup> [Emphasis added.]

Some jurisdictions require an automatic refusal of a WWCC clearance if the applicant has certain serious offences in their criminal history. Generally, convictions for these offences as a juvenile do not result in automatic refusal but are considered as part of a risk assessment process. We did not recommend changing this approach. However, we recommended that states and territories ensure that juvenile records for the automatic refusal categories are specified as relevant criminal records so that they will be considered in a risk assessment.<sup>2125</sup>

### 37.9.3 What we were told in submissions

#### Child sex offender registries

In its submission in response to the Consultation Paper, Legal Aid NSW submitted that the sex offender registration scheme does not adequately distinguish between risks posed by adult offenders and juvenile offenders. Further they submitted that:

While the [*Child Protection (Offenders Registration) Act 2000* (NSW)] makes some allowances for juveniles by halving the reporting periods and providing exceptions for indecency and child pornography offences, it does not go far enough to ensure that the children who commit offences against other children are dealt with in a manner appropriate to their age and circumstances.<sup>2126</sup>

The Law Society of New South Wales submitted that children should not be included in the Child Protection Register and stated that:

the Child Protection Register was set up ostensibly to track paedophiles, and this purpose is not served by including children. We submit that children and young people should be treated differently to adults, taking into account their lower level of intellectual and emotional maturity.<sup>2127</sup>

Some submissions expressed concern that some offences capture consensual sexual activity and therefore may lead to juveniles who engage in consensual sex being included in the Child Protection Register.<sup>2128</sup>

In its submission in response to the Consultation Paper, Legal Aid NSW provided the following as a case study example of where consensual sexual activity led to the registration of a juvenile:

Graham pleaded guilty to 2 offences contrary to section 66(C)(1) and one offence contrary to section 66C(3) of the *Crimes Act 1900*.

Graham and his girlfriend were in a relationship and engaged in consensual sexual intercourse. The first and second offence occurred when Graham was 16 and his girlfriend was 13, and then 13 years and 6 months. The third offence occurred when Graham was 17 years and 3 months and his girlfriend was 14 years 9 months.

The Magistrate sentenced Graham to probation orders and directed that no convictions be recorded. The Magistrate accepted the information in Juvenile Justice and psychologist reports that there was no suggestion of paedophilia. Despite that, Graham is a registrable person subject to a reporting period of 7.5 years.

The Children's Legal Service has seen many cases like Graham's.<sup>2129</sup>

Both Legal Aid NSW and the Law Society of New South Wales expressed concerns about the practical impact of the scheme's reporting requirements on juvenile offenders, providing the example that a child on the register would be required to report all children with whom they have contact, which would include their friends and peers, and their details.<sup>2130</sup>

The Law Society of New South Wales submitted that:

The Law Society recommends an amendment to the [*Child Protection (Offenders Registration) Act 2000 (NSW)*] to exempt child offenders altogether from the Child Protection Register, but allowing a sentencing court to exercise discretion and make a registration order. If this recommendation is not accepted, we would support an expansion of the list of exceptions outlined under s 3A of the CPOR Act.<sup>2131</sup>

Legal Aid NSW submitted that offences involving consensual sexual activity between children should not be registrable offences. In the alternative, Legal Aid NSW submitted that:

- registration of a juvenile child sex offender should be discretionary rather than mandatory
- registration should only occur where a court is satisfied that the offender poses an ongoing risk to the safety of children
- the offender should have a right to appeal a decision to register and to apply for an exemption from registration at any time after sentence on the basis that they no longer pose a risk to children.<sup>2132</sup>

The Victorian Commissioner for Children and Young People submitted that:

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.<sup>2133</sup>

## Working with Children Checks

Some submissions in response to the Consultation Paper commented on the recommendations made in the *Working with Children Checks report* with specific reference to the implications for juvenile offenders.<sup>2134</sup>

The New South Wales ODP expressed support for the recommendation in the *Working with Children Checks report* that offences committed as juveniles should be available for review as part of the screening process conducted for persons wishing to commence work with children.<sup>2135</sup> It also submitted that:

the proposed standard definition of a ‘criminal history’ for working with children purposes should be broadened in the manner proposed in recommendations 17 of the *Working with Children Checks Report*.<sup>2136</sup>

In relation to recommendation 17 of our *Working with Children Checks report*, the New South Wales Government, the Law Society of New South Wales and Legal Aid NSW expressed support for a standard definition of ‘criminal history’ for WWCC purposes.<sup>2137</sup>

The Law Society of New South Wales and Legal Aid NSW expressed concern about a broad definition of ‘criminal history’ in relation to a person’s history as a child.<sup>2138</sup> For example, Legal Aid NSW submitted that it did not support a definition which includes:

- all convictions, whether or not spent,
- findings of guilt that did not result in a conviction recorded, and
- charges, regardless of status or outcome, including where charges were withdrawn or led to acquittals.

To include charges, regardless of outcome, will mean that a person who was charged inappropriately by police as a child, or who was acquitted of a charge, will nonetheless have that charge considered in the context of future employment. We can see no legitimate argument why this would be fair, appropriate or necessary. In these circumstances, there is no objective risk to child safety that could outweigh the prejudicial impact on the person.<sup>2139</sup>

PACT was critical of some recommendations made in our *Working with Children Checks report*, particularly in relation to a WWCC not being required for persons under 18 years of age. It submitted:

As evidenced in Chapter 15 [of the Consultation Paper], child-to-child sexual offences occur. Exempting someone from obtaining a Working with Children Check until the age of 18, so [sic] poses unnecessary risks to vulnerable children.<sup>2140</sup>

The Law Society of New South Wales raised concerns and sought clarification about some of the recommendations in our *Working with Children Checks report*, particularly in relation to the application of the recommendations to juvenile offenders. It raised a number of issues, including:

- whether non-conviction outcomes for juveniles would be included in the records checked for a WWCC and the potential unfairness of including the record of a child diverted by a court but not a child diverted by police



- the coverage of recommendations 20 and 21 of the *Working with Children Checks report* in relation to juvenile records and non-conviction charges
- whether recommendation 29 in relation to appeals is intended to exclude appeals by persons placed on the Child Protection Register, which imposes some controls on the offenders' conduct or movement.<sup>2141</sup>

### 37.9.4 Discussion and conclusions

We do not consider that reducing sex offender registration requirements for juvenile offenders or making it easier for juvenile offenders to obtain a WWCC clearance would help protect children against child sexual abuse in an institutional context. Both these measures – sex offender registration and WWCC – are intended to manage risk and protect children rather than to punish offenders.

However, we note that some jurisdictions have provided for judicial discretion in relation to whether a juvenile offender will be required to register on a child sex offender registry and that the WALRC has expressed support for this approach. State and territory governments may wish to keep under consideration from time to time the adequacy and appropriateness of the coverage of their child sex offender registration schemes in relation to juveniles. If evidence emerges to show that treatment programs for juvenile child sex offenders remove the risk of further sexual offending against children, state and territory governments could also reconsider the application of their sex offender registration and WWCC clearance requirements to those juveniles who successfully complete treatment.



# PART X INTERACTION BETWEEN CRIMINAL JUSTICE AND REGULATORY RESPONSES



# 38 Interaction between criminal justice and regulatory responses

## 38.1 Introduction

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Both the criminal justice system and the regulatory system respond to child sexual abuse, including institutional child sexual abuse. Both systems need to work together effectively to respond to institutional child sexual abuse.

One point of interaction occurs when both the criminal justice system and the regulatory system – either directly and/or through the institution – are responding to an allegation of institutional child sexual abuse. Police may be investigating an allegation at the same time as a reportable conduct scheme or other industry regulatory scheme is responding or requiring the institution to respond. In Chapter 9, we discussed how the police and the institution should cooperate. As we concluded in section 9.2.7, the police response should take priority to the institution's response. Generally, the police, child protection, other regulatory agencies and the institution should cooperate to ensure that there is no interference with the police investigation, while also using available regulatory mechanisms if required to reduce risks to children.

Another point of interaction occurs when allegations that may involve criminal child sexual abuse in an institutional context are made to a regulatory agency and not directly to police. As discussed in section 16.2, child sexual abuse can be reported through mandatory reporting and reportable conduct schemes. While we recommended in Chapter 16 that known or suspected institutional child sexual abuse *should* be reported directly to police – in addition to complying with any other regulatory reporting requirements – we also recommended that state and territory governments should ensure that they have systems in place in relation to their mandatory reporting scheme and any reportable conduct scheme to ensure that any reports made under those schemes that may involve child sexual abuse offences are brought to the attention of police.

The other significant point of interaction is how regulatory responses can interact effectively with the outcomes of a criminal justice response, whether they are a decision not to charge, a withdrawal of charges, an acquittal or a conviction.

In the Consultation Paper, we focused on the situation where the criminal justice response does not result in any criminal conviction.<sup>2142</sup> We suggested that, given the difficulties in prosecuting institutional child sexual abuse cases discussed in section 2.4 and the operation of the criminal justice system discussed in section 2.5, it is unrealistic to expect that all true allegations of institutional child sexual abuse will result in a criminal conviction of the accused even if the criminal justice system is reformed to achieve the objectives we identified in section 2.7.

We suggested in the Consultation Paper that, where a conviction is not obtained, victims may be left with a sense that justice has been denied them and that other children may be left at risk of abuse by the perpetrator. This risk arises in the context of institutional child sexual abuse in particular, where offenders may have access to many children.

Some steps in the criminal justice process also provide the basis on which the regulatory system can act to reduce the risk of institutional child sexual abuse. In particular:

- In determining whether or not to grant a Working with Children Check (WWCC) clearance, WWCC schemes generally must consider criminal records and criminal charges in addition to other information. Some criminal convictions automatically preclude a person from obtaining a WWCC clearance, and some charges will result in a clearance being automatically suspended. In our *Working With Children Checks report*, we noted that the advent of national criminal record monitoring would assist in ensuring that offences committed in other jurisdictions can be monitored and result in cancelling clearances where they are disqualifying offences.<sup>2143</sup>
- Some professional or industry regulatory schemes prevent registered sex offenders from working in the relevant profession or industry. Sex offender registration depends on relevant criminal convictions and in some cases on the exercise of judicial discretion.

Whether the regulatory system is responding in circumstances where the criminal justice system has not resulted in a conviction, or even in charges being laid, or whether it is responding to steps in the criminal justice process that allow it to act, it is important to ensure that both systems interact effectively with each other.

## 38.2 Regulatory responses

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We are considering the adequacy of current regulatory responses to institutional child sexual abuse in other parts of our work, and they will be the subject of discussion and recommendations in our final report.

We outlined mandatory reporting and reportable conduct requirements briefly in section 16.2. Mandatory reporting and reportable conduct schemes can be a source of information for both child protection and police responses. Other regulatory requirements also interact with criminal justice responses.

In Case Study 38, we heard evidence about several regulatory responses in New South Wales that operate alongside the criminal justice system:

- **Reportable conduct:** The NSW Deputy Ombudsman, Mr Steve Kinmond, gave evidence about the operation of Parts 3A and 3C of the *Ombudsman Act 1974* (NSW), which establish reportable conduct schemes for the protection of children and of people

with a disability, respectively. The reportable conduct schemes require a range of government and non-government institutions to report any allegations of sexual offending or misconduct against children or people with a disability to the Ombudsman within 30 days.<sup>2144</sup> These allegations therefore may be reported to the Ombudsman at the same time as they are reported to police.

Mr Kinmond outlined the role that the Ombudsman then plays in monitoring any investigation of the allegation by the institution. As part of this role, the Ombudsman also considers information available to him through his access to the NSW Police Force and child protection database systems, COPS and KiDS respectively.<sup>2145</sup>

The Ombudsman can then help to ensure that allegations do not ‘fall through the cracks’ by passing on relevant information to police and child protection agencies and, where relevant, the Office of the Children’s Guardian so that they can feed into the administration of the WWCC scheme.<sup>2146</sup> This ensures that appropriate action is taken to minimise the risk of sexual abuse to children where criminal proceedings cannot be supported on the evidence available or for any other reason.

The Ombudsman’s oversight of the investigation conducted by the institution also provides a means of managing risks to children. While institutions are usually responsible for conducting their own investigation, the oversight role provides a mechanism to ensure that investigations are carried out satisfactorily and that appropriate action is taken at the end of the process. This includes communicating with the appropriate regulator of the institution to ensure that appropriate conditions are placed, or maintained, on the institution to reduce the risk posed to children.<sup>2147</sup>

- **WWCCs:** As noted above, the NSW Ombudsman is able to provide information to the Office of the Children’s Guardian and to require the institution to provide information to that agency for the purposes of its administration of the WWCC scheme. We considered the role of WWCC schemes and made recommendations for their improved operation in our *Working with Children Checks report*.<sup>2148</sup> We also considered the role of WWCC schemes in relation to adult sex offender treatment in section 36.2.3 and in relation to juvenile offenders in section 37.9.
- **Industry or professional regulation:** Institutions that provide services to children may be subject to industry-specific licensing and regulatory requirements. Similarly, particular professions – including teachers and healthcare professions – may be subject to professional licensing and regulatory requirements. Regulators of these industries or professions may have powers that enable them to respond to child sexual abuse allegations and convictions, in addition to a criminal justice response or where the criminal justice response does not result in a conviction. In section 38.3, we discuss the example of the cases of CDO and CDQ, which involved a response by the regulator of childcare centres.

In a submission to the Royal Commission in response to issues discussed in Case Study 41 in relation to the responses of disability service providers to allegations of child sexual abuse, the Acting NSW Ombudsman outlined his office's work in relation to the disability sector, including the operation of Part 3C of the *Ombudsman Act 1974* (NSW). The Acting Ombudsman emphasised his office's role in 'building the capacity of service providers to prevent and effectively respond to disability reportable incidents, and to address abuse and neglect of people with disability more broadly'.<sup>2149</sup>

In its submission in response to the Consultation Paper, the New South Wales Government referred to the need for an effective and robust regulatory response to institutional child sexual abuse, in addition to the criminal justice system, and stated that the 'effective interaction between regulatory and criminal justice responses, as well as other support services is imperative'.<sup>2150</sup> The New South Wales Government submitted:

NSW has a number of regulatory schemes aimed at child protection, including:

- working with children checks scheme administered by the Office of the Children's Guardian under the *Child Protection (Working with Children) Act 2012* (NSW)
- reportable conduct scheme operated by the NSW Ombudsman under the *Ombudsman Act 1974* (NSW)
- mandatory reporting obligations under the *Children and Young Persons (Care and Protection) Act 1998* (NSW).

In addition, the NSW Department of Education has its own investigative Directorate, the Employee Performance and Conduct Directorate (EPAC). Investigators are mandatory reporters who must make reports to the Child Protection Helpline which is operated by the Department of Family and Community Services (FACS). The Department of Education's policy also requires any allegations of child sexual abuse to be reported to the police, regardless of whether or not the alleged victim is willing to make a statement. EPAC liaises with the police and is guided by their advice. EPAC also undertakes preventative work, including training and advice to schools, and makes recommendations for systems improvement when investigations identify systemic issues.<sup>2151</sup>

### 38.3 Regulatory responses where there is no conviction

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There will be circumstances where credible allegations of child sexual abuse will not result in a conviction. In Chapter 30, we outlined a number of examples, including the cases of CDI, CDL, CDO and CDQ, where matters were unable to proceed to a trial because the complainants were unable to meet the criminal justice system's requirement for oral evidence.

In the case of CDI, which we discussed in section 30.2.2, allegations of child sexual abuse were made against a school bus driver, CDF. Police charged CDF. The child protection service interviewed the children, all of whom were very young and had intellectual disabilities.



Ultimately, charges were withdrawn or dismissed because the South Australian Office of the Director of Public Prosecutions determined that there was insufficient evidence in relation to some charges and that the child witnesses would not be able to be cross-examined.

In the case of CDL, which we discussed in section 30.2.3, Victoria Police conducted a number of interviews with CDL in relation to his allegations of child sexual abuse by CDJ over a number of years. CDL had autism, Tourette's syndrome and a moderate intellectual disability. Ultimately, police did not charge CDJ, in particular, because it was considered unlikely that CDL would be able to provide any meaningful answers under cross-examination and, therefore, any proceedings would possibly be unfair to CDJ as the accused.

In her evidence in the public hearing in Case Study 46 Ms Stephanie Gotlib, representing Children and Young People with Disability Australia, referred to the position of children with high communication needs, who may not be able to make a disclosure, although they may be able to communicate their experiences through their behaviour.<sup>2152</sup> Ms Gotlib said that it can be difficult to gain access to behaviour support for such a group and suggested that, in addition to better training for criminal justice professionals in dealing with people with disability, the criminal justice system should explore alternative means for evidence to be presented in such cases. This might include allowing evidence to be presented by significant others (for example, family members or support workers), who had sufficient expertise to explain to a court what a child's behaviour means.<sup>2153</sup>

In Chapter 30, we made a number of recommendations to assist children, people with disability and other vulnerable witnesses to give their best evidence in criminal proceedings. However, we do not consider that a circumstance where a complainant is only able to communicate through their behaviour is likely to be able to support a criminal prosecution. As we noted in section 30.8.2, it seems unlikely that abuse could be proved beyond reasonable doubt on the evidence of a third party about a disclosure made by an alleged victim unless there is also other evidence to prove the abuse.

It is also likely that there will continue to be circumstances in which charges cannot be laid or brought to trial, and circumstances in which a conviction is not obtained, even if our recommendations in Chapter 30 are implemented. In these circumstances, it is particularly important that regulatory responses work effectively with criminal justice responses and can respond to risks to children's safety even if the criminal justice response does not result in charges or convictions.

The cases of CDO and CDQ, which we examined in Case Study 38 and discussed in section 30.2.4, provide an example of the interaction between criminal justice and regulatory responses in New South Wales. CDO and CDQ were allegedly sexually abused by CDM in a childcare centre. In summary, the key elements of the interaction between criminal justice and regulatory responses were as follows:

- Police received and investigated allegations that CDM, who worked at the childcare centre, had sexually abused a child at the childcare centre.
- After CDM was charged, the regulator of childcare centres – which in 2010 was the Children’s Services Directorate within the Department of Community Services – took the following action:
  - Ms Tracy Mackey, Executive Director of Early Childhood Education and Care Directorate within the New South Wales Department of Education, gave evidence in Case Study 38 that the regulator took immediate action to issue a notice of exclusion in relation to the alleged perpetrator.<sup>2154</sup> The Director General of the Department of Community Services issued a notice of exclusion to CDM directing him to refrain from entering the premises of the childcare centre; informing him that his continued presence at the centre would constitute an unacceptable risk to the safety, welfare or wellbeing of a child or children enrolled with the centre; and informing him that it was a criminal offence for him to enter the centre.
  - The regulator then undertook an investigation and subsequently placed conditions on the licence of the childcare centre which required the childcare centre itself to prevent CDM from entering or remaining on the premises on the basis that he posed an unacceptable risk to the safety, welfare or wellbeing of a child or children enrolled at the centre.<sup>2155</sup>
- Further charges were laid against CDM in relation to two other children.
- After CDM was committed to stand trial, the Deputy Director of Public Prosecutions determined that there be no further proceedings on the basis that the prosecutions were likely to fail given the inability of the children to give sufficient detail about the charged incidents.
- The owner of the childcare centre had reported the initial allegations against CDM to the NSW Ombudsman as required under the reportable conduct scheme operating in New South Wales. The Ombudsman had advised her to defer any investigation until after the criminal proceedings were concluded.
- Following the discontinuance of the criminal proceedings, the owner of the childcare centre commissioned a review of CDM’s conduct. The review recommended findings of ‘not sustained’ in relation to the allegations of sexual offences. The Ombudsman was given a copy of the review.
- The Ombudsman advised the owner of the childcare centre to make a notification to the New South Wales Commission for Children and Young People, which was then responsible for operating the WWCC scheme in New South Wales.

The cases of CDO and CDQ provide an example of how regulatory action was taken initially by the regulator of childcare centres at the same time as the criminal justice system was responding, and subsequently by the Ombudsman, and in relation to the agency responsible for WWCCs, when the prosecution was withdrawn without any trial or determination of guilt.

Despite the available evidence being insufficient to support a prosecution or conviction, regulatory agencies were able to respond to the risk to children:

- at the institution – through action taken by the regulator of childcare centres
- more generally – through action taken by the Ombudsman, including to ensure the agency responsible for the WWCC scheme was notified.

## 38.4 Regulatory responses where there is a conviction

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Even where a criminal justice response to a report of child sexual abuse results in a conviction, a regulatory response may also be important.

In section 13.4.1, we discussed the case of *Queensland College of Teachers v Morrow*,<sup>2156</sup> which raised issues in relation to teacher registration, WWCC clearances and sex offender registration, particularly as they operate between different states.

The case considered whether Morrow was disqualified from applying for teacher registration in Queensland by virtue of his convictions for child sex offences in Victoria.

The *Commission for Children and Young People and Child Guardian Act 2000* (Qld) provided that an offence under a law of another jurisdiction was a disqualifying offence in Queensland if it constituted a relevant offence if committed in Queensland. However, the Queensland Civil and Administrative Tribunal found that Morrow was not disqualified from being a teacher because the offences for which Morrow was convicted in Victoria were not exactly equivalent to the relevant offence in Queensland.

In subsequent proceedings, Morrow was found to be disqualified because he was a registered sex offender in Victoria and he was a ‘corresponding reportable offender’ under the child sex offender regime in Queensland, which was sufficient to disqualify him from being a teacher in Queensland.

In another matter we investigated arising from an account in a private session, a teacher who pleaded guilty to one count of indecent assault was not deregistered as a teacher. The offender had originally been charged with nine charges, but seven charges were withdrawn when it was discovered they were outside the limitation period.

When the complainant had difficulty recalling the details of some of the abuse during the committal hearing, prosecutors negotiated with the accused’s solicitors to accept a guilty plea to one charge of indecent assault. It could not be certain that the incident supporting that conviction had occurred while the complainant was still at school and under 18 or whether it occurred shortly after the complainant finished the school year and turned 18. No sex offender registration was sought as part of sentencing the offender.

Following the conviction, the offender's registration as a teacher was not withdrawn, and no further action was taken by the relevant teacher registration body following a further review.

## 38.5 Conclusions and recommendation

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An effective response to institutional child sexual abuse will often require both a criminal justice response and a regulatory response.

However, there are many circumstances in which the criminal justice response will not result in a conviction. In some cases, charges may not be laid. Even if all the recommendations we made in Chapter 30 to assist children, people with disability and other vulnerable witnesses to give their best evidence in criminal proceedings are implemented, there will continue to be circumstances in which charges cannot be laid or brought to trial and circumstances in which a conviction is not obtained.

In these circumstances, it is particularly important that regulatory responses work effectively with criminal justice responses and can respond to risks to children's safety. It is also important that regulators can respond urgently to risks to children's safety where required – such as the example we discussed in section 38.3 in relation to the childcare centre – while the criminal justice response continues.

Where the criminal justice response does not result in a conviction, regulators cannot afford to assume that no regulatory response is required. Equally, institutions cannot assume that the absence of a conviction means that there is no risk for the institution to address.

The evidence required to produce a criminal conviction is appropriately high. Given the serious consequences of a conviction for a criminal offence, including the possible deprivation of the liberty of a person, it is appropriate that a conviction should not be determined unless the trier of fact is satisfied beyond reasonable doubt that the accused committed the crime.

However, this means that there will be circumstances where a person is not charged with an offence, or is acquitted, notwithstanding that there are – or should be – real concerns that they may pose a risk to children. In these circumstances, the risk to children requires a response outside of the criminal justice system.

We have heard of examples of institutions, and regulators, interpreting an acquittal as a definitive determination of the accused's innocence, such that no further action is required or allowed. However, this risks misunderstanding the meaning of an acquittal. It also ignores important differences between the criminal justice and regulatory systems. Regulatory systems generally operate on a 'balance of probabilities' standard and may appropriately prioritise child safety rather than fairness to the person the subject of allegations.

Regulatory responses such as the reportable conduct scheme in New South Wales can ensure that institutional and regulatory responses are pursued even where there is no criminal conviction.

There is no inherent inconsistency in a person who has been acquitted of a crime nevertheless facing a regulatory response – including the withdrawal of teacher registration or a WWCC clearance – if the available evidence supports a regulatory response.

We will discuss and make recommendations in relation to regulatory and institutional responses to institutional child sexual abuse in our final report.

Regulatory responses that rely on outcomes of the criminal justice response, including convictions and sex offender registration, must also be effective. As police record searches and the Australian National Child Offender Register are available on a national basis, information about convictions and sex offender registration should be readily available to law enforcement and authorised regulatory agencies in all Australian jurisdictions.

However, state and territory governments need to ensure that legislation in relation to their regulatory schemes works effectively not only with their crimes legislation but also with the crimes legislation of all other Australian jurisdictions.

As the discussion in Parts III and IV of this report demonstrates, jurisdictions often amend and update their crimes legislation in relation to child sexual abuse offences. We have also recommended further amendments in this report.

We consider that state and territory governments should keep the interaction of their legislation establishing regulatory schemes in relation to child sexual abuse with their crimes legislation and the crimes legislation of all other Australian jurisdictions under regular review to ensure that they work together effectively in the interests of protecting children.

#### **Recommendation**

85. State and territory governments should keep the interaction of:

- a. their legislation relevant to regulatory responses to institutional child sexual abuse
- b. their crimes legislation and the crimes legislation of all other Australian jurisdictions, particularly in relation to child sexual abuse offences and sex offender registration

under regular review to ensure that their regulatory responses work together effectively with their relevant crimes legislation and the relevant crimes legislation of all other Australian jurisdictions in the interests of responding effectively to institutional child sexual abuse.



# APPENDICES





# Appendix A: Letters Patent



ELIZABETH THE SECOND, by the Grace of God Queen of Australia and Her other Realms and Territories, Head of the Commonwealth:

TO

The Honourable Justice Peter David McClellan AM,

Mr Robert Atkinson,

The Honourable Justice Jennifer Ann Coate,

Mr Robert William Fitzgerald AM,

Dr Helen Mary Milroy, and

Mr Andrew James Marshall Murray

GREETING

WHEREAS all children deserve a safe and happy childhood.

AND Australia has undertaken international obligations to take all appropriate legislative, administrative, social and educational measures to protect children from sexual abuse and other forms of abuse, including measures for the prevention, identification, reporting, referral, investigation, treatment and follow up of incidents of child abuse.

AND all forms of child sexual abuse are a gross violation of a child's right to this protection and a crime under Australian law and may be accompanied by other unlawful or improper treatment of children, including physical assault, exploitation, deprivation and neglect.

AND child sexual abuse and other related unlawful or improper treatment of children have a long-term cost to individuals, the economy and society.

AND public and private institutions, including child-care, cultural, educational, religious, sporting and other institutions, provide important services and support for children and their families that are beneficial to children's development.

ENTERED ON RECORD by me in Register of Patents No. 48 , page 2 , on 11 January 2013

Secretary to the Federal Executive Council

AND it is important that claims of systemic failures by institutions in relation to allegations and incidents of child sexual abuse and any related unlawful or improper treatment of children be fully explored, and that best practice is identified so that it may be followed in the future both to protect against the occurrence of child sexual abuse and to respond appropriately when any allegations and incidents of child sexual abuse occur, including holding perpetrators to account and providing justice to victims.

AND it is important that those affected by child sexual abuse can share their experiences to assist with healing and to inform the development of strategies and reforms that your inquiry will seek to identify.

AND noting that, without diminishing its criminality or seriousness, your inquiry will not specifically examine the issue of child sexual abuse and related matters outside institutional contexts, but that any recommendations you make are likely to improve the response to all forms of child sexual abuse in all contexts.

AND all Australian Governments have expressed their support for, and undertaken to cooperate with, your inquiry.

NOW THEREFORE We do, by these Our Letters Patent issued in Our name by Our Governor-General of the Commonwealth of Australia on the advice of the Federal Executive Council and under the Constitution of the Commonwealth of Australia, the *Royal Commissions Act 1902* and every other enabling power, appoint you to be a Commission of inquiry, and require and authorise you, to inquire into institutional responses to allegations and incidents of child sexual abuse and related matters, and in particular, without limiting the scope of your inquiry, the following matters:

- (a) what institutions and governments should do to better protect children against child sexual abuse and related matters in institutional contexts in the future;
- (b) what institutions and governments should do to achieve best practice in encouraging the reporting of, and responding to reports or information about, allegations, incidents or risks of child sexual abuse and related matters in institutional contexts;
- (c) what should be done to eliminate or reduce impediments that currently exist for responding appropriately to child sexual abuse and related matters in institutional contexts, including addressing failures in, and impediments to, reporting, investigating and responding to allegations and incidents of abuse;

- (d) what institutions and governments should do to address, or alleviate the impact of, past and future child sexual abuse and related matters in institutional contexts, including, in particular, in ensuring justice for victims through the provision of redress by institutions, processes for referral for investigation and prosecution and support services.

AND We direct you to make any recommendations arising out of your inquiry that you consider appropriate, including recommendations about any policy, legislative, administrative or structural reforms.

AND, without limiting the scope of your inquiry or the scope of any recommendations arising out of your inquiry that you may consider appropriate, We direct you, for the purposes of your inquiry and recommendations, to have regard to the following matters:

- (e) the experience of people directly or indirectly affected by child sexual abuse and related matters in institutional contexts, and the provision of opportunities for them to share their experiences in appropriate ways while recognising that many of them will be severely traumatised or will have special support needs;
- (f) the need to focus your inquiry and recommendations on systemic issues, recognising nevertheless that you will be informed by individual cases and may need to make referrals to appropriate authorities in individual cases;
- (g) the adequacy and appropriateness of the responses by institutions, and their officials, to reports and information about allegations, incidents or risks of child sexual abuse and related matters in institutional contexts;
- (h) changes to laws, policies, practices and systems that have improved over time the ability of institutions and governments to better protect against and respond to child sexual abuse and related matters in institutional contexts.

AND We further declare that you are not required by these Our Letters Patent to inquire, or to continue to inquire, into a particular matter to the extent that you are satisfied that the matter has been, is being, or will be, sufficiently and appropriately dealt with by another inquiry or investigation or a criminal or civil proceeding.

AND, without limiting the scope of your inquiry or the scope of any recommendations arising out of your inquiry that you may consider appropriate, We direct you, for the purposes of your inquiry and recommendations, to consider the following matters, and We authorise you to take (or refrain from taking) any action that you consider appropriate arising out of your consideration:



- (i) the need to establish mechanisms to facilitate the timely communication of information, or the furnishing of evidence, documents or things, in accordance with section 6P of the *Royal Commissions Act 1902* or any other relevant law, including, for example, for the purpose of enabling the timely investigation and prosecution of offences;
- (j) the need to establish investigation units to support your inquiry;
- (k) the need to ensure that evidence that may be received by you that identifies particular individuals as having been involved in child sexual abuse or related matters is dealt with in a way that does not prejudice current or future criminal or civil proceedings or other contemporaneous inquiries;
- (l) the need to establish appropriate arrangements in relation to current and previous inquiries, in Australia and elsewhere, for evidence and information to be shared with you in ways consistent with relevant obligations so that the work of those inquiries, including, with any necessary consents, the testimony of witnesses, can be taken into account by you in a way that avoids unnecessary duplication, improves efficiency and avoids unnecessary trauma to witnesses;
- (m) the need to ensure that institutions and other parties are given a sufficient opportunity to respond to requests and requirements for information, documents and things, including, for example, having regard to any need to obtain archived material.

AND We appoint you, the Honourable Justice Peter David McClellan AM, to be the Chair of the Commission.

AND We declare that you are a relevant Commission for the purposes of sections 4 and 5 of the *Royal Commissions Act 1902*.

AND We declare that you are authorised to conduct your inquiry into any matter under these Our Letters Patent in combination with any inquiry into the same matter, or a matter related to that matter, that you are directed or authorised to conduct by any Commission, or under any order or appointment, made by any of Our Governors of the States or by the Government of any of Our Territories.

AND We declare that in these Our Letters Patent:

*child* means a child within the meaning of the Convention on the Rights of the Child of 20 November 1989.

*government* means the Government of the Commonwealth or of a State or Territory, and includes any non-government institution that undertakes, or has undertaken, activities on behalf of a government.

*institution* means any public or private body, agency, association, club, institution, organisation or other entity or group of entities of any kind (whether incorporated or unincorporated), and however described, and:

- (i) includes, for example, an entity or group of entities (including an entity or group of entities that no longer exists) that provides, or has at any time provided, activities, facilities, programs or services of any kind that provide the means through which adults have contact with children, including through their families; and
- (ii) does not include the family.

*institutional context*: child sexual abuse happens in an *institutional context* if, for example:

- (i) it happens on premises of an institution, where activities of an institution take place, or in connection with the activities of an institution; or
- (ii) it is engaged in by an official of an institution in circumstances (including circumstances involving settings not directly controlled by the institution) where you consider that the institution has, or its activities have, created, facilitated, increased, or in any way contributed to, (whether by act or omission) the risk of child sexual abuse or the circumstances or conditions giving rise to that risk; or
- (iii) it happens in any other circumstances where you consider that an institution is, or should be treated as being, responsible for adults having contact with children.

*law* means a law of the Commonwealth or of a State or Territory.

*official*, of an institution, includes:

- (i) any representative (however described) of the institution or a related entity; and
- (ii) any member, officer, employee, associate, contractor or volunteer (however described) of the institution or a related entity; and
- (iii) any person, or any member, officer, employee, associate, contractor or volunteer (however described) of a body or other entity, who provides services to, or for, the institution or a related entity; and
- (iv) any other person who you consider is, or should be treated as if the person were, an official of the institution.

*related matters* means any unlawful or improper treatment of children that is, either generally or in any particular instance, connected or associated with child sexual abuse.

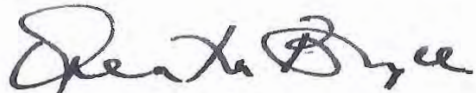
AND We:

- (n) require you to begin your inquiry as soon as practicable, and
- (o) require you to make your inquiry as expeditiously as possible; and
- (p) require you to submit to Our Governor-General:
  - (i) first and as soon as possible, and in any event not later than 30 June 2014 (or such later date as Our Prime Minister may, by notice in the *Gazette*, fix on your recommendation), an initial report of the results of your inquiry, the recommendations for early consideration you may consider appropriate to make in this initial report, and your recommendation for the date, not later than 31 December 2015, to be fixed for the submission of your final report; and
  - (ii) then and as soon as possible, and in any event not later than the date Our Prime Minister may, by notice in the *Gazette*, fix on your recommendation, your final report of the results of your inquiry and your recommendations; and
- (q) authorise you to submit to Our Governor-General any additional interim reports that you consider appropriate.

IN WITNESS, We have caused these Our Letters to be made Patent.

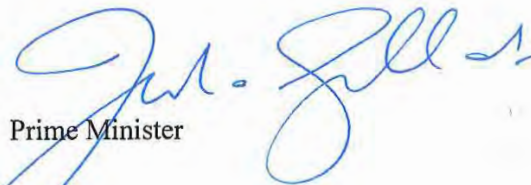
WITNESS Quentin Bryce, Governor-General of the  
Commonwealth of Australia.

Dated 11<sup>th</sup> Jan. 2013



By Her Excellency's Command

Governor-General



Prime Minister





ENTERED ON RECORD by me in Register of Patents No. 49

, page 31, on 13 November 2014

Secretary to the Federal Executive Council

*She Fox*

ELIZABETH THE SECOND, by the Grace of God Queen of Australia and Her other Realms and Territories, Head of the Commonwealth:

TO

The Honourable Justice Peter David McClellan AM,

Mr Robert Atkinson,

The Honourable Justice Jennifer Ann Coate,

Mr Robert William Fitzgerald AM,

Dr Helen Mary Milroy, and

Mr Andrew James Marshall Murray

GREETING

WHEREAS We, by Our Letters Patent issued in Our name by Our Governor-General of the Commonwealth of Australia, appointed you to be a Commission of inquiry, required and authorised you to inquire into certain matters, and required you to submit to Our Governor-General a report of the results of your inquiry, and your recommendations, not later than 31 December 2015.

AND it is desired to amend Our Letters Patent to require you to submit to Our Governor-General a report of the results of your inquiry, and your recommendations, not later than 15 December 2017.

NOW THEREFORE We do, by these Our Letters Patent issued in Our name by Our Governor-General of the Commonwealth of Australia on the advice of the Federal Executive Council and under the Constitution of the Commonwealth of Australia, the *Royal Commissions Act 1902* and every other enabling power, amend the Letters Patent issued to you by omitting from subparagraph (p)(i) of the Letters Patent "31 December 2015" and substituting "15 December 2017".

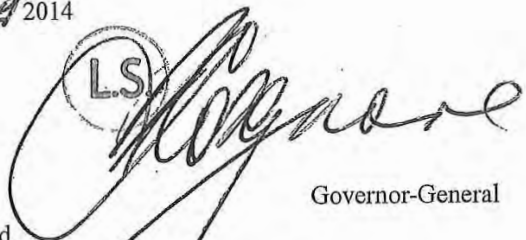


IN WITNESS, We have caused these Our Letters to be made Patent.

WITNESS General the Honourable Sir Peter Cosgrove AK MC  
(Ret'd), Governor-General of the Commonwealth of Australia.

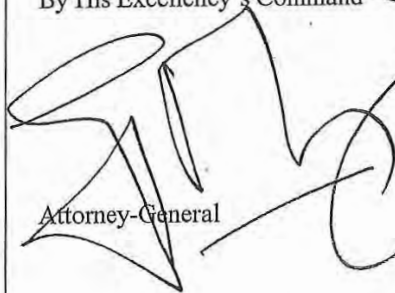
Dated *12th November* 2014

LS

A large, stylized handwritten signature in black ink, likely belonging to Sir Peter Cosgrove, written over a circular stamp containing the letters 'LS'.

Governor-General

By His Excellency's Command

A large, stylized handwritten signature in black ink, likely belonging to the Attorney-General, written over the text 'By His Excellency's Command' and 'Attorney-General'.

Attorney-General

## Appendix B: Glossary

Term	Definition
<b>accused</b>	a person charged with committing a criminal offence or offences in court. Other words for accused are 'defendant' and 'alleged offender'
<b>acquittal</b>	when a magistrate, jury or appeal court find that a person is not guilty of an offence
<b>actus reus</b>	the physical element or elements of an offence ('mens rea' is the mental element of an offence)
<b>adjournment</b>	when a trial or legal proceedings are put off until a later time
<b>admissible evidence</b>	evidence that is allowed to be given in court and taken into account in the proceedings. Not all evidence is admissible
<b>appeal</b>	to take a case to a higher court to challenge a decision on the grounds that there has been an error. The person who appeals is the appellant. Not all decisions can be appealed
<b>Appeals Study</b>	a part of the Delayed Reporting Research which analyses grounds of appeal and appeal outcomes in child sexual abuse cases in the New South Wales Court of Criminal Appeal. The study is published on the Royal Commission's website
<b>best evidence</b>	the most complete and accurate evidence a witness is able to give, as discussed in section 30.1
<b>blind reporting</b>	reporting to police information about an allegation of child sexual abuse without providing the alleged victim's name or other identifying details
<b>brief of evidence</b>	a collection of statements from witnesses and other evidence that is given to the Director of Public Prosecutions by the police or investigating agency after they have finished their investigation. The Director of Public Prosecutions uses the material contained within the brief of evidence to decide whether a prosecution should take place and, if so, to prosecute the accused
<b>case management</b>	monitoring of cases by the court to finalise matters efficiently and ensure court time is used to maximum effect
<b>Case Study 38</b>	a public hearing held by the Royal Commission in Sydney from 15 to 24 March 2016. The public hearing inquired into criminal justice issues relating to child sexual abuse in an institutional context – in particular, the admissibility and use of tendency and coincidence evidence and how the requirements of the criminal justice system, including in relation to oral evidence and cross examination, affect the investigation and prosecution of allegations of child sexual abuse in an institutional context, particularly where the complainant is a young child or a person with disability
<b>Case Study 46</b>	a public hearing held by the Royal Commission in Sydney from 28 November to 2 December 2016. The public hearing inquired into issues raised in the Royal Commission's Consultation Paper on Criminal Justice

<b>charge</b>	the formal accusation by the Crown that a person has committed a specific crime. Charges are what are prosecuted at trial
<b>charge negotiation</b>	discussions between the defence and the prosecution about the appropriate charge in the circumstances. For example, an accused may agree to admit to a crime (sometimes lesser than the original charge)
<b>child</b>	human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier
<b>child sexual abuse</b>	any act which exposes a child to, or involves a child in, sexual processes beyond his or her understanding or contrary to accepted community standards. Sexually abusive behaviours can include the fondling of genitals, masturbation, oral sex, vaginal or anal penetration by a penis, finger or any other object, fondling of breasts, voyeurism, exhibitionism and exposing the child to or involving the child in pornography. It includes child grooming, which refers to actions deliberately undertaken with the aim of befriending and establishing an emotional connection with a child, to lower the child's inhibitions in preparation for sexual activity with the child
<b>child sexual abuse in an institutional context</b>	<p>abuse that, for example:</p> <ul style="list-style-type: none"> <li>• happens on premises of an institution, where activities of an institution take place, or in connection with the activities of an institution</li> <li>• is engaged in by an official of an institution in circumstances (including circumstances involving settings not directly controlled by the institution) where you consider that the institution has, or its activities have, created, facilitated, increased or in any way contributed to (whether by act or omission) the risk of child sexual abuse or the circumstances or conditions giving rise to that risk</li> <li>• happens in any other circumstances where you consider that an institution is, or should be treated as being, responsible for adults having contact with children.</li> </ul> <p>Note that we also use 'institutional child sexual abuse' to refer to child sexual abuse in an institutional context in this report</p>
<b>child sexual assault</b>	physical assault of a sexual nature on a child. Most but not all child sexual abuse constitutes an offence. Sometimes child sexual assault is used for offences involving penetration, and indecent assault is used for offences involving assault but not penetration
<b>coincidence evidence</b>	evidence that relies on the improbability or implausibility of two or more events occurring coincidentally to prove that a person did a particular act or had a particular state of mind. This is discussed in section 23.1.3

<b>committal hearing</b>	a hearing of all the evidence supporting the charge in the lower court by a magistrate, who then decides if there is enough evidence for the case to go to trial. In some cases, witnesses may be required to give evidence at a committal hearing
<b>common law</b>	law developed by judges through decisions in individual cases
<b>complainant</b>	a person who alleges a crime has been committed against them. 'Complainant' is used in this consultation paper to describe a person who is a victim and gives evidence in proceedings in relation to particular charges relating to them
<b>Complainants' Evidence Research</b>	a research project by Professor Martine Powell, Dr Nina Westera and Professor Jane Goodman-Delahunty, commissioned by the Royal Commission, on how evidence is elicited from complainants of child sexual abuse. The study is published on the Royal Commission's website
<b>Consultation Paper</b>	a consultation paper released on 5 September 2016 by the Royal Commission on criminal justice issues, seeking input on various criminal justice issues
<b>conviction</b>	when a person accused of committing a criminal offence is found guilty of that offence, and a record of their guilt is recorded on their criminal history
<b>counsel</b>	a barrister acting for the defence or the prosecution
<b>County Court (Victoria)</b>	a trial court of intermediate jurisdiction between the Magistrates' Court and the Supreme Court in Victoria. In some states and territories, the equivalent court is the District Court
<b>credibility</b>	<p>refers to how truthful a witness or witness's evidence is. 'Determination of the credibility of evidence will often depend upon the assessment of the witness who gives the evidence.'<sup>2157</sup> For example, should a witness with a motive to lie be believed; should witnesses who have colluded before giving evidence be believed; should a witness with a criminal record for offences involving dishonesty be believed?</p> <p>The reliability of the witness's evidence is relevant to the credibility of the evidence.</p> <p>A witness may be accepted as truthful – in the sense that they are saying what they honestly believe to be true – but unreliable – in the sense that their evidence is inaccurate or mistaken.</p> <p>See also 'reliability'</p>
<b>criminal history</b>	a record of offences of which a person has been convicted
<b>criminal justice system</b>	we use this term to include the process from initial reporting to police to the investigation, charge, prosecution, sentencing, possible appeal, and administration of a sentence

<b>criminal proceeding</b>	includes any formal proceedings that relate to a criminal charge, including the laying of the charge, and any mentions or hearings at court to determine the outcome of the charge
<b>criminogenic</b>	likely to cause or produce criminal behaviour or may contribute to offending indirectly
<b>cross-examination</b>	when a witness for one party (for example, the prosecution) is asked questions in court by a lawyer for the other party (for example, the defence). Cross-examination follows the giving of evidence in chief
<b>Crown prosecutor</b>	for matters on indictment before judge and jury, the prosecutor is usually a Crown prosecutor or a person representing the Director of Public Prosecutions. 'The Crown' refers to representing the Queen in right of the Commonwealth
<b>defence</b>	the accused person's case and the lawyers, including defence counsel, who represent them
<b>defendant</b>	a person charged with a criminal offence. Another term for 'an accused'
<b>Delayed Reporting Research</b>	a research project by Professor Judy Cashmore, Dr Alan Taylor, Associate Professor Rita Shackel and Professor Patrick Parkinson AM, commissioned by the Royal Commission, on the impact of delayed reporting on the prosecution of child sexual abuse offences in New South Wales and South Australia. The study is published on the Royal Commission's website
<b>deliberations</b>	the process taken by a jury to decide whether the accused is guilty or not guilty
<b>deterrence</b>	discouraging people from committing a crime
<b>Director of Public Prosecutions (DPP)</b>	the executive officer with authority to prosecute criminal offences within each jurisdiction. The Director of Public Prosecutions' powers include commencing and terminating prosecutions, conducting trials and appealing against inadequate sentences
<b>District Court</b>	an intermediate court that operates in some jurisdictions. In hierarchy, it is below the Supreme Court but higher than Local Courts. In Victoria the equivalent court is the County Court
<b>evidence</b>	information provided to the court that is used to prove or disprove a fact in issue in court proceedings
<b>evidence in chief</b> (also referred to as examination in chief)	the questioning of a witness by the party who called that witness – for example, when the prosecution asks the complainant questions so that they can tell the court what happened. It also includes the playing of a prerecorded investigative interview, as discussed in sections 8.5 and 30.4
<b>exhibits</b>	evidence tendered during a public hearing

<b>government</b>	government of the Commonwealth or of a state or territory, including any non-government institution that undertakes, or has undertaken, activities on behalf of a government.  Note that we use ‘government’ to refer to the Australian Government and state and territory governments in this report
<b>grooming</b>	the process of establishing or building a relationship with a child to facilitate sexual contact with that child. Grooming offences are discussed in Chapter 12
<b>guilty</b>	to be legally responsible for a criminal offence. When a defendant enters a plea of guilty, he or she accepts responsibility for the offence
<b>High Court</b>	the highest court in the Australian judicial system
<b>indictable offence</b>	a serious criminal offence that is usually heard in a higher court before a judge and jury. Less serious indictable offences, known as summary offences, are usually heard in a Local Court
<b>indictment</b>	a formal written accusation charging a person with an offence that is to be tried in a higher court
<b>institution</b>	public or private body, agency, association, club, institution, organisation or other entity or group of entities of any kind (whether incorporated or unincorporated), and however described, and: <ul style="list-style-type: none"> <li>• includes, for example, an entity or group of entities (including an entity or group of entities that no longer exists) that provides, or has at any time provided activities, facilities, programs or services of any kind that provide the means through which adults have contact with children, including through their families</li> <li>• does not include the family</li> </ul>
<b>institutional child sexual abuse</b>	see ‘child sexual abuse in an institutional context’
<b>intermediary</b>	a specialist who assists in the communication between a victim or survivor (usually a child or person with disability) and police and/or legal professionals in court
<b>Joint Investigation Response Team (JIRT)</b>	a multidisciplinary response to child abuse, including child sexual abuse, in New South Wales. It brings together the NSW Police Force, Department of Family and Community Services and NSW Health
<b>joint investigation specialist response</b>	a unit where police and child protection officers are colocated to perform jointly the role of investigating sexual abuse or assault
<b>joint trial</b>	where two or more complainants who have allegedly been sexually abused by the same accused have the charges in relation to them heard at the same trial
<b>judicial direction</b>	a judge’s instructions to the jury about relevant laws and other matters to guide their deliberations

<b>judicial review</b>	judges' review of administrative decisions. This is discussed in the context of Director of Public Prosecutions decisions in Chapter 21
<b>jurisdiction</b>	the Commonwealth, state and territory legal entities.  It can also refer to the scope of the power of a court or administrative decision-maker or tribunal to examine and determine facts, interpret and apply the law, make orders and, in the case of a court, declare judgment
<b>juror</b>	a member of the jury. We use the term 'mock juror' when describing participants in the Jury Reasoning Research
<b>jury</b>	a group of people randomly selected from eligible citizens to decide whether an accused person in a criminal trial is either guilty or not guilty. A jury typically consists of 12 people in a criminal trial, although this number may be increased by court order. We use the term 'mock juries' when describing juries in the Jury Reasoning Research
<b>Jury Reasoning Research</b>	a research project by Professor Jane Goodman-Delahunty, Professor Annie Cossins and Ms Natalie Martschuk, commissioned by the Royal Commission, on how juries reason in joint and separate trials of institutional child sexual abuse. The study is published on the Royal Commission's website
<b>juvenile</b>	in this report we use this term to distinguish those who are accused of committing a child sexual abuse offence and who are under 18 years of age
<b>Legal Aid Commission</b>	government-funded organisations in each state which provide legal services to people who are socially or economically disadvantaged. It delivers legal services with the private legal profession through grants of legal aid
<b>limitation period</b>	imposes a maximum period from the date of the alleged offence during which a prosecution may be brought. After that time the offence lapses and it is too late to prosecute
<b>Local Court</b>	a lower court which deals with less serious (summary) matters and holds committal hearings for indictable matters. In other jurisdictions, the equivalent court is the Magistrates' Court. A magistrate sits on a Local Court / Magistrates' Court without a jury
<b>magistrate</b>	a judicial officer appointed by the executive government to hear and determine civil and criminal matters arising in courts of summary jurisdiction
<b>Magistrates' Court</b>	a lower court which hears less serious matters. A magistrate sits on a lower court without a jury. See also Local Court
<b>mention</b>	where the case is heard in court for a brief time, usually to deal with a procedural matter, and is not the 'hearing' of the matter

<b>multidisciplinary centre</b>	Victorian units where police and at least one other agency are co-located to perform the primary role of providing a coordinated response to sexual abuse or assault. Sexual Offences and Child Abuse Investigation Teams provide the police component. The combination of agencies varies in each centre but may include child protection, counselling, medical and forensic, child interviewing, victim advocate and prosecution services
<b>nolle prosequi (also known as ‘no bill’)</b>	a decision by the Director of Public Prosecutions not to proceed with a charge or charges that have already been presented to the court on indictment. This may be due to reasons such as insufficient evidence. A prosecution is discontinued when the court is informed of this
<b>not guilty</b>	a plea made by an accused person to a criminal charge which then requires the prosecution to prove the person’s guilt in court. A ‘not guilty’ verdict represents the jury’s failure to be satisfied of the accused’s guilt beyond reasonable doubt
<b>Notice to Produce</b>	requires a person to provide specified documents or items in their possession to the issuer of the notice
<b>offender</b>	a person who is found to have done something which is prohibited by law. Until this happens, a person may be called an alleged offender, defendant or accused or, by the police, a suspect or person of interest
<b>Office of the Director of Public Prosecutions (ODPP) also Office of Public Prosecutions (OPP)</b>	an independent prosecution service established by parliaments in each jurisdiction to prosecute alleged offences
<b>official (of an institution)</b>	includes: <ul style="list-style-type: none"> <li>• any representative of the institution or a related entity</li> <li>• any member, officer, employee, associate, contractor or volunteer of the institution or a related entity</li> <li>• any person, or any member, officer, employee, associate, contractor or volunteer of a body or other entity who provides services to, or for, the institution or a related entity</li> <li>• any other person who you consider is, or should be treated as if the person were, an official of the institution</li> </ul>
<b>particulars</b>	details of the alleged offence with which the alleged offender is charged, including dates, times and locations
<b>perpetrator</b>	a person who has sexually abused a child
<b>plea bargaining/ negotiation</b>	see charge negotiation
<b>police-only specialist unit</b>	a unit where police officers are co-located to perform the primary role of investigating sexual abuse or assault



<b>prerecorded interview</b>	a recorded police investigative interview with a witness containing their evidence about an alleged child sexual abuse offence
<b>prima facie case</b>	a case which, on first appearance, contains sufficient evidence to prove the elements of the offence
<b>private session</b>	a confidential meeting where victims, survivors and their families can meet with a Commissioner from the Royal Commission to tell their story of institutional child sexual abuse
<b>propensity evidence</b>	common law name for tendency evidence. This is discussed in section 23.1.2
<b>prosecution</b>	the proceedings by which a person is brought to trial for a criminal offence. It may also refer to the person representing the Director of Public Prosecutions and conducting a criminal case before the court
<b>prosecutor</b>	the person who conducts criminal proceedings on behalf of the prosecution. For matters on indictment before judge and jury, the prosecutor is usually a Crown prosecutor or a person representing the Director of Public Prosecutions
<b>public defender</b>	appointed barristers who appear in serious criminal matters for clients who have been granted legal aid
<b>reasonable prospects of conviction</b>	a test applied by the Director of Public Prosecutions to determine whether a prosecution is justified. For example, if there is no reasonable prospect of a conviction even though there may be a prima facie case, the prosecution should not proceed. There is also a public interest test
<b>recidivism</b>	habitual or repeated offending after conviction
<b>re-examination</b>	further questioning of a witness by the party who first called the witness, after the witness has been cross-examined by the other party. The purpose of re-examination is to allow the witness to explain matters that arose in cross-examination to remove ambiguities that may otherwise distort the witness's account
<b>reliability</b>	<p>refers to the quality of evidence in relation to what the evidence is put forward to prove. 'Determination of reliability will often depend upon some analysis of the circumstances surrounding the coming into existence of the evidence.'<sup>2158</sup> The reliability of a witness will depend on the witness's 'ability to accurately discern and relay the truth as to an event'<sup>2159</sup> (reference omitted). Factors such as delay, inconsistencies between accounts the witness has given at different times, and whether the witness's evidence was given in response to leading questions may affect the reliability of the evidence.</p> <p>A witness may be considered unreliable – in the sense that their evidence is inaccurate or mistaken – even if they are considered to be truthful – in the sense that they are saying what they honestly believe to be true.</p> <p>See also 'credibility'</p>

<b>repealed</b>	legislation that is no longer in force
<b>reportable conduct scheme</b>	a scheme that requires reporting of allegations of conduct to a government body for investigation. New South Wales has a reportable conduct scheme which requires designated government and non-government agencies to notify the Ombudsman of allegations of 'reportable conduct'. This includes sexual offences or sexual misconduct, with or in the presence of a child, against employees of the agency, including volunteers engaged by the agency to provide services to children. Other jurisdictions are introducing reportable conduct schemes
<b>restorative justice</b>	alternative approaches to address harm which generally involve an offender admitting that they caused the harm, engaging in a process of dialogue with those directly affected and discussing appropriate courses of action which meet the needs of victims and others affected by the offending behaviour
<b>retrial</b>	a new trial of the same charges – for example, following a successful conviction appeal or after a jury is hung or discharged
<b>sentence</b>	the penalty imposed by a court after a person has been found guilty of, or has pleaded guilty to, a criminal offence
<b>Sentencing Data Study</b>	a research project by Dr Karen Gelb, commissioned by the Royal Commission, which expands on the sentencing database created for the Sentencing Research and provides a more detailed analysis of the interactions of the factors collected in the database. The study is published on the Royal Commission's website
<b>Sentencing Research</b>	a research project by Emeritus Professor Arie Freiberg, Mr Hugh Donnelly and Dr Karen Gelb, commissioned by the Royal Commission, on a number of sentencing and post-sentencing issues with a focus on institutional child sexual abuse. The study is published on the Royal Commission's website
<b>Sexual Offences and Child Abuse Investigation Teams (SOCITs)</b>	Victoria's specialist police response organised around child abuse and child sexual abuse. In addition to responding to adult and child sexual offences, SOCITs also respond to other forms of child abuse. They provide the police component of multidisciplinary centres. They are further discussed in section 7.9.4
<b>similar fact evidence</b>	common law name for coincidence evidence. This is discussed in section 23.1.3
<b>summary offence</b>	a less serious criminal offence that may be dealt with by a lower court
<b>summons</b>	order by a court requiring a person to appear at court or produce documents
<b>Supreme Court</b>	the court with highest authority in each Australian state and territory. It generally includes a Court of Appeal. It hears appeals from intermediate courts and the most serious offences at first instance

<b>survivor</b>	someone who has suffered child sexual abuse in an institutional context. In this consultation paper, we use both ‘survivor’ and ‘victim’. We generally use ‘survivor’ to refer to those who are now adults who suffered child sexual abuse in an institutional context. We use ‘victim’ particularly where it is used in relevant legislation (victim impact statements) or Director of Public Prosecutions guidelines, or where a person makes a report of abuse relatively quickly, as a child. We acknowledge that some people prefer the term ‘victim’ to the term ‘survivor’ and others prefer ‘survivor’ to ‘victim’
<b>tendency evidence</b>	evidence relating to a person’s character, reputation, or conduct that is used to prove that someone has a tendency to act or think in a particular way. This is discussed in section 23.1.2
<b>transcript</b>	a written record of proceedings
<b>trial</b>	a procedure where an issue of fact or law is determined before a judge, either alone or with a jury, according to the applicable law
<b>trial advocate</b>	legal representative (usually a barrister) at trial. It is a specific position title in the New South Wales Office of the Director of Public Prosecutions, junior to a Crown prosecutor
<b>Uniform Evidence Act</b>	uniform evidence legislation based on an initial report by the Australian Law Reform Commission in 1987, and a further report by the Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission in 2006
<b>Uniform Evidence Act jurisdictions</b>	jurisdictions that have enacted the Uniform Evidence Act (sometimes with jurisdiction-specific additions or amendments). Currently, the Commonwealth, New South Wales, Victoria, Tasmania, the Australian Capital Territory and the Northern Territory are Uniform Evidence Act jurisdictions
<b>victim</b>	someone who has suffered child sexual abuse in an institutional context. See also the definition of ‘survivor’
<b>victim impact statement</b>	a statement read or presented before the sentencing of an offender which informs the court about the harm suffered by the victim or survivor arising from the offence
<b>voir dire</b>	a separate hearing on evidence or a particular legal issue, often to determine preliminary issues before trial, which takes place in the absence of the jury
<b>vulnerable or special witness</b>	witnesses who require special protections when giving evidence at court regarding child sexual abuse. This is further discussed in Chapter 30
<b>witness</b>	a person who appears and gives evidence at a hearing
<b>Witness Assistance Service (WAS)</b>	a service available in states and territories to assist victims of crime and vulnerable prosecution witnesses
<b>Working with Children Check (WWCC)</b>	pre-employment screening for child-related work. These checks are available in each state and territory. They prevent people from working or volunteering with children if records indicate that they may pose an unacceptable level of risk to children

## Appendix C: Finalisation by victim unwillingness to proceed

In section 7.6.8, we discuss reports finalised by police on the basis that the victim is unwilling to proceed.

This appendix sets out further analysis of these reports finalised by police on the basis that the victim is unwilling to proceed, considering:

- victim gender
- victim age at time of incident and at time of report
- the relationship between the victim and the offender
- ‘historical’ offences and reports where the victim was 20 or older at the time of report
- offence type, using Australian and New Zealand Standard Offence Classification (ANZSOC) classifications
- the year in which the report was made to police.

### Victim unwillingness to proceed – gender

Table C.1, shows that a greater proportion of reports of child sexual abuse where the victim is female are finalised on the basis that the victim is unwilling to proceed than reports where the victim is male.

**Table C.1: Reported cases of child-to-child sexual abuse, 2010–2014, all jurisdictions, finalised by victim unwillingness to proceed, gender of the victim<sup>2160</sup>**

Jurisdiction	Male (%)	Female (%)
New South Wales	12	20
Victoria	8	13
Queensland	9	18
Western Australia	6	13
South Australia	11	18
Tasmania	2	5
Australian Capital Territory	2	4
Northern Territory	8	13

The report *Police responses to child sexual abuse 2010–2014: An analysis of administrative data for the Royal Commission into Institutional Responses to Child Sexual Abuse* (Police Data Report) found that, with the exception of Tasmania and the Australian Capital Territory, there were statistically significant differences when comparing the gender of the victim, showing that reported cases of child sexual abuse involving a female victim were more likely to be finalised on the basis that the victim was unwilling to proceed than reported cases involving a male victim. The differences in Tasmania and the Australian Capital Territory were not statistically significant.<sup>2161</sup>

## Victim unwillingness to proceed – age

Table C.2 shows that, as the age of the victim at the time of the incident increases, so does the proportion of cases that are finalised on the basis of the victim being unwilling to proceed.

**Table C.2: Reported cases of child sexual abuse, 2010–2014, all jurisdictions, finalised by victim unwillingness to proceed, age at incident<sup>2162</sup>**

Jurisdiction	0–10 (%)	11–14 (%)	15–17 (%)
New South Wales	9	20	26
Victoria	8	12	18
Queensland	9	18	29
Western Australia	5	12	21
South Australia	11	19	21
Tasmania	3	4	7
Australian Capital Territory	2	4	6
Northern Territory	6	11	21

Table C.3 sets out reports finalised on the basis of the victim being unwilling to proceed by the age of the victim at the time that the incident was reported.

**Table C.3: Reported cases of child sexual abuse, 2010–2014, all jurisdictions, finalised by victim unwillingness to proceed, age at report<sup>2163</sup>**

Jurisdiction	0–9 (%)	10–14 (%)	15–19 (%)	20–29 (%)	30–39 (%)	40+ (%)
New South Wales	7	22	25	13	10	6
Victoria	6	13	17	8	10	7
Queensland	4	16	28	21	23	14
Western Australia	3	10	20	16	10	8
South Australia	7	16	22	17	14	17
Tasmania	3	4	7	0	7	2
Australian Capital Territory	1	4	5	12	6	4
Northern Territory	5	10	20	13	20	16

With the exception of the Australian Capital Territory, in all jurisdictions finalisation of reported cases of child sexual abuse on the basis of the victim being unwilling to proceed was most common among victims who were between the ages of 15 and 19.

The Police Data Report found a statistically significant difference in the rates of finalisation through the victim being unwilling to proceed between different age groups. For example, in Queensland and New South Wales, more than a quarter of reported cases (29 per cent and 26 per cent respectively) involving a teenage victim were finalised on this basis. Cases that involved a teenage victim at time of the incident or that had been reported by victims while they were teenagers had a higher proportion being finalised on the basis that the victim was unwilling to proceed than cases involving younger victims.<sup>2164</sup>

## Victim unwillingness to proceed – victim–offender relationship

Table C.4 sets out the proportion of reported cases of child sexual abuse finalised by the victim's unwillingness to proceed, by the relationship between the victim and the offender.

**Table C.4: Reported cases of child sexual abuse, 2010–2014, all jurisdictions, finalised by victim unwillingness to proceed, by relationship between victim and offender**<sup>2165</sup>

Jurisdiction	Family/ intimate (%)	Other known (%)	Stranger (%)	Not stated (%)
New South Wales	16	22	19	17
Victoria	10	13	11	14
Queensland	13	19	10	9
Western Australia	n/a	n/a	n/a	n/a
South Australia	17	18	13	13
Tasmania	3	6	2	3
Australian Capital Territory	4	5	1	3
Northern Territory	7	17	17	7

Table C.4 shows that in all jurisdictions, finalisation on the basis of the victim being unwilling to proceed was most common in reported cases where the offender and the victim are known to one another but are not in a familial or intimate relationship. However, the distribution between different relationship types within individual jurisdictions varies. The Police Data Report did not find a statistically significant difference in the finalisation of reports on the basis of the victim being unwilling to proceed when considering the victim-offender relationship.<sup>2166</sup>

## Victim unwillingness to proceed – ‘historical’ offence or victim 20 or older at time of report

Table C.5 sets out the proportion of reported cases of child sexual abuse finalised on the basis of the victim being unwilling to proceed, in relation to:

- cases involving ‘historical’ offences
- cases where the victim was 20 or older at the time the offence is reported.

**Table C.5: Reported cases of child sexual abuse, 2010–2014, all jurisdictions, finalised by victim unwillingness to proceed, ‘historical’ offences and victims 20 or older at report**<sup>2167</sup>

Jurisdiction	‘Historical’ (%)	Non-‘historical’ (%)	Victim aged 20–29 (%)	Victim aged 30–39 (%)	Victim aged 40+ (%)
New South Wales	11	20	13	10	6
Victoria	9	14	8	10	7
Queensland	16	13	21	23	14
Western Australia	10	10	16	10	8
South Australia	15	15	17	14	17
Tasmania	2	6	0	7	2
Australian Capital Territory	4	4	12	6	4
Northern Territory	17	11	13	20	16

## Victim unwillingness to proceed – category of offence

Table C.6 sets out data in relation to the proportion of cases that were finalised on the basis of the victim being unwilling to proceed in relation to the ANZSOC offence classification (discussed in section 7.3.1).

**Table C.6: Reported cases of child-to-child sexual abuse, 2010–2014, all jurisdictions, finalised by victim unwillingness to proceed, offence type**<sup>2168</sup>

Jurisdiction	Aggravated sexual assault (%)	Non-aggravated sexual assault (%)	Non-assaultive (%)
New South Wales	22	13	19
Victoria	12	14	6
Queensland	16	3	22
Western Australia	12	16	3
South Australia	17	22	6
Tasmania	5	4	3
Australian Capital Territory	4	5	2
Northern Territory	14	8	10

The preliminary analysis in the Police Data Report found inconsistent results when considering whether the classification of the offence was statistically significant in relation to finalisation on the basis of the victim's unwillingness to proceed.<sup>2169</sup>

## Victim unwillingness to proceed – year offence was reported

Table C.7 sets out the proportion of reported cases that were finalised on the basis of the victim being unwilling to proceed by year of report.

**Table C.7: Reported cases of child sexual abuse, 2010–2014, all jurisdictions, finalised by victim unwillingness to proceed, year of report**<sup>2170</sup>

Jurisdiction	2010 (%)	2011 (%)	2012 (%)	2013 (%)	2014 (%)
New South Wales	21	26	23	15	9
Victoria	11	13	13	12	11
Queensland	14	14	15	14	14
Western Australia	9	9	12	13	7
South Australia	15	16	14	15	15
Tasmania	1	3	3	4	10
Australian Capital Territory	4	6	3	2	4
Northern Territory	18	13	9	10	11



# Appendix D: Victoria Police information

## Reporting sexual assault to police



VICTORIA POLICE

Authorised and published by  
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## Reporting sexual assault to police

**Reporting sexual assault to police is a significant step.** This document explains the investigation process and the options that are available to help you consider your decision.

We understand it can be difficult to report your experience to us. Making the decision to report sexual assault is an important personal choice. In reaching that decision, you may wish to seek advice and guidance from others.

Telling us about your experience does not mean that we will always commence an investigation. The decision as to whether or not to conduct a formal investigation will be discussed with you and the circumstances of your particular assault will always

be taken into account. It may be that police conduct a formal investigation or we may take and record your information and take no further action.

---

Regardless of the investigation decision, **telling us about your sexual assault is important.** When considering your options we encourage you to read this document together with speaking to one of our specialist detectives from a Sexual Offences and Child Abuse Investigation Team (SOCIT) who will assist with any questions or concerns.

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## What is sexual assault?

**Sexual assault happens when someone does not consent to a sexual act or acts. In some cases, such as offences against children, consent is not an issue.** Sexual assault can refer to a broad range of sexual behaviours that make a victim feel uncomfortable, frightened or threatened. This includes rape, sexual touching and child sexual abuse.

It is important that you do not worry about whether the sexual assault you have experienced is a criminal offence or not. It is our job to work that out. If you are concerned about something that has happened to you, we encourage you to come and speak with us. You need not worry about your actions or choices, or that you will not be taken seriously. Our investigators are trained to understand these complicated stories. We will listen without judgment. Any form of sexual assault is serious and everyone is entitled to protection under the law.

## What happens when I report sexual assault to police?

**Your wellbeing and the safety of the community is our first priority.** We will consider your immediate medical needs and take steps to ensure you are safe. We will offer you counselling and advocacy support from a Centre Against Sexual Assault (CASA) and if your sexual assault has occurred recently, accompany you to a Crisis Care Unit where you will be supported by a CASA counsellor.

After your immediate medical and safety needs have been addressed, we will carefully explain the information contained within this pamphlet about your reporting options and the investigation process and discuss any concerns you may have.

## What if the assault happened a long time ago?

**It is never too late to report sexual assault.**

Delays in reporting sexual assault to police are not uncommon. Our detectives often investigate assaults reported weeks, months and even years after an assault has occurred. You are encouraged to report it regardless of when the incident occurred.

## Why is telling the police about my sexual assault important?

Even if a decision is made to not conduct an investigation, there are a number of reasons why telling us about your sexual assault is important.

**The information you provide helps us to:**

- Assess your safety and assist you to remain safe
- Assess and ensure the safety of others
- Help solve previous sexual assaults that have been reported or are later reported
- Identify serial sexual perpetrators
- Prevent future sexual assaults and protect victims
- Learn more about sexual assault in the community
- Refer and link you to victims of crime and support agencies that will provide you with specialist ongoing assistance.

## What is the process if there is a police investigation?

**The primary role of Victoria Police is to investigate offences and apprehend offenders.** Sexual assault investigations are conducted by specialised detectives trained in the investigation of sexual assault. Your investigation will be handled by a primary investigator who will be your main point of contact.

During the investigation we will keep you informed of the progress and ensure your questions and concerns are answered promptly. You may request to receive progress reports in writing, by phone, email or in person.

The investigation process is made up of a number of stages. The initial stage involves the collection and examination of all the available evidence. Evidence includes anything that may assist in the investigation and may later be produced at court.

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## Medical examination

Depending on the circumstances of your report and the time frame, you may be asked to undergo a forensic medical examination. In addition to addressing any immediate medical needs, this may also be for the purpose of collecting evidence. Forensic medical examinations are conducted by a trained medical professional called a Forensic Medical Officer (FMO) or a Forensic Nurse Examiner (FNE). Where a forensic medical examination is appropriate, we will arrange the consultation with the FMO/FNE.

During the forensic medical examination the FMO/FNE will assess and treat any immediate medical needs or arrange your referral to a specialist medical service. The FMO/FNE may discuss concerns relating to sexually transmitted infections (STIs) and pregnancy and will collect evidence for use in the investigation.

You may wish to have a support person present during the examination. This support person can be a counsellor, family member or friend, unless they are a witness to the assault.

Even if you are unsure about proceeding with a report, we encourage you to undergo a forensic medical examination in case you decide to proceed at a later time. Whether to undergo a forensic medical examination is your choice, however be mindful that any evidence that could be obtained to assist with the investigation may be lost with time.

**For more information about forensic medical examinations, please visit the Victorian Institute of Forensic Medicine website at [www.vifm.org/forensics/clinical-forensic-medicine](http://www.vifm.org/forensics/clinical-forensic-medicine)**

## Recording your statement

**An important aspect of the investigation is for us to take your statement.** This will usually be done very early in the investigation. Statements will be taken in a private setting. A statement is a written document that records what you can recall about the incident in detail. It is important that statements include everything that happened. Even small details that you might not think are important may help us to investigate the incident.

We know it may not be easy for you to reveal certain facts, but it is important to disclose everything. Remember, we will listen without judgment.

It is very important you are given the time you need to make your statement. Making statements may require several hours and sometimes may even require several appointments. It is important you have sufficient time and feel comfortable when giving your statement.

If your sexual assault happened a long time ago, the thought of recalling events can be overwhelming. Our detectives are trained to assist you in this process.

If you are under 18 years of age or have a cognitive impairment your statement may be electronically recorded. No one gets a copy of this recording and they are securely stored by police. We will explain this form of statement in greater detail and answer your questions should this apply to you.

## Evidence collection

**In certain circumstances we may need to take photographs of any injuries and collect clothing or other items that may provide evidence relating to your experience.** We may attend the scene of the assault, examine video surveillance, mobile phones, social media and/or inquire into any other matter that may assist with establishing all the facts. If the incident occurred several years ago we may need to review old records and documents.

Any items taken as evidence will only be kept for as long as necessary. At the completion of the investigation and/or court proceeding, we will discuss with you which items you would like returned to you or disposed of.

We will also take statements from people who may assist with information about the incident. Any person who makes a statement, including you as a victim, is referred to as a witness. Others may include those who may have witnessed the incident and those who can provide information around your incident. Sometimes victims are reluctant to have investigators speak to family or close friends as it may cause embarrassment or concern. While we understand you may find this difficult, it is important we are thorough. **We respect your privacy and will not disclose any unnecessary information when speaking to witnesses. If you are concerned or worried about anyone we might speak to, let us know and we will discuss these concerns.**

## Interviewing the offender

**When the suspect is known or has been identified, we will interview the suspect.** Depending on the circumstances, the suspect might be kept in custody. On other occasions, the suspect will be released pending some further investigation. Your safety will be the first priority at every stage of the investigation.

At the conclusion of the investigation, all the evidence collected will be examined by a person who is specifically trained in making decisions about matters that may proceed to court. The decision is made after careful consideration and is based on the available evidence and the rules of law.

## The court process and witness support

There are a number of support services available to you should your matter proceed to court. The Office of Public Prosecution's (OPP) Witness Assistance Service and the Child Witness Service are examples of these services. They offer support to victims and families of victims of serious crime throughout the court process. We work closely with the OPP and can make referrals to specialist support services if required. You may also wish to have a friend or family member (who is not a witness), assist you.

**For more information on Victim and Witness Support, please visit the Witness Assistance Service website at [www.opp.vic.gov.au/witnesses-and-victims](http://www.opp.vic.gov.au/witnesses-and-victims).**

Each stage in the court process will be explained to you. There are a number of different stages in a court hearing process before witnesses will be required to attend and give evidence. There are special arrangements for sexual assault victims/survivors designed to minimise trauma to victims of this crime. One of the things that may be available to reduce trauma is the remote witness facility. This is an area where the victim gives evidence via camera, which is transmitted into the Court to prevent the accused person coming face to face with the victim.

**For more information about going to court, please visit the Department of Justice and Regulation website at [www.victimsofcrime.vic.gov.au](http://www.victimsofcrime.vic.gov.au)**

## What if the matter does not proceed to court?

**Not all investigations proceed to court.** This does not mean we don't believe you. It simply means we do not have a sufficient amount of evidence to meet the required level for criminal prosecution. If this occurs, you will be advised and the reasons will be explained to you. The evidence collected during the investigation will be securely stored.

It is still very important that you share your story with police and that we fully investigate your report. In some instances, further evidence regarding your report may become available at a later date. If this occurs, we may be able to review the investigation and consider prosecution.

## What if I no longer want to continue?

It is the role of Victoria Police to encourage and support you through an investigation regardless of the circumstances. However, we understand there may be reasons for you to decide a police investigation is not the best option for you at the time. You may also choose to defer formal reporting for a period of time or may decide to have no further involvement with us.

Deciding to not proceed does not prohibit you from proceeding at a later date. However a delay in the investigation may result in the loss of some evidence. Regardless of your decision, your safety and welfare will still be addressed and we will refer you to other agencies that can offer you support.

In some circumstances, where there is a risk to community safety, we may still need to proceed with an investigation. Your safety and welfare will remain our priority.

## Support and welfare information

All victims/survivors of sexual assault can access sexual assault support services. We will provide you with information regarding the centres and services offered to you at no cost. The services provided varies on the support you would like, but can include:

- Follow-up short, medium and longer term counselling and support
- Information and support during the investigation and court process
- Medical assistance and follow-up medical treatment
- Emergency housing
- Victims of Crime Assistance Tribunal applications
- Information and counselling for friends and family members.

Your Sexual Offences and Child Abuse Investigation Team (SOCIT) detective or Centre Against Sexual Assault (CASA) counsellor can assist you in obtaining the support and help you need.

**For information about the services provided by CASA, please visit their website at:**  
**[www.casa.org.au](http://www.casa.org.au)**



## Who else can I speak to?

If you would like further information about the investigation process you may speak to a SOCIT detective. You may also seek further information from the following agencies:

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### Centres Against Sexual Assault

T: 1800 806 292

[www.casa.org.au](http://www.casa.org.au)

Centres Against Sexual Assault provide free counselling and support to women, children and men who are victims/survivors of sexual assault. To access your nearest CASA during business hours, ph. 1800 806 292.

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### After Hours Sexual Assault Crisis Line

T: 1800 806 292

The after-hours Sexual Assault Crisis Line (SACL) provides a state-wide crisis counselling and support service to all victims of sexual assault at any time in their lives and coordinates after-hours crisis care responses with CASA for recent victims/survivors of sexual assault. SACL operates between 5pm weeknights through to 9am the next day and throughout weekends and public holidays.

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### National Sexual Assault, Domestic Family Violence Counselling Service

T: 1800 737 732 (1800RESPECT)

[www.1800RESPECT.org.au](http://www.1800RESPECT.org.au)

The National Sexual Assault, Domestic Family Violence Counselling Service is a 24 hours a day, 7 days a week nation-wide telephone and online counselling service for victims/survivors of both past and recent sexual assault and/or domestic family violence. They offer an interpreting and sign language (Auslan) service.

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### Department of Justice and Regulation Victims of Crime

T: 1800 819 817

[www.victimsofcrime.vic.gov.au](http://www.victimsofcrime.vic.gov.au)

The Department of Justice and Regulation provides free information and support 7 days a week between 8am and 11pm. They provide information and advice on reporting a crime and information about your rights, the court process and other services that can help you. They can also help you in applying for compensation and financial assistance.

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### Safe Steps Family Violence Response Centre

T: 1800 015 188

[www.safesteps.org.au](http://www.safesteps.org.au)

Safe Steps (formerly Women's Domestic Violence Crisis Service) is a state-wide service for women and children experiencing violence and abuse from a partner or ex-partner, another family member or someone close to them. They provide a comprehensive range of support services to enable women and children to become – and stay – free from violence. Women experiencing family violence can call 24 hours a day 7 days a week and speak confidentially to another woman for information on family violence support services, legal rights and accommodation options.

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### Women's Legal Service Victoria

T: 03 8622 0600 (Metro)

or 1800 133 302 (Country)

[www.womenslegal.org.au](http://www.womenslegal.org.au)

Women's Legal Service Victoria assists women experiencing disadvantage who are facing legal issues due to a relationship breakdown and violence. They can assist with issues such as protection from family violence and personal safety intervention orders, child custody and access, division of property after separation, separation and divorce and victim's of crime applications. Financial advice is also available to women experiencing problems with debt, financial hardship or accessing financial entitlements following a relationship breakdown.

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**NORTH-WEST  
METROPOLITAN**

Diamond Creek (03) 9438 8320  
Epping (03) 9409 8174  
Fawkner (03) 9355 6100  
Footscray (03) 8398 9860  
Brimbank (03) 9313 3460  
Melbourne (03) 8690 4056

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**SOUTHERN METROPOLITAN**

Dandenong (MDC)\* (03) 8769 2200  
Frankston (MDC)\* (03) 8770 1000  
Moorabbin (03) 9556 6128

\*Multi-disciplinary Centre

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**WESTERN VICTORIA**

Ballarat (03) 5336 6055  
Central Victoria (Bendigo) (03) 5448 1420  
Colac (03) 5230 0044  
Geelong (MDC)\* (03) 5223 7200  
Horsham (03) 5382 9241  
Ararat (03) 5355 1500  
Mildura (MDC)\* (03) 5023 5980  
Swan Hill (03) 5036 1600  
Warrnambool (03) 5560 1333

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**EASTERN VICTORIA**

Bairnsdale (03) 5150 2677  
Benalla (03) 5760 0200  
Box Hill (03) 8892 3292  
Knox (03) 9881 7939  
Central Gippsland (Morwell) (03) 5131 7014  
Wonthaggi (03) 5671 4100  
Sale (03) 5142 2200  
Seymour (03) 5735 0208  
Shepparton (03) 5820 5878  
Wangaratta (03) 5723 0848  
Wodonga (02) 6049 2673

Investigator:

Contact your local  
Sexual Offences  
and Child Abuse  
Investigation Team  
(SOCIT)

Our Sexual Offences and  
Child Abuse Investigation Team  
(SOCIT) locations and phone  
numbers across Victoria are  
listed on the following page.  
The locations are divided into  
regions to make it easier for  
you to find your nearest unit.

**Remember, in an emergency  
dial Triple Zero (000).**

# Appendix E: NSW Police Force *Standard Operating Procedures for Employment related child abuse allegations*

NPF.072.008.0565

## **SOPS for Employment related child abuse allegations**

### **Purpose<sup>1</sup>**

To give guidance about responding to employment-related criminal child abuse allegations against employees of certain agencies providing services to children and young people.

### **Procedures:**

As an agency is unable to conduct its own investigation until police have either rejected the matter or completed their investigation, it is important that the agency is kept informed of the police investigation and any action that can be undertaken by the agency while police are conducting their own investigation.

The following procedures outline in more detail some of the key issues to be addressed in responding to employment related child abuse allegations<sup>2</sup>.

- In cases where the LAC decides that the matter should be referred to JIRT, the JIRT procedures should be followed and the employing agency notified within **48 hours** of the transfer and the contact details of the JIRT.
- If the matter was not referred to the LAC by the employing agency and the LAC is aware that the subject of the allegations is engaged in child related employment, then the LAC should notify the employer of the criminal allegations as soon as is practicable so they can take appropriate risk management action.
- In cases where the Police referral is made by any source other than Community Services, then the LAC should as soon as practicable confirm with the employing agency or other reporter whether the matter has been reported to Community Services (and in the case of an agency referral, if not, why not).
- The LAC is to make a decision to accept or reject the investigation as soon as practical and preferably within two business days, and advise the agency.
- If the matter will be investigated by police, the agency should be provided with:
  - the contact details of the investigating officer,
  - expected timeframes for updates,
  - advice as to whether the employee can be advised of the nature of the allegations,
  - advice as to whether the employee can be informed of the police investigation, and
  - any known information relating to the safety, welfare or well being of a particular child or children or young person/s if the investigating officer believes that the provision of the information would assist the agency to manage any risk to such persons that might arise in the agency's capacity as employer of the suspect..

<sup>1</sup> Full details of the legislative scheme, including definitions are at Appendix 1

<sup>2</sup> It should be recalled that in all interactions with children and young people their safety, welfare and wellbeing is of paramount concern to police

Prior to providing such advice, Police will usually need to discuss these issues with the employing agency, to assist both parties to reach a shared understanding as to how best to protect the investigative process, while at the same time enabling the employer to fulfill its statutory and other common law responsibilities.

- If the LAC is unable to make a decision about whether to proceed with an investigation within two business days, the employing agency is to be contacted by a police officer from the LAC as soon as practicable after the expiry of the second business day for the purpose of informing the employing agency when it is likely to make such a decision.
- When an investigation is discontinued prior to the laying of charges, the investigating officer or his or her nominee is to inform the employing agency within **48 hours** of the making of the decision to discontinue the investigation. The investigating officer or his or her nominee is to provide information relating to the safety, welfare or well being of a particular child or young person (or class thereof) if he or she reasonably believes that the provision of the information would assist the agency:
  - (a) to make any decision, assessment or plan or to initiate or conduct any investigation, or to provide any service, relating to the safety, welfare or well-being of the child or young person or class thereof.
  - (b) manage any risk to of the child or young person or class thereof such persons that might arise in the employing agency's capacity as an employer..
- For all matters the subject of ongoing investigation and/or prosecution, Police should provide the agency with regular updates on the progress of the investigation or prosecution. Police and the employing agency should reach an agreement as to the frequency of these updates.

## Appendix:

### **The Legislative Scheme**

Part 3A of the *Ombudsman Act 1974* (the Act) relates to the Ombudsman's workplace child protection jurisdiction. The Ombudsman oversees designated and non-designated employers' handling of reportable allegations against their employees. Reportable allegations constitute sexual offences, sexual misconduct, assault, ill-treatment, neglect and behavior that causes psychological harm to children.

Designated employers include both government and non government agencies who are required to notify the Ombudsman of allegations arising in the course of their employee's work and non-work life.

Non-designated employers include all other government agencies (such as NSW Police Force) who are only required to report to the Ombudsman reportable allegations made about their employees that arise in the course of their employment with their agency.

### **Relevant section of Ombudsman Act 1974 No 68**

#### **Part 3A Child protection**

##### **25A Definitions**

(1) In this Part:

*child* means a person under the age of 18 years.

*designated government agency* means any of the following:

- (a) the Department of Education and Training (including a government school), the Department of Community Services, the Department of Health, the Department of Sport and Recreation, the Department of Juvenile Justice or the Department of Corrective Services,
- (b) an area health service within the meaning of the *Health Services Act 1997*,
- (c) any other public authority prescribed by the regulations for the purposes of this definition.

*designated non-government agency* means any of the following:

- (a) a non-government school within the meaning of the *Education Act 1990*,
- (b) a designated agency within the meaning of the *Children and Young Persons (Care and Protection) Act 1998* (not being a department referred to in paragraph (a) of the definition of designated government agency in this subsection) or a licensed children's service within the meaning of that Act,

- (c) an agency providing substitute residential care for children,
- (d) any other body prescribed by the regulations for the purposes of this definition.

**employee** of an agency includes:

- (a) any employee of the agency, whether or not employed in connection with any work or activities of the agency that relates to children, and
- (b) any individual engaged by the agency to provide services to children (including in the capacity of a volunteer).

**head** of an agency means the chief executive officer or other principal officer of the agency. The regulations may specify the person who is to be regarded as the head of a particular agency for the purposes of this definition.

**investigation** of a matter includes any preliminary or other inquiry into, or examination of, the matter.

**reportable allegation** means an allegation of reportable conduct against a person or an allegation of misconduct that may involve reportable conduct.

**reportable conduct** means:

- (a) any sexual offence, or sexual misconduct, committed against, with or in the presence of a child (including a child pornography offence), or
- (b) any assault, ill-treatment or neglect of a child, or
- (c) any behaviour that causes psychological harm to a child,

whether or not, in any case, with the consent of the child. Reportable conduct does not extend to:

- (a) conduct that is reasonable for the purposes of the discipline, management or care of children, having regard to the age, maturity, health or other characteristics of the children and to any relevant codes of conduct or professional standards, or
- (b) the use of physical force that, in all the circumstances, is trivial or negligible, but only if the matter is to be investigated and the result of the investigation recorded under workplace employment procedures, or
- (c) conduct of a class or kind exempted from being reportable conduct by the Ombudsman under section 25CA.

**Note.** Examples of conduct that would not constitute *reportable conduct* include (without limitation) touching a child in order to attract a child's attention, to guide a child or to comfort a distressed child; a school teacher raising his or her voice in order to attract

attention or to restore order in the classroom; and conduct that is established to be accidental.

**reportable allegation** means an allegation of reportable conduct against a person or an allegation of misconduct that may involve reportable conduct.

**reportable conviction** means a conviction (including a finding of guilt without the court proceeding to a conviction), in this State or elsewhere, of an offence involving reportable conduct.

- (2) A reference in this Part to a designated government or non-government agency is a reference to a designated government agency or a designated non-government agency.
- (3) A reference in this Part to a reportable allegation or a reportable conviction extends to any such allegation or conviction in respect of a matter occurring before the commencement of this Part.

### Information Provision

New laws that relate to the exchange of information about children and young people commenced on **30 October 2009**. **Chapter 16A** of the [\*Children and Young Persons \(Care and Protection\) Act 1998\*](#) prioritises the safety, welfare and wellbeing of a child or young person over an individual's right to privacy.

Chapter 16A allows government agencies – including NSW Police - and non-government organizations (NGOs) who are "prescribed bodies" to exchange information that relates to a child's or young person's safety, welfare or wellbeing, whether or not the child or young person is known to Community Services, and whether or not the child or young person consents to the information exchange. Up until now, information exchange has generally only been possible where the information was sent to or received from Community Services.

# Appendix F: JIRT Local Contact Point Protocol

NPF.072.005.0367

Joint Investigation Response Team  
Local Contact Point Protocol

## JIRT Local Contact Point Protocol 2014

*A system for dealing with parental and community concerns when  
there are reports of child sexual abuse under investigation in an  
institutionalised setting*

*This protocol has been developed by:  
NSW Family and Community Services, NSW Police Force,  
NSW Kids and Families, NSW Health*



Family &  
Community Services  
Community Services



Health



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## 1. Introduction

### 1.1 Background

In January 2013, the Governor-General of the Commonwealth of Australia, appointed a six-member Royal Commission to investigate Institutional Responses to Child Sexual Abuse. During the hearing, the Royal Commission identified a need, in cases involving institutional settings where a class of children is at risk, to address the concerns of parents of children who have and have not made a disclosure of sexual abuse.

NSW Police Commander for the Child Abuse Squad; provided evidence to the Royal Commission about a proposed future protocol for dealing with communication issues between child protection agencies and parents and community members.

As a result, this new JIRT Local Contact Point Protocol 2014 (*JIRT LCP Protocol*) has been developed in alignment with existing policy and procedures governing Family and Community Services, NSW Police, NSW Health and the Department of Education and Communities. This *JIRT LCP Protocol* system will include informing Local Area Command Police (LAC), the Child Protection Helpline, Principals of schools, the Department of Education and Communities (in its capacity as regulator of early childhood education and care) and other relevant parties of the existence of a Local Contact Point for information and advice<sup>1</sup>. This document outlines the criteria to activate the Local Contact Point, establishment processes, and operational functions, within which an identified service is provided to families via a local telephone support line.

### 1.2 Objectives

The objectives of the *JIRT Local Contact Point Protocol (JIRT LCP Protocol)* are to provide clear operational guidelines for staff<sup>2</sup> on:-

- What matters warrant enactment of the *JIRT LCP Protocol*
- When and how to establish a Local Contact Point
- Outline the function and role of the *JIRT LCP Protocol* in the provision of information and support to:
  - parents and concerned community members
  - broader community groups and relevant stakeholders

<sup>1</sup> Rustja transcript 912 line 43

<sup>2</sup> JIRT staff, Local CSCommunity Services staff, Helpline, health staff and relevant stakeholders

### 1.3 Links with existing joint policies

Joint planning and information exchange regarding the safety, welfare and wellbeing of a child or young person is fundamental to the successful delivery of the JIRT intervention. The process by which JIRT practitioners maximise their capacity to protect children and young people, bring alleged perpetrators to justice and enhance the child/young person's recovery is articulated in *JIRT Local Planning and Response (LPR<sup>3</sup>) Procedures*.

For each referral accepted for a JIRT intervention, LPR procedures require field staff from the three (3) agencies to jointly plan the intervention. This involves sharing relevant information, planning the victim interview, identifying and facilitating access to immediate forensic medical and/or treatment needs, determining any mandatory notification requirements, allocating responsibilities and time frames while managing immediate risks to the child/young person and support needs of their protective carers. The agencies reconvene post the field response to determine subsequent action, time frames and responsibilities.

The *JIRT LCP Protocol* for responding to a report/s of child sexual abuse involving institutional settings should be considered during the LPR process.

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<sup>3</sup> Reviewed 2013

## 2. JIRT Local Contact Point Protocol

### 2.1 Criteria

JIRT Agencies will consider the need to implement the *JIRT LCP Protocol* where:

1. A report of child sexual abuse has been accepted by the JIRT Referral Unit;  
And;
2. Initial investigation and assessment obtains sufficient evidence to indicate further children at risk or broader community concern;  
And;
3. The alleged offender is over the age of 18 years and is working in a paid or a voluntary capacity for an Institution<sup>4</sup> providing services to children and young people  
Or;
4. Senior Officers determine that implementation of the *JIRT LCP Protocol* is warranted.

### 2.2 Assessment

- Where it becomes known that a report meets the *JIRT LCP Protocol* criteria, the JIRT local management team<sup>5</sup> will brief their JIRT agency line managers<sup>6</sup> and provide their recommendation in writing [*see Resource 1 – Activation Request/Approval*] on activating the *JIRT LCP Protocol*.
- Respective JIRT agency line managers will jointly assess the recommendation in consultation with the local JIRT management team and will:
  - i. Approve the recommendation in writing [*see Resource 1 – Activation Request/Approval*] to activate the *JIRT LCP Protocol* and;
  - ii. Approve the timing regarding the activation the *JIRT LCP Protocol* to ensure the integrity of the criminal investigation and the safety, welfare and well-being of the reported child/ren and young people<sup>7</sup> and;
  - iii. Where required, assume responsibility for coordinating the establishment of a LCP.

<sup>4</sup>Any public or private body, agency, association, club, institution, organisation or other entity or group of entities of any kind (whether incorporated or unincorporated), however described, and includes, for example, an entity or group of entities (including an entity or group of entities that no longer exists) that provides, or has at any time provided activities, facilities, programs or services of any kind that provide the means through which adults have contact with children, including through their families; and does not include the family.

<sup>5</sup> Police Team Leader, CS JIRT Manager Casework and JIRT Senior Health Clinician

<sup>6</sup> CAS Inspector, CS JIRT Manager Client Services & JIRT Health Manager.

<sup>7</sup> The LCP Protocol will only be enacted once sufficient evidence has been obtained to indicate further children at risk or broader community concern.

## 2.3 Planning

Following the decision and approval to activate the *JIRT LCP Protocol* the coordination of a number of LCP activities will run parallel to the joint response provided to a victim child/children and their families.

The following actions may need to occur:

### JIRT local management team<sup>8</sup>:-

- i. Allocate responsibility to one JIRT agency representative<sup>9</sup> to liaise with the nominated representative<sup>10</sup> for the institution to brief them on the *JIRT LCP Protocol* [Note: it is preferred that both parties agree to enacting the *LCP Protocol*, this agreement and/or dissenting views in relation to enacting the *LCP Protocol* are to be recorded. Significant issues are to be raised with the line supervisors<sup>11</sup> *[see Resource 1 – Activation Request/Approval]*.
- ii. Jointly determine the most appropriate agency to undertake the role of the Local Contact Point (LCP), in most cases it is likely that the appropriate agency will be either CS or NSW Health;
- iii. Consult with managers<sup>12</sup> from the selected agency to identify a staff member that has both the experience and capacity to undertake the LCP role,
- iv. Brief the designated LCP and their supervisor on the role and responsibilities of the position<sup>13</sup>; provide a copy of this document and the *LCP Resource 2: Recording Template*.
- v. Jointly determine what information will be provided to the designated LCP regarding the details of the matter/s under investigation prior to them undertaking the role;
- vi. Local management team review and confirm information that is suitable for the institution to share to the broader community *[see LCP Resource 3: communication with parents/staff/stakeholders]*.
- vii. Provide the institution with the approved *LCP Resource 3: communication with parents/staff/stakeholders*
- viii. Promptly review drafted communication content provided by the institution to enable this to be sent to parents, staff and relevant stakeholders in a timely manner;
- ix. Once the LCP has been activated the JIRT Health Senior Clinician to coordinate and liaise with local health services, as required, to advise of possible increases in demand;
- x. Liaise, as frequently as is required, with the designated LCP and their supervisor to update them on the status of the investigation, or where there are changes to information;

<sup>8</sup> Police Team Leader, CSJIRT Manager Casework and JIRT Senior Health Clinician or as required JIRT agency line managers

<sup>9</sup> Either the CSJIRT Manager Casework, JIRT Police Team Leader, JIRT Health Senior Clinician

<sup>10</sup> For example DEC School Principal, CEO of institution

<sup>11</sup> CAS Inspector, CSJIRT Manager Client Services & JIRT Health Manager

<sup>12</sup> Internal agency consultation re: allocation of staffing resources should occur between officers of similar delegation /authority ie: MCS to MCS etc

<sup>13</sup> Refer to page 9

- xi. Contact the designated LCP weekly, or as required, to ensure that all relevant information held by either party is exchanged.

#### **JIRT agency line management<sup>14</sup>:-**

- i. Review and approve requests to activate *JIRT LCP Protocol* [see Resource 1 – Activation Request/Approval].
- ii. Provide internal agency communication and advice<sup>15</sup> regarding the activation of the *JIRT LCP Protocol* and the details of the Local Contact Point (i.e.: LACs, CP Helpline Director and Helpline staff, CSC<sup>16</sup> /JRU Staff, Child Wellbeing Unit, Child Protection Unit, Sexual Assault Services and other relevant Health staff)<sup>17</sup>;
- iii. If the institution subject to the investigation is an education and care service as defined under s.5 of the *Children (Education and Care Services) National Law (NSW)* (“National Law”) and the *Children (Education and Care Services) Supplementary Provisions Regulation 2004* (*Supplementary Provisions*), such as long day care, family day care, outside school hours care, home based, mobile or occasional education and care services then the Early Childhood Education and Care Directorate as the Regulatory Authority of NSW is to be notified of the activation of the *JIRT LCP Protocol*.
- iv. Consult, as required, on the content of joint media releases<sup>18</sup>;
- v. Review and approve requests to deactivate the *JIRT LCP Protocol*;
- vi. Where required participate in activities to evaluate the functionality of the *JIRT LCP Protocol*.

## **2.4 Engagement**

- The allocated local JIRT agency representative will brief the nominated representative for the institution on the processes governing the *JIRT LCP Protocol*.
- It is preferred that the nominated representative for the institution together with the local JIRT agency representative agree to enact the *JIRT LCP Protocol*.<sup>19</sup>

<sup>14</sup> CAS Inspector, CS JIRT Manager Client Services & JIRT Health Manager

<sup>15</sup> For Community Services where available, communication and advice is to be sent to team/unit mailboxes as well as directly to relevant staff members

<sup>16</sup> To include advice to other local CSCs that may receive calls from the community about the matter under investigation

<sup>17</sup> It is essential that the Director of the CP Helpline communicates the activation of the *JIRT LCP Protocol* and the details of the Local Contact Point to Helpline staff in order to re-direct callers to this service, should it be required.

<sup>18</sup> Media being released broadly will identify key agency contact points i.e.: Crime Stoppers, Triple 000, CP Helpline

<sup>19</sup> agreement and/or dissenting views in relation to enacting the *LCP Protocol* are to be recorded and raised to line supervisors

## 2.5 Activation of the Local Contact Point (LCP)

Upon agreement between the local JIRT agency representative and the nominated representative for the institution to enact the *JIRT LCP Protocol*, the local JIRT agency representative will provide the institution with the template paragraphs for communicating with parents; staff and relevant stakeholders *[see LCP Resource 3 - communication with parents/staff/stakeholders]*. This template provides approved paragraphs for inclusion, advice and contact details for the LCP.

If the information subject to the investigation is related to an education and care service, then the Department of Education and Communities is to be notified of the activation of the *JIRT LCP Protocol*.

The local JIRT agency representative and the nominated representative for the institution must ensure that the LCP is operational before the letter/email or alternative communication message is sent out to parents, staff and relevant stakeholders.

### **The nominated representative for the institution will:-**

- i. Determine the best process to inform parents and staff of the institution concerned and any other relevant stakeholders about the existence of the LCP i.e. in the form of a letter/email and/or alternative communication message;
- ii. If the institution is an early childhood education and care service, provide notification of the incident / complaint to the Department of Education and Communities within 24 hours;
- iii. Consult with the local JIRT agency representative prior to forwarding ANY communication to parents, staff and relevant stakeholders about the details of the matter/s under investigation to ensure the information that is provided does not compromise the integrity of the criminal investigation and/or breach the confidentiality, safety, welfare and well-being of the victim children and families;
- iv. Draft the communication to parents, staff and relevant stakeholders and forward this draft to the JIRT agency representative for review prior to sending;
- v. Once the content of the information in the communication to parents, staff and relevant stakeholders has been agreed, send the communication to parents, staff and relevant stakeholders ensuring that the details of the designated Local Contact Point staff member are easily identified;
- vi. Continue to liaise, as appropriate, with the local JIRT agency representative to ensure that all relevant information held by either party is exchanged.

**The designated Local Contact Point staff member will:-**

- i. Provide to callers, with information and support that meets their needs;
- ii. Where appropriate, provide callers with the approved information given by the local JIRT management team about the details of the matter/s currently under investigation;
- iii. Provide advice and support to callers such as information about child sexual abuse, the process of disclosure, protective behaviours, engaging children in conversations to explore/elicit information on their experiences within the organisation or with staff/others from the organisation;
- iv. Provide the electronic link to callers to the **Helping to Make it Better** [Resource 5] <http://www.ecav.health.nsw.gov.au/online-shop/booklets-manuals/helping-to-make-it-better/> or send out printed material as required;
- v. Act as the centralised point for the collection and reporting of information by JIRT agencies which is relevant to the investigation;
- vi. Record and provide the local JIRT management team with daily reports, on caller data i.e.: volume of calls, caller identification details, issues reported, nature of callers concerns, action taken [see LCP Resource 2 - Recording Template];
- vii. Provide access to information / contact details of other local support services available including child sexual assault counselling services;
- viii. Ensure that reports of child abuse or neglect are recorded and reported to the CP Helpline<sup>20</sup>, and that reporters (callers) are advised that the information they have provided to the LCP will be sent to the CP Helpline;
- ix. Ensure that any information relevant to the current criminal investigation is reported promptly to the local Police JIRT management and provide the Crime Stoppers number for any anonymous reporting of information 1800 333 000;
- x. Operate during business hours and will communicate / re-direct inquiries outside of these hours to the correct service / agency ie: Child Protection Helpline 132 111, Crime Stoppers 1800 333 000.

## 2.6 De-activation of the Local Contact Point (LCP)

- Throughout the investigation the JIRT local management team<sup>21</sup> will maintain communication with the LCP staff member. Once it becomes apparent that the LCP is no longer required the local JIRT management team will liaise with the institution regarding the recommendation to deactivate the LCP. The JIRT management team will then brief their JIRT agency line managers<sup>22</sup> and provide their recommendation in writing to de-activate the *JIRT LCP Protocol* [see LCP Resource 4 – Deactivation Request/Approval].

<sup>20</sup> where relevant obtain JIRT consent and from reporters (callers)

<sup>21</sup> Police Team Leader, CS JIRT Manager Casework and JIRT Senior Health Clinician

<sup>22</sup> CAS Inspector, CS JIRT Manager Client Services & JIRT Health Manager.



- Respective JIRT agency line managers will jointly assess the recommendation in consultation with the local JIRT management team and will:
  - i. Approve the recommendation in writing to de-activate the JIRT LCP Protocol *[see LCP Resource 4 – Deactivation Request/Approval]*.
  - ii. Approve the timing of de-activating the *JIRT LCP Protocol*
  - iii. Liaise with internal stakeholders on the decision to deactivate the *JIRT LCP Protocol*
  - iv. Advise the LCP of deactivation and to liaise with any residual contacts as required and
  - v. Delegate the local JIRT agency representative to advise all relevant stakeholders of the approval to de-activate the LCP.

## 2.7 Monitoring & Review

1. The designated LCP will record all caller data *[see LCP Resource 2 - Recording Template]*  
The LCP will provide regular updates to JIRT management team.
2. The local JIRT management team will contact the designated LCP weekly, or as required to ensure that all relevant information is updated and exchanged.
3. Once matter/s under investigation are finalised and the LCP has been deactivated the local JIRT management team and JIRT agency line managers will evaluate the functionality of the *JIRT LCP Protocol*. The Local JIRT Management Team will:-
  - Consult with the relevant nominated organisation involved to gather their feedback,
  - Consult with the Department of Education and Communities as appropriate;
  - Identify strengths and/or deficits in the processes;
  - Make recommendations to the JIRT agency line management team to refine/improve the system, templates.
4. The JIRT Statewide Management Group will annually review the *JIRT LCP Protocol*.

## 2.8 Protocol Overview

## JIRT LCP Protocol Overview

## Assessment

- Matter/s reported to CP Helpline and meets criteria for referral to JIRT.
- JIRT Referral Unit (JRU) accepts report/s sends to local JIRT for investigation and assessment.
- *JIRT LPR process begins.*
- Report/s identified as meeting criteria for activating *JIRT LCP Protocol*.

## Planning

- JIRT local management team allocate 1 agency representative to contact the institution and brief on *JIRT LCP Protocol*.
- JIRT agency line management approve the request to initiate the *JIRT LCP Protocol*.
- JIRT agency line management jointly select the agency best suited to appoint a LCP and negotiate with the managers of that unit management re: a suitable LCP staff member and **starting timeframe**.
- JIRT local management team determine information provided to the designated LCP on matter/s under investigation and assessment.
- JIRT local management team review and confirm LCP Resource 3 - communication with parents/staff/stakeholders.
- Nominated representative for the institution should agree with the activation of the LCP for it to be activated and to use the agreed LCP Resource 3.

## Engagement

- Local JIRT management team brief Local Contact Point staff member on roles and responsibilities.
- JIRT agency line management inform key stakeholders of the activation of a JIRT LCP; including CP Helpline Director, HL staff, LAC, CSC/JRU, JIRT Media Units
- JIRT management team liaise with nominated representative for the institution and provide agreed communication content for release to parents, staff and stakeholders, this will include LCP contact details. Institution to determine best method to share the information and will share drafted communication to parents/stakeholders with JIRT local management prior to release. Regulatory Authority is notified.

## Activation

- Designated LCP activated - provides support, advice and assistance to parents, staff and stakeholders.
- LCP records and exchanges all caller activity data to local JIRT management team, identifying details shared with caller consent.

## Deactivation

- Local JIRT management team consult with LCP and nominated representative for the institution regarding deactivation and seek approval from JIRT agency line management for deactivation process to occur.

## Review

- JIRT management team will evaluate functionality of *JIRT LCP Protocol*; identify strengths or deficits in processes.
- JIRT management team will provide recommendations to JIRT agency line management to improve/refine *JIRT LCP Protocol*.
- JIRT Statewide management group will annually review the *JIRT LCP Protocol*.

### 3. Information for parents and concerned community members

Information provided by the designated LCP to callers will include:

- Approved information provided by the local JIRT management team on the details and or status of the matter/s under investigation;
- **Helping to Make it Better** – ECAV on-line resource *[see Information Resource 5]*.
- Other resources included below will be made available, in addition to access to / information on local services as required.

### 4. Resources

**Resource 1 – Template:** Local Contact Point Activation Request/Approval Form

**Resource 2 – Template:** Local Contact Point Recording Template

**Resource 3 – Template:** Local Contact Point Communicating with parents/staff/ key stake holders

**Resource 4 – Template:** Local Contact Point Deactivation Request/Approval Form

**Resource 5 – Information Resource:** Helping to make it better.

<http://www.ecav.health.nsw.gov.au/online-shop/booklets-manuals/helping-to-make-it-better/>

**Resource 6 – Information Resource:** NSW Health Website for access to local sexual assault services

<http://www.health.nsw.gov.au/sexualassault/Pages/default.aspx>

Additional resource for parents, carers and stakeholders available to order online is:

**Is This Normal? – Understanding your child's sexual behaviour** by Holly Brennan and Judy Graham – available for purchase from Family Planning Queensland

[http://www.fpq.com.au/publications/teachingAids/Is\\_this\\_normal.php](http://www.fpq.com.au/publications/teachingAids/Is_this_normal.php)

# Appendix G: NSW Police Force information on blind reporting



**NSW POLICE**  
www.police.nsw.gov.au  
ABN 43 408 613 180

## MEMORANDUM

**STATE CRIME COMMAND**

**To:** Region Operations Managers  
Local Area Commanders  
Crime Managers

**CC:** Det Supt Linda Howlett  
Manager Intelligence Nerys Evans  
Det Insp Chris Goddard  
Det Sgt Lauren Seretis

**From:** Det Insp Paul Jacob Manager Sex Crimes Squad SCC

**Date:** 9 July 2014.

**Subject:** Reporting Processes NGO's to NSWPF

### Background:

For some years Non Government Organisations (NGOs), including the Catholic Church, Anglican Church, The Salvation Army and others have periodically sent reports of historical physical and sexual abuse allegations to NSW Police Force (NSWPF) via The Sex Crimes Squad. These have contained summaries of historical allegations of misconduct against church personnel that had been held in the records of the organisation.

Following the establishment of two major public enquiries in late 2012 the NGOs substantially increased the number of submissions to The Sex Crimes Squad. This identified a need to implement a formalised process by which the reports could be addressed and if necessary investigated in a timely manner. As a result the NGOs are now being advised to forward the reports to the relevant Local Area Commands.

These reports can be categorised as follows;

1. Reports where the identity of a victim of suspected crime is not known;
2. Reports where the identity of a victim of a suspected crime is known;
3. In circumstances where a victim of a suspected crime is known but that victim does not wish to speak with the Police, proceed as follows;

### **Sex Crimes Squad**

NSW Police Headquarters Locked Bag 5102 Parramatta NSW 2124

Tel (02) 8835 8666 Fax (02) 8835 8688 TTY (02) 9211 3776 (Hearing/Speech Impaired) Enet 28566 Efax 28688

Government Information Public Access Act (2009)  
Document has been released by the NSW Police  
Force Information Access Unit



Listed below are the minimum NSWPF response for each type of report/category of report.

**1. Reports where the identity of a victim of suspected crime is not known:**

In cases where a complaint is received by (The NGO) concerning a person being suspected of having committed a criminal offence but the victim is not known, (The NGO) will report the matter to the Police by way of a Form which will include, inter alia;

- a) Sufficient description of the suspected offence(s)
- b) Confirmation as to what steps (The NGO) has taken to assess any current or ongoing risks to children or adults arising from or similar to the circumstances of the suspected crime being reported; and
- c) Confirmation as to what other notifications have been made by (The NGO) (for example, to the NSW Ombudsman, Office of the Children's Guardian and FaCS.

**NSWPF will under these circumstances:**

- I. Acknowledge receipt of information.
- II. Assess any immediate or ongoing risk to any persons including children and action/advise if necessary.
- III. Record information on COPS in the form of Information Report or Event, as deemed appropriate and provide a COPS reference number to NGO, then disseminate to The SCC Sex Crimes Squad.

**2. Reports where the identity of a victim of a suspected crime is known:**

- a) In cases where a complaint is received by a victim (The NGO) will encourage the victim to speak with the Police immediately; and
- b) Will assist the victim to approach, the Local Area Command to speak with the Crime Manager and/or Detective on duty. (Sex Crimes Squad would be advised through internal disseminations).
- c) Where a victim is willing to speak with the Police, then (The NGO) are not to conduct an investigation or to interview witnesses – the investigating police will do this.
- d) (The NGO) will ensure that any evidence which we can access (video, telephone records, documents, diaries etc.) is preserved so that the Police can access it in the course of their investigation.

**NSWPF will under these circumstances:**

- I. Acknowledge receipt of information.
- II. Assess any immediate or ongoing risk to any persons including children and action/advise if necessary
- III. Assist NGO in arranging a mutually convenient appointment for an investigator to meet with the victim and take over the management of the victim's welfare
- IV. Commence an investigation
- V. Establish a liaison with the NGO and receive any relevant evidence
- VI. Record information on COPS in the form of Information Report or Event, as deemed appropriate and provide a COPS reference number to NGO and disseminate to the SCC Sex Crimes Squad.
- VII. At the conclusion of the investigation advise the NGO of the outcome and disseminate to SCC Sex Crimes Squad.

**3. In circumstances where a victim of a suspected crime is known but that victim does not wish to speak with the Police, proceed as follows;**

The NGO will;

- a) Advise the victim that they can change their mind and speak with the Police at any time in the future;
- b) Where the victim is receiving counselling support, the counsellor may advise victim of the availability of reporting to the police through The Sexual Assault Reporting Option (SARO) process.
- c) Preserve all available evidence in case the victim changes their mind and the evidence is required for a later Police investigation;
- d) Conduct any necessary investigation to deal with any internal disciplinary matters, as required (for staff / volunteers etc.);
- e) Confirm what steps have been taken to assess any current or ongoing risks arising from or similar to the circumstances of the suspected crime being reported
- f) Send through to the relevant LAC a notification form in two stages - initially as a preliminary notification to confirm that an investigation will be undertaken and later, a more detailed report to be provided once concluded; and
- g) The notification form should confirm that the victim has been advised of the continuing option of speaking with the Police and also of appropriate counselling services which might be able to assist them
- h) Confirmation as to what other notifications have been made by (The NGO) (for example, to the NSW Ombudsman / Office of the Children's Guardian) and FaCS

**NSWPF will under these circumstances:**

- I. Acknowledge receipt of information and provide a COPS reference number.
- II. Action as appropriate any disclosure on a SARO form
- III. Assess any immediate or ongoing risk to any person including children/action/advise if necessary
- IV. Record information on COPS in the form of Information Report or Event, as deemed appropriate.

Attached to this memorandum are the following;

- Template of letter to be forwarded to Crime Managers
- Template of letter to be forwarded to all NGO's
- Flow chart outlining process to be followed reports from NGO's to the NSWPF
- A Form which will be used by NGO's to report matters to the NSWPF
- One page overview for the information of NGO's

The Sex Crimes Squad will operate a Help Desk to provide advice on any issues arising and will monitor this process.



**Paul Jacob  
Det Insp**



**Local Area Commander  
Crime Managers  
NSWPF**



10 July 2014

**Process for managing historical physical and sexual abuse allegations referred from Non Government Organisations (NGOs) to the NSW Police Force.**

For some years Non Government Organisations (NGOs), including the Catholic Church, Anglican Church, The Salvation Army and others have periodically sent reports of historical physical and sexual abuse allegations to NSW Police Force (NSWPF) via The Sex Crimes Squad. These have contained summaries of historical allegations of misconduct against church personnel that had been held in the records of the organisation.

Following the establishment of two major public enquiries in late 2012 the NGOs substantially increased the number of submissions to Sex Crimes Squad. This identified a need to implement a formalised process by which the reports could be addressed and if necessary investigated in a timely manner. As a result the NGOs are now being advised to forward the reports to the relevant Local Area Commands.

Based on our experience, along with our ongoing liaison with Victims Groups and Victims Support Services, as a general rule the NSWPF will not 'Cold Call' victims or potential victims of historical sexual abuse/assault, except in exceptional circumstances. This process ensures that those NGO's who are engaged with victims identify whether or not the victims wish to engage with police. This practice does not relate to children currently at risk where normal 'Child At Risk' protocols apply.

The attached flow chart (annexure A) provides a guide to processing the reports. Should you have any further enquiries, please contact State Crime Command, Sex Crimes Squad.

The attached Incident Report (annexure B) has been developed and forwarded to NGO's as a guide and will ensure a consistency and quality of the information that is provided by them.

**L Howlett  
Commander Sex Crimes Squad  
State Crime Command**

**State Crime Command  
Sex Crimes Squad**

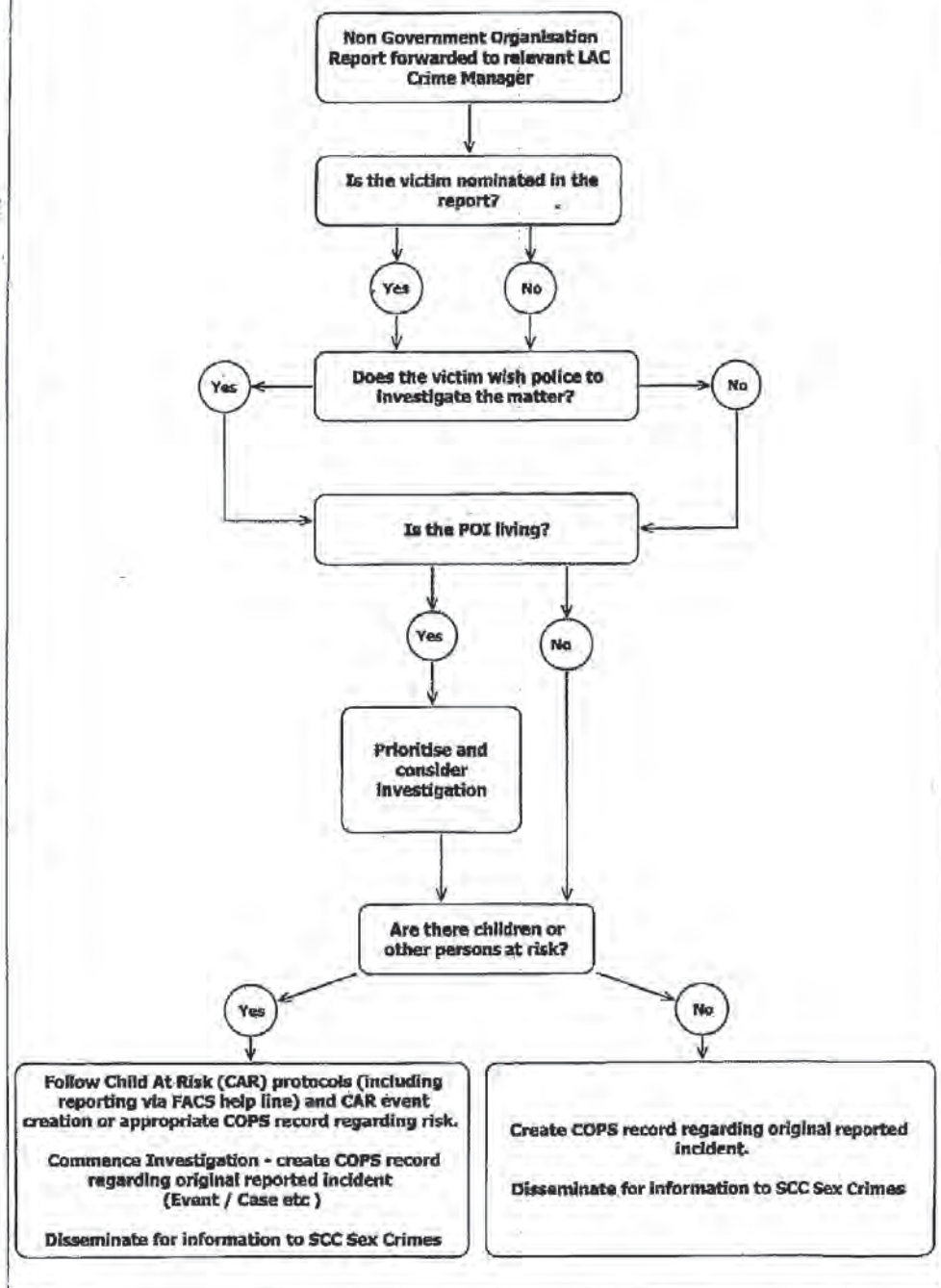
Level 6A, 1 Charles Street Parramatta, 2124

Telephone 02 8835 8724 Facsimile 02 8835 8688 ENel 28724 EFax 28688 TTY 9211 3776 (Hearing/Speech impaired)

ADN 43 406 613 100

**NSW POLICE FORCE RECRUITING NOW 1800 222 122**  
WWW.POLICE.NSW.GOV.AU/RECRUITMENT

# FLOW CHART - INCIDENT REPORTING





# **Incident Report to NSW Police Force by a Non Government Organisation (NGO)**

(To be used in circumstances of suspected physical or sexual abuse AND where the victim details are unclear / unknown OR the victim does not want to report the incident to police)

This form is **not** to be completed if you have a current child victim – use existing mandatory reporting child at risk protocol.

NOTIFYING ORGANISATION DETAILS	
Organisation Name (ORG)	
Contact Name	
Contact Address	
Phone	
Mobile	
Email	
Date you were made aware of the incident or when it was reported to you.	
Has a report been made to Police? If so, where, when and to whom? Include NSWPF Reference No	
Have any other parties been notified? (E.g. FACS, Ombudsman, Children's Guardian, etc.)  If so where, when and to whom?	
Is there any known urgency to have this matter reported to police?	
What steps have been taken by ORG to assess any current/ongoing risks	
What steps have been taken by the ORG to preserve all available evidence (ie notes, admissions, interviews, photos, etc) in case the victim changes their mind & the evidence is required for a police investigation ?	
Has the victim been advised of the continuing option of speaking with Police?	

1 | Page

Source of Information	
Surname	
Given Name/s	
Address	
Home Phone	
Work Phone	
Mobile	
Email	
Preferred contact	

Alleged Person of Interest (POI)	
Surname	
Given Name/s	
DOB or approx age	
Gender	
Address	
Home Phone	
Work Phone	
Mobile	
Email	
Preferred contact	

Alleged Incident	
Time	
Date	
Location	
How reported	
To whom reported	
Circumstances of the suspected offence	

Alleged Victim Details	
Surname	
Given Name/s	
DOB or approx age	
Gender	
Address	
Home Phone	
Work Phone	
Mobile	
Email	
Preferred contact	
Age of victim at time of incident	
Has the victim been advised of the continuing option of speaking with Police?	



**Head of Department  
Professional Standards Office**



**NSW Police Force**  
www.police.nsw.gov.au

10 July 2014

**Process for managing historical physical and sexual abuse allegations referred from Non Government Organisations (NGOs) to the NSW Police Force.**

For some years Non Government Organisations (NGOs), including the Catholic Church, Anglican Church, The Salvation Army and others have periodically sent reports of historical physical and sexual abuse allegations to NSW Police Force (NSWPF) via The Sex Crimes Squad. These have contained summaries of historical allegations of misconduct against church personnel that had been held in the records of the organisation.

Since late 2012, The Sex Crimes Squad has received a substantial increase in the number of reports from organisations which has resulted in NSWPF reviewing the current process so that the reports can be managed in a timely manner.

As a result NSWPF requests that future reports are now forwarded to the Local Area Command, Crimes Manager where the offence occurred. The Local Area Command will now be responsible for processing the reports, conducting investigations and where necessary liaising with the relevant organisation.

Attached for your information is a Template Incident Report and the suggested protocol/process for managing these reports to the NSWPF. These documents will assist you in addressing key information required by the NSWPF for proper assessment of the report. You may incorporate the Template Incident Report into a specific form for your organisation, however you must address all of the key areas

The Sex Crimes Squad will remain a point of contact for your general enquiries and will continue providing assistance to your organisation as required.

**L Howlett  
Commander Sex Crimes Squad  
State Crime Command**

**State Crime Command  
Sex Crimes Squad**

Level 6A, 1 Charles Street Parramatta, 2124

Telephone 02 8835 8724 Facsimile 02 8835 8698 EMail 28724 EFax 28598 TTY 9211 3776 (Hearing/Speech Impaired)  
ABN 43 408 813 180

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## **SUGGESTED PROTOCOL/PROCESS FOR PROVIDING INFORMATION TO THE NSWPF**

**Sex Crimes Squad** - Telephone – 8835 8533, Facsimile – 8835 8688

### **1. Reports where the identity of a victim of suspected crime is not known:**

In cases where a complaint is received by your organisation concerning a person being suspected of having committed a criminal offence but the victim is not known, your organisation will report the matter to the Police by way of a Form which will include, inter alia:

- a) Sufficient description of the suspected offence(s)
- b) Confirmation as to what steps have been taken by your organisation to assess any current or ongoing risks to children or adults arising from or similar to the circumstances of the suspected crime being reported; and
- c) Confirmation as to what other notifications have been made by your organisation (for example, to the NSW Ombudsman, Office of the Children's Guardian, FaCS).

### **2. Reports where the identity of a victim of a suspected crime is known:**

- a) In cases where a complaint is received by a victim (The NGO) will encourage the victim to speak with the Police immediately; and
- b) Will assist the victim to approach the Local Area Command to speak with the Crime Manager and/or Detective's on duty. (Sex Crimes Squad would be advised through internal disseminations).
- c) Where a victim is willing to speak with the Police, then (The NGO) are not to conduct an investigation or to interview witnesses – the investigating police will do this.
- d) (The NGO) will ensure that any evidence which we can access (video, telephone records, documents, diaries etc.) is preserved so that the Police can access it in the course of their investigation.

### **3. In circumstances where a victim of a suspected crime is known but that victim does not wish to speak with the Police, proceed as follows;**

- a) Advise the victim that they can change their mind and speak with the Police at any time in the future;
- b) Where the victim is receiving counselling support, the counsellor may advise victim of the availability of reporting to the police through the The Sexual Assault Reporting Option (SARO) process, [www.police.nsw.au/community\\_issues/adult\\_sexual\\_assault](http://www.police.nsw.au/community_issues/adult_sexual_assault)
- c) Preserve all available evidence in case the victim changes their mind and the evidence is required for a later Police investigation;
- d) Conduct any necessary investigation to deal with any internal disciplinary matters, as required (for staff / volunteers etc.);
- e) Confirm what steps (The NGO) has taken to assess any current or ongoing risks arising from or similar to the circumstances of the suspected crime being reported
- f) Send through to the relevant LAC a notification form in two stages - initially as a preliminary notification to confirm that an investigation will be undertaken and later, a more detailed report to be provided once concluded; and
- g) The notification form should confirm that the victim has been advised of the continuing option of speaking with the Police and also of appropriate counselling services which might be able to assist them
- h) Confirmation as to what other notifications have been made by (The NGO) (for example, to the NSW Ombudsman / Office of the Children's Guardian), FaCS

# Appendix H: Draft provisions in relation to the persistent child sexual abuse offence

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draft

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**Royal Commission into Institutional Responses to Child Sexual Abuse**

**Persistent Sexual Abuse of Children Model Provisions**

**Contents**

	Page
1 Name of Model Provisions	1
2 Definitions	1
3 Offence of maintaining unlawful sexual relationship with child	2
4 Charging both unlawful sexual relationship offence and sexual offences	3



## Persistent Sexual Abuse of Children Model Provisions

### 1 Name of Model Provisions

These Model Provisions are the *Persistent Sexual Abuse of Children Model Provisions*.

### 2 Definitions

- (1) In these Model Provisions:

**adult** means a person over the age of 18 years.

**child** means:

- (a) a person who is under the age of 16 years, or
- (b) a person under the age of 18 years, if, during the period of the relationship that is the subject of the alleged unlawful sexual relationship offence, the person is under the special care of the adult in the relationship.

**predecessor offence** means the offence of persistent sexual abuse of a child.

**sexual offence** means:

- (a) an offence that involves having sexual intercourse with another person, or
- (b) an offence that involves an act of indecency on or in the presence of another person, or
- (c) an offence that involves procuring a person for unlawful sexual activity, or
- (d) an offence that involves compelling another person to engage in any sexual self-manipulation, or
- (e) an offence involving the sexual servitude of another person, or
- (f) an offence under a previous enactment that is substantially similar to an offence referred to in paragraph (a), (b), (c), (d) or (e), or
- (g) an offence that involves an attempt to commit an offence of a kind referred to in paragraph (a), (b), (c), (d), (e) or (f).

**unlawful sexual relationship offence** means an offence against section 3 (1).

- (2) For the purposes of these Model Provisions, a person under the age of 18 years (**the child**) is under the **special care** of an adult if:

- (a) the adult is the parent, step-parent, guardian or foster parent of the child or the de facto partner of a parent, step-parent, guardian or foster parent of the child, or
- (b) the adult is a school teacher and the child is a pupil of the school teacher, or
- (c) the adult has an established personal relationship with the child in connection with the provision of religious, sporting, musical or other instruction to the child, or
- (d) the adult is a custodial officer of an institution of which the child is an inmate, or
- (e) the adult is a health professional and the child is a patient of the health professional, or
- (f) the adult is responsible for the care of the child and the child has a cognitive impairment.

**Jurisdictional note.**

The definition of sexual offence is a general description of the types of offences that should be covered by the offence. Each jurisdiction should insert a specific definition of the individual sexual offences that constitute the unlawful sexual relationship offence.

**Jurisdictional note.**

For the purposes of the offence, a child is a person under the age of 16 years. However, subsection (2) extends the definition of child to a person who is over 16 but under the age of 18 years, to cover sexual offences against younger persons committed by adults who are in a special relationship of trust or authority with the child. Each jurisdiction should tailor the wording of subsection (2) to suit the wording of the relevant offences in that jurisdiction.

**Jurisdictional note.**

A reference to the predecessor offence is only required in those jurisdictions that currently have an offence of persistent sexual abuse of a child. That offence should be repealed by the new offence. The definition of predecessor offence should refer to the section number of the offence that is repealed.

**3 Offence of maintaining unlawful sexual relationship with child**

- (1) An adult who maintains an unlawful sexual relationship with a child is guilty of an offence.  
Maximum penalty: Imprisonment for 25 years.
- (2) An unlawful sexual relationship is a relationship in which an adult engages in 2 or more unlawful sexual acts with or towards a child over any period.
- (3) An unlawful sexual act is any act that constitutes, or would constitute (if particulars of the time and place at which the act took place were sufficiently particularised), a sexual offence.
- (4) For an adult to be convicted of an unlawful sexual relationship offence, the trier of fact must be satisfied beyond reasonable doubt that the evidence establishes that an unlawful sexual relationship existed.
- (5) However:
  - (a) the prosecution is not required to allege the particulars of any unlawful sexual act that would be necessary if the act were charged as a separate offence, and
  - (b) the trier of fact is not required to be satisfied of the particulars of any unlawful sexual act that it would have to be satisfied of if the act were charged as a separate offence, but must be satisfied as to the general nature or character of those acts, and
  - (c) if the trier of fact is a jury, the members of the jury are not required to agree on which unlawful sexual acts constitute the unlawful sexual relationship.
- (6) The prosecution is required to allege the particulars of the period of time over which the unlawful sexual relationship existed.
- (7) This section extends to a relationship that existed wholly or partly before the commencement of this section and to unlawful sexual acts that occurred before the commencement of this section.
- (8) A court that imposes a sentence for an unlawful sexual relationship offence constituted by an unlawful sexual relationship that is alleged to have existed wholly or partly before the commencement of this section must, when imposing sentence, take into account:
  - (a) the maximum penalty for the predecessor offence, if the predecessor offence was in force during any part of the alleged period of the unlawful sexual relationship, and
  - (b) the maximum penalty for the unlawful sexual acts that the unlawful sexual relationship is alleged to have involved, during the period of the unlawful sexual relationship, if the unlawful sexual relationship is alleged to have existed wholly or partly before the commencement of the predecessor offence.



**Jurisdictional note.**

For jurisdictions that require a fault element to be specified for each physical element of the offence, the intention is that the fault element for the offence is the fault element for each constituent unlawful sexual act.

**4 Charging both unlawful sexual relationship offence and sexual offences**

- (1) A person may be charged on a single indictment with, and convicted of and punished for, both:
  - (a) an offence of maintaining an unlawful sexual relationship with a child, and
  - (b) one or more sexual offences committed by the person against the same child during the alleged period of the unlawful sexual relationship.
- (2) Except as provided by subsection (1), a person who has been convicted or acquitted of a sexual offence in relation to a child cannot be convicted of an unlawful sexual relationship offence in relation to the same child if the sexual offence of which the person has been convicted or acquitted is one of the unlawful sexual acts that are alleged to constitute the unlawful sexual relationship.
- (3) Except as provided by subsection (1), a person who has been convicted or acquitted of an unlawful sexual relationship offence in relation to a child cannot be convicted of a sexual offence in relation to the same child if the occasion on which the sexual offence is alleged to have occurred is during the period over which the person was alleged to have committed the unlawful sexual relationship offence.
- (4) A person who has been convicted or acquitted of a predecessor offence in relation to a child cannot be convicted of an unlawful sexual relationship offence in relation to the same child if the period of the alleged unlawful sexual relationship includes any part of the period during which the person was alleged to have committed the predecessor offence.
- (5) For the purposes of this section, a person ceases to be regarded as having been convicted for an offence if the conviction is quashed or set aside.

# Appendix I: Jury research referred to by the Law Society of New South Wales

The Law Society of New South Wales raised concerns that the report *Jury reasoning in joint and separate trials of institutional child sexual abuse: An empirical study* (Jury Reasoning Research) had not referred to 'significant research by Louise Ellison and Vanessa Munro, which focuses on jury reasoning issues in mock trial scenarios'.<sup>2171</sup> We discuss these concerns in section 25.3.5.

The Law Society of New South Wales did not cite any particular publications by Professors Ellison and Munro. The Royal Commission obtained and reviewed the following six publications written by them.

The following three articles report on different aspects of a mock jury study involving 160 mock jurors:

- '*Telling tales*': *Exploring narratives of life and law within the (mock) jury room*<sup>2172</sup>  
– The abstract of this article states:

Based on a [sic] findings of a simulation study in which 160 members of the public observed a mini rape trial re-enactment and were then asked to deliberate in jury groups towards a unanimous verdict, this paper explores the extent to which participants were able, and willing, to understand and apply judicial directions, and the legal tests or criteria contained therein. More specifically, it reflects on whether the additional provision of written directions in the jury room influenced the tone or direction of jurors' discussions, and illustrates the limited recourse made by participants to their contents, as well as their tendency to misinterpret or misapply them when they were relied upon. Having done so, this paper moves on to explore the reasons behind this limited impact, suggesting that fundamental tensions may exist between legal and lay imaginaries, such that jurors are reluctant to jettison their more natural inclinations to reach individual and collective verdicts on the basis of narrative constructions grounded in 'common sense' and 'personal experience'.<sup>2173</sup>

- *A 'special' delivery? Exploring the impact of screens, live-links and video-recorded evidence on mock juror deliberation in rape trials*<sup>2174</sup> – The abstract of this article states (in part) that:

This article discusses the findings of a study ... [that] investigated the influence upon mock jurors of three special measures currently made available in England and Wales to adult sexual offence complainants by the *Youth Justice and Criminal Evidence Act 1999*, namely (1) live-links; (2) video-recorded evidence-in-chief followed by live-link cross-examination and (3) protective screens. Following a careful and contextual exploration of the content of the mock juries' deliberations, the researchers conclude that there was no clear or consistent impact as a result of these divergent presentation modes, suggesting that concerns over the use of special measures by adult rape complainants (at least in terms of juror influence) may be overstated.<sup>2175</sup>

- *Better the devil you know? ‘Real rape’ stereotypes and the relevance of a previous relationship in (mock) juror deliberations*<sup>2176</sup> – The abstract of this article states:

It has become commonplace in commentaries on the ‘justice gap’ in rape cases to lament the existence of a ‘real rape’ stereotype which prevents assaults involving known assailants, which take place in private spaces and perhaps without the use of additional physical violence, from being accepted as genuine and/or serious violations, whether by police, prosecutors or jurors. In previous work, we have urged caution lest too much reliance on the ‘real rape’ stereotype disguise the complexities at play in framing jurors’ responses to rape cases involving acquaintances. In this article, we take these reflections further ... Though the vast majority of our jurors were receptive, in principle, to the idea that a woman could be raped by a man with whom she had previously had a relationship – and indeed often noted the statistical prevalence of such assaults – participants continued to consider these cases to be ‘less clear-cut’, ‘more delicate’ and ‘a lot harder’ than rapes involving a stranger. In line with our previous findings in the context of acquaintance rapes, the fact of a familiarity between the trial parties created an opportunity for jurors to invoke and rely upon engrained expectations regarding resistance and sexual (mis)communication, which – when combined with persuasive strategies that interpreted the standard of proof as requiring nothing short of absolute certainty – mitigated against the likelihood of returning a guilty verdict. Significantly, though, as we will illustrate in this article, the fact of a previous intimate relationship interacted with these expectations in heightened and often quite specific ways to create new tropes.<sup>2177</sup>

The following three articles report on different aspects of a different mock jury study involving 216 mock jurors:

- *A stranger in the bushes, or an elephant in the room? Critical reflections upon received rape myth wisdom in the context of a mock jury study*<sup>2178</sup> – The abstract of this article states:

Commentators, even in contemporary times, have often insisted that the narrowness of public (and thus juror) conceptions of what constitutes sexual assault poses a significant obstacle to securing a conviction in rape cases. Though empirically flawed, it is asserted that the popular image of ‘real rape’ assumes the existence of – amongst other things – a stranger perpetrator, a public attack location, a use of violence by the assailant, and a show of physical resistance by the victim. Drawing on a mock jury study, in which 216 members of the public observed a mini-rape trial reconstruction and were asked to deliberate within jury groups toward a verdict, this article critically examines participants’ subscription to this ‘real rape’ prototype. It explores the extent to which jurors’ reluctance to convict may be attributable to a more complex interplay of factors than is reflected in the simplistic charge that they assume an unduly narrow conception of what rape does, or could, look like. In addition, it critically reflects upon

participants' perceptions of the prevalence of and reasons for, women's false rape allegations. Juxtaposing participants' responses to predeliberation questionnaires with their discursive contributions to the jury deliberations, moreover, this article lodges a broader, methodological critique. More specifically, it highlights some of the dangers associated with uncritical extrapolation from abstract rape myth acceptance surveys to predict verdict outcomes in concrete cases, where jurors (mock or otherwise) are more familiar with the circumstantial context and directed to comply with operative legal standards in reaching their conclusions.<sup>2179</sup>

- *Turning mirrors into windows? Assessing the impact of (mock) juror education in rape trials*<sup>2180</sup> – The abstract of this article states:

In 2006, the Government proposed allowing prosecutors in England and Wales to adduce 'general' expert witness testimony in rape cases. This initiative was based on two assumptions — first, that jurors currently lack an adequate understanding of rape complainants' post-assault behaviour (which, in turn, generates inappropriate inferences regarding credibility) and, second, that expert testimony offers a useful vehicle for addressing such juror ignorance. In a previous article, the authors reported on a mock jury study that provided empirical support for the first of these claims — at least in regard to a complainant's calm demeanour, delayed reporting or lack of physical resistance. In this article, the authors investigate whether educational guidance presented at trial — via expert testimony or an expansive judicial instruction — can have the intended beneficial impact of redressing popular misconceptions, thereby leading to a fairer assessment of complainant credibility in rape cases.<sup>2181</sup>

- *Reacting to rape: Exploring mock jurors' assessments of complainant credibility*<sup>2182</sup> — This is the 'previous article' referred to above in the abstract of *Turning mirrors into windows? Assessing the impact of (mock) juror education in rape trials*. After referring to the mock jury study, the abstract of this article states:

While previous research has established that jurors are often influenced by extra-legal factors relating to the complainant's behaviour before an alleged attack, this study explored the impact of complainant conduct during and post-assault on assessments of her credibility. More specifically, it examined the effects of (1) lack of physical resistance; (2) delayed reporting; and (3) calm emotional demeanour.<sup>2183</sup>

# Appendix J: Jury research referred to by the ALRC

In section 28.1.5, we discuss what the Australian Law Reform Commission (ALRC) wrote about the ability of juries (and judges and magistrates) to handle and assess evidence in the ALRC's report *Evidence (interim)*.

The ALRC referred to the studies of mock juries and comparisons of jury verdicts with the views of the judges, lawyers and police involved. The ALRC stated:

The results of these studies, while not conclusive, do not support the view that juries are, on the whole, likely to be incompetent and incapable of properly assessing, using and weighing evidence in the context of our present jury trial system (with its directions and laws controlling the admission of evidence). *At the same time they do not assist us directly in forming a view as to whether exclusionary rules could be safely abandoned with or without suitable directions to juries about the use to be made of evidence admitted as a result.* The research does suggest, however, that some juries are capable of responding appropriately to directions, although the results vary.<sup>2184</sup> [References omitted. Emphasis added.]

The footnote at the end of the sentence in italics reads:

The studies do, however, suggest that we should be reluctant to admit evidence of bad character.<sup>2185</sup>

The footnote at the end of the paragraph lists the research studies.<sup>2186</sup>

We summarise below the research studies cited by the ALRC in the order in which they are cited.

## 1. Kalven and Zeisel, *The American jury* (1966)<sup>2187</sup>

Kalven and Zeisel's *The American jury* reports on the University of Chicago Law School Jury Project.

The jury project studied 3,576 jury trials upon which the trial judges reported by completing a questionnaire. The principal matters for investigation were the extent of disagreement between judge and jury and the reasons for such disagreement. The judge was asked to state, before the jury rendered its verdict, how the judge would have decided the case; and, in the event of the jury's deciding differently, the judge was asked to offer their view as to the reason for the disagreement.

In addition, the judge provided information on other aspects of the case. These included the charges; details about the defendant – including whether he had a record and, if so, whether the jury learnt of it and whether he gave evidence; the nature of the judge's instructions to the jury; the length of the trial and of the jury's deliberations; and the relative quality of counsel. A second (improved) questionnaire also asked for information about the evidence (nature and amount); the nature of the defence; and a number of assessments that proved of great significance for the evaluation of the jury's behaviour – for instance, the judge's view of the verdict; whether the case was easy or difficult to comprehend; whether guilt or innocence was a

clear or a close question; and the impressions created by the defendant and the victim (if any). Explanations of judge–jury disagreement were established by assessing the judges’ reasons for jury verdicts where they disagreed with the judges’ views and by cross-tabulation.

Results across the 3,576 trials were:

- the judge would have convicted in 83.3 per cent of cases compared to 64.2 per cent in which the jury convicted
- the jury was hung in 5.5 per cent of cases
- the judge would have acquitted in 16.7 per cent of cases compared with 30.3 per cent in which the jury acquitted.

The researchers distributed hung jury cases equally between acquittal and conviction and calculated that judge–jury disagreement as to acquittal or conviction occurred in 22 per cent of the cases, comprising:

- 19 per cent of cases, where the jury acquitted but the judge would have convicted (‘normal disagreements’)
- 3 per cent of cases, where the jury convicted but the judge would have acquitted (‘cross-over cases’).

The researchers identified normal disagreements and crossover cases for different types of offences, and identified the following five categories of reasons for disagreement:

- sentiments on the law
- sentiments on the defendant
- issues of evidence
- facts only the judge knew
- disparity of counsel.

The researchers concluded that the jury follows the evidence and understands the case.

In their chapter, ‘A Last Word’, the researchers stated:

In the large, the mind of the jury in the criminal cases might perhaps be said to exhibit four dominant traits. First, there is the niceness of its calculus of equities; it will treat provocation as justifying defensive moves by the victim but only to the extent of the one-punch battery; it may even treat injury to the victim as punishment for the act, but only where the relationship is close and the conduct is inadvertent. Second, there is the jury’s broad tendency to see little difference between tort and crime and thus to see the victim rather than the state as the other party to the case, with the consequence that the public controversy is appraised largely as though it were a private quarrel. Third, there is a

comparably broad tendency to merge at several point considerations of penalty with those of guilt. Finally, and this is a point on which we will say more in a moment, there is a quality of formal symmetry about the jury's responses. In what we have called the simple rape cases the jury seems to say, whatever kind of offense the defendant has committed, it just was not rape; conversely, in the cases of sexual approach to children, it says that whatever the defendant did, even though far short of rape, it was some kind of offense. Thus while the jury is often moved to leniency by adding a distinction the law does not make, it is at times moved to be more severe than the judge because it wishes to override a distinction the law does make.<sup>2188</sup>

## **2. Baldwin and McConville, *Jury trials* (1979)<sup>2189</sup>**

This text reported research designed to evaluate the performance of the jury by examining the jury's verdict and the 'verdict' of others (judges, solicitors and police officers – the Bar refused to participate<sup>2190</sup>) involved in the case. Limits were imposed on the questions that could be asked of solicitors and judges, and their opinion on the verdict could only be obtained through indirect questions.<sup>2191</sup> The research was conducted in relation to jury trials in Birmingham and London in 1975–1976.<sup>2192</sup> In the overview of findings, the authors reported a 'considerable dissatisfaction expressed by respondents about many of the verdicts delivered by juries'; there was more frequent disagreement with jury acquittals than convictions, but there was also disagreement with a small group of convictions.<sup>2193</sup>

The research found that:

- police concerns that professional criminals were able to exploit the system were largely misplaced<sup>2194</sup>
- jury composition has achieved a cross-section of the community in terms of age and social class but not in terms of sex and race<sup>2195</sup>
- there was no evidence to suggest any relationship between the composition of the jury and the verdict returned<sup>2196</sup>
- the judges, solicitors and police who participated in the research thought juries reached wrong or questionable conclusions in a number of cases, such that 'the jury appeared on occasion to be over-ready to acquit those who were probably guilty and insufficiently prepared to protect the possibly innocent'<sup>2197</sup>
- there was no clear pattern in the cases with a questionable verdict.<sup>2198</sup>

## **3. Simon, *The jury and the defence of insanity* (1967)<sup>2199</sup>**

This text reports on a study of how juries handle the defence of insanity arising from the University of Chicago Law School Jury Project (see Kalven and Zeisel in 1 above). It tested how verdicts changed if the evidence of expert psychiatric witnesses varied in quality, or if the M'Naghten instructions on insanity<sup>2200</sup> were replaced by instructions from the *Durham case*.<sup>2201</sup>

#### 4. Sealy and Cornish, 'Jurors and their verdicts' (1973)<sup>2202</sup>

This article reported on an element of the London School of Economics Jury Project (discussed in 5 below). The project was undertaken during a period when a recommendation to remove the property qualification for juror selection was under consideration. This recommendation was then enacted in 1972. The property qualification was based on the rateable value of premises; the authors stated that revaluations for rating had spread the net to include occupiers of much working-class housing, but non-householders – disproportionately women and young adults – were still excluded.<sup>2203</sup>

The project recruited two different groups of mock jurors: Group 1 (319 jurors) were recruited by invitations posed in commercial and government offices in Central London; Group 2 were (257 jurors) were recruited by personal invitation in selected London Boroughs, intended to obtain roughly the same number of middle-class and working-class jurors.<sup>2204</sup>

The authors concluded from this aspect of the project that their data 'generally support the wisdom of opening jury service to adult citizens, whether or not they are householders', suggesting that their occupation, education, sex or age generally did not predict verdicts.<sup>2205</sup>

#### 5. Sealy and Cornish, 'Juries and the rules of evidence: LSE Jury Project' (1973)<sup>2206</sup>

Note that the summary of this research is also included in Appendix L.

The London School of Economics Jury Project involved groups of mock jurors listening to a tape recording re-enacted from the transcript of a real trial and then reaching a verdict on what they had heard.<sup>2207</sup> The project tested two mock trials, with slightly shortened versions of actual cases, 'selected for their brevity and uncertainty'.<sup>2208</sup> One involved alleged theft of £10 worth of meat. The other involved a charge of rape of a 16-year-old girl with two co-defendants. Twenty-two juries heard the rape case.<sup>2209</sup>

Each mock juror recorded their verdict and the degree of certainty they felt about it immediately after the summing up, then the mock jury deliberated. If they had not reached a verdict after 100 minutes, they were treated as hung. At the end of deliberations, the mock jurors were asked to complete a questionnaire in which they recorded their final verdict, the reasons for it, and their views on the conduct of the case. The questionnaire also included scales designed to measure attitude and personality.<sup>2210</sup>

The experiment was designed to test two rules of evidence:

- the rule rendering inadmissible the accused's previous convictions
- the rule requiring the judge to instruct the jury about the standard of proof.<sup>2211</sup>



The previous convictions rule was tested by the following variations:

- Condition X – convictions for similar offences:
  - previous record for similar offences (theft: convictions for stealing meat; rape: convictions for indecent assaults on girls)
  - no instruction by the judge to disregard the evidence
  - previous conviction in the theft case introduced either by defence asking the prosecution witness about his own criminal record and the defendant admitting his previous convictions in cross-examination; or by the defendant putting his good character in evidence then admitting previous convictions in cross-examination
  - previous conviction in the rape case introduced by the record being ‘let slip’ by the co-defendant.<sup>2212</sup>
- Condition Y – convictions for dissimilar offences:
  - previous record for dissimilar offences (theft: indecency; rape: dishonesty)
  - previous conviction in the theft case introduced by the defendant putting his good character in evidence then admitting previous convictions in cross-examination
  - previous conviction in the rape case introduced by the record being ‘let slip’ by the co-defendant.<sup>2213</sup>
- Condition Z – convictions for similar offences with judge instructing jury to disregard:
  - previous record for similar offences the same as for condition X
  - previous conviction in the theft case introduced by the record being ‘let slip’ by a prosecution witness (police)
  - previous conviction in the rape case introduced by the record being ‘let slip’ by the co-defendant.<sup>2214</sup>
- Condition Co: control, with no previous record mentioned.

Each variation of the defendant’s previous record was designed to be tested with each of the various variations of the standard of proof instruction, although not every combination was employed in the rape case. Instead, they tested variations omitting the judge’s warning in relation to conviction on the uncorroborated evidence of the victim or omitting the instruction to treat evidence of early complaint as showing consistency and not corroboration.<sup>2215</sup>

This paper reported on final verdicts by individual mock jurors and set out the experimental results in detail.<sup>2216</sup> There was no evaluation of mock jury deliberations.

In respect of the rules of evidence that formed the basis of this part of the research, the authors concluded:

we would tentatively suggest the following conclusions.

- (1) The admission of previous convictions does increase the chance of a guilty verdict, but only if those convictions are for offences similar to that charged. If they are dissimilar it is possible for them to have an effect that is positively favourable to the accused. Similar previous convictions may adversely affect the outcome for a co-accused.
- (2) Contrary to common supposition, juries give real weight to an instruction to disregard relevant previous record wrongly admitted.
- (3) None of the instructions – on standard of proof, corroboration or recent complaint – showed the kind of variation that lawyers apparently suppose will follow ...<sup>2217</sup>

## 6. Cornish, *The jury* (1968)<sup>2218</sup>

This book examined the selection and role of juries, the then-current state of the debate about their value and possible alternatives to jury trials. It referred to the London School of Economics jury study (discussed in 4 and 5 above) that was then being undertaken and expressed the hope that it would provide some empirical information from which to judge the desirability of allowing juries to know the past criminal history of all defendants.<sup>2219</sup>

## 7. Stephen, 'Sex prejudice in jury simulation' (1974)<sup>2220</sup>

This article reported on a study of mock jurors designed to test the hypothesis that male and female jurors respond differently to male and female defendants in a criminal trial. The mock jurors were 84 male and 101 female university students enrolled in undergraduate sociology and psychology courses.<sup>2221</sup> One-third of the mock jurors participated individually and two-thirds participated in like-sex groups of three.

Each mock juror read a synopsis of a murder trial in which the defendant was a man accused of murdering his wife or a woman accused of murdering her husband. Each version of the trial involved a love triangle, a shooting and a contest as to whether it was premeditated murder or temporary insanity.<sup>2222</sup> Mock jurors were asked to give verdicts – either innocent, guilty of manslaughter, guilty of second degree murder or guilty of first degree murder – and sentence (if the verdict was guilty). All mock jurors completed a questionnaire individually about the verdict, their certainty, their feelings towards the defendant and, in the groups of three, questions about the group decision-making.<sup>2223</sup>

The study found that mock jurors were less likely to find a defendant of their own sex guilty than they were to find a defendant of the opposite sex guilty when the three guilty verdicts were combined into one category and compared with the not guilty verdict or when the different verdicts were treated as an interval scale.<sup>2224</sup>

The author referred to Kalven and Zeisel's determination that a number of sex-related variables – the defendant being a woman, an attractive woman, a mother, a war widow – created sympathy for the defendant, suggesting that both male and female jurors favour female defendants.<sup>2225</sup> The data in this study did not support that hypothesis.<sup>2226</sup>

The article reported on a number of other findings, including that individuals and groups differed only on one variable, with mock jurors in groups having a significantly easier time deciding on the verdict than individual mock jurors.<sup>2227</sup>

#### **8. Landy and Aronson, 'The influence of the character of the criminal and his victim on the decisions of simulated jurors' (1969)<sup>2228</sup>**

The authors summarised their research and findings in the synopsis of this article as follows:

In two separate experiments subjects read a standardized description of a crime of negligent automobile homicide. In both Experiments I and II, the victim of the crime was presented to approximately one-half of the subjects as an unattractive person (Unattractive Victim condition) and to the other half of the subjects as an attractive person (Attractive Victim condition). In Experiment II the character of the defendant was also varied; he was described to some subjects as an attractive person, to some as an unattractive person, and to others as a 'neutral' person. The actual circumstances of the crime were, of course, identical for all subjects. The subjects were requested to sentence the defendant to a specific number of years of imprisonment according to their own personal judgment.

As predicted, the results of both Experiments I and II showed that subjects in the Attractive Victim conditions tended to sentence the defendant to a greater number of years of imprisonment than subjects in the Unattractive Victim conditions. In Experiment II, subjects in the Unattractive Defendant condition sentenced the defendant more severely than subjects in either the Attractive or Neutral Defendant conditions.<sup>2229</sup>

The subjects were introductory psychology course students and the experimental sessions were held in university classrooms. Students were asked for their individual decisions about sentence, with no deliberation.<sup>2230</sup> Experiment I involved 261 male and female students. The variation between the attractive and unattractive victim was stated as follows:

*Attractive victim.* 'The victim ... was a senior partner of a successful stock brokerage firm and an active member of the community welfare board. He was a widower and is survived by his son and daughter-in-law ... At the time of the accident the victim was on his way to the Lincoln Orphanage, of which he was a founding member, with Christmas gifts'.

*Unattractive victim.* 'The victim ... was a notorious hoodlum and ex-convict who had been convicted of assault and extortion. He was a henchman for a crime syndicate which had been under police investigation for some time. A loaded 32-caliber pistol was found on his body'.<sup>2231</sup>

The authors stated that they 'wanted to employ a situation in which there was little or no doubt in the minds of our subjects about the guilt of the defendant, i.e. a situation in which it would be clear that he had actually perpetrated the offense'.<sup>2232</sup>

Experiment I did not produce statistically significant differences in the sentencing of the offender when the victim was attractive compared with when the victim was unattractive.<sup>2233</sup>

Experiment II was therefore designed to make the manipulation more powerful and to manipulate the character of the defendant.<sup>2234</sup>

Experiment II involved 116 male and female students in an introductory government course at the University of Texas.<sup>2235</sup> The victim attractiveness or unattractiveness was broadly similar to Experiment I, although, if anything, the unattractive victim was even more unattractive, having been alleged to be responsible in the 'massacre' of five men and, at the time of his death, being out of prison on bond awaiting trial for mail fraud and income tax evasion.<sup>2236</sup>

The three variations of defendant – attractive, unattractive and neutral – followed similar lines:

- The attractive defendant was an older, longstanding employee, 'friendly with everyone and ... known as a good worker'. His wife having recently died of cancer, he was to spend Christmas Eve with his son and daughter in law. In the incident, he re-aggravated a gun wound which caused him a slight limp and much pain. He had some traffic violations.
- The unattractive defendant was a younger man, only recently employed and not known by many of the other employees. He was a two-time divorcee. He was to spend Christmas Eve with his girlfriend. The incident had only a negligible effect on him, with no major injuries. He had recent convictions for breaking and entering and a drug violation as well as traffic offences.
- The neutral employee was given no age or employment record. He was said to be heading home from the party. He suffered no major injuries in the incident. He had some traffic violations.<sup>2237</sup>

The study focused on length of sentence, although the authors also collected some data in Experiment II on the subjects' rating of how guilty they considered the defendant to be. The different ratings between the experiment conditions were not statistically significant.<sup>2238</sup>

## **9. Kerr, Atkin and others, 'Guilt beyond a reasonable doubt: Effects of concept definition and assigned decision rule on the judgments of mock jurors' (1976)<sup>2239</sup>**

This research tested the ambiguity of the concept of reasonable doubt and the compounding effect of requiring group verdicts.<sup>2240</sup>

The authors summarised their research and findings in the synopsis of this article as follows:

The concept of reasonable doubt was examined as both an individual and group decision criterion. Previous research indicates that neither criterion has an effect on verdicts. A reexamination of this research suggested that such effects might occur for cases producing maximum disagreement. An experiment was performed in which mock jurors reached individual and group verdicts for such a case. The decision criteria for individuals

(judge's definition of reasonable doubt) and groups (assigned decision rule) were varied in a factorial design. As predicted, mock juries assigned a unanimity decision rule were significantly less likely to reach a verdict than juries assigned a majority rule. Minority members of juries assigned a majority decision rule were particularly dissatisfied with group deliberation. Definitional variations in reasonable doubt significantly affected both individual and group verdicts. The effects of independent variables for the group decision-making process were also examined using a model-fitting approach to Davis' social decision scheme model.<sup>2241</sup>

The 645 subjects were university students undertaking introductory psychology and social psychology courses. Most of the subjects participated in six-person mock juries.<sup>2242</sup>

The trial materials involved articles that purportedly appeared in a local newspaper before the trial and a 50-minute audio and videotape of evidence, counsel's summaries and the judge's charge to the jury. The judge's instructions were varied in relation to the meaning of reasonable doubt. The subjects participated individually in the first part of the experiment, which involved the presentation of the trial materials and completion of a questionnaire with various questions about the guilt or innocence of the defendant.<sup>2243</sup>

The second part of the experiment involved the group deliberations. The students were told to deliberate for up to 30 minutes to reach a final verdict. They were given different instructions depending on whether they were required to reach a unanimous verdict or a majority verdict. After their deliberations, they individually completed another questionnaire of the same questions about the guilt or innocence of the defendant.<sup>2244</sup>

The experiment found that the variation in the judge's instructions concerning reasonable doubt had a significant difference in the group conviction rate and that the difference was most pronounced when the case produced strong disagreement.<sup>2245</sup> It also found that the definition of reasonable doubt does not affect the mock jurors' assessment of the probability that the defendant committed the crime, but it does affect the criterion for conviction.<sup>2246</sup>

## **10. Friend and Vinson, 'Leaning over backwards: Jurors' responses to defendants' attractiveness' (1974)<sup>2247</sup>**

This article is introduced as follows: 'Does a defendant with an attractive appearance and personality get a lighter sentence? One study shows that jurors who are trying to be impartial may overcompensate for their biases.'<sup>2248</sup>

Referring to the work of Landy and Aronson (discussed in 8 above), the authors conducted a similar experiment but asked the subjects to try to be impartial.<sup>2249</sup>

The subjects were 102 male students in an introductory psychology course. They read about the case and were asked to sentence the defendant to a specific number of years of imprisonment. Some were given an instruction to disregard the personality and characteristics of the

defendant.<sup>2250</sup> They were randomly assigned to cases involving an attractive, unattractive and neutral defendant in a motor vehicle negligent homicide case. The subjects were also assessed on scales to determine their authoritarian aggression, authoritarian submission and power and toughness.<sup>2251</sup>

The authors concluded that, when jurors give a commitment to be impartial, socially and physically unattractive defendants may receive less severe sentences than attractive and neutral defendants.<sup>2252</sup>

### **11. Sue, Smith and Caldwell, 'Effects of inadmissible evidence on the decisions of simulated jurors: A moral dilemma' (1973)<sup>2253</sup>**

This article reported on a study that was designed to assess the influence of evidence that was damaging to the defendant and that was ruled inadmissible after it was presented to jurors.<sup>2254</sup>

The mock jurors were 107 university students studying an abnormal psychology course. They were asked to read a summary of a trial and then to give their individual verdict. All mock jurors received either circumstantial or strong initial evidence against the defendant. The mock jurors were given either a weak or strong case against the defendant. Within each of those groups, mock jurors received either:

- additional evidence that was ruled admissible
- additional evidence that was ruled inadmissible
- no additional evidence.

The experiment was conducted during class. The student mock jurors were given a four-page booklet containing instructions, a description of the crime, a summary of the trial and a questionnaire concerning their verdicts, confidence in their verdicts and recommendations for sentencing if they found the defendant guilty. The crime involved armed robbery of a small grocery store and the shooting murder of the shop owner and his five-year-old granddaughter.

All jurors were told that the defendant had been previously convicted for a robbery. The cases were varied (apart from evidence strength) in relation to extra evidence about a recording of a telephone call the accused made shortly after the crime, which was recorded under a warrant to record calls made by the person who the accused called. The call did not contain an express admission by the accused but was clearly inculpatory.

The results found a statistically significant difference in guilty verdicts between mock jurors who were given the weak evidence case and mock jurors who were given the strong evidence case. There was also a statistically significant difference in guilty verdicts between the mock jurors who had the additional evidence that was ruled admissible (across both the weak and strong evidence cases) and the mock jurors who received no additional evidence. The mock jurors who received additional evidence that was ruled inadmissible occupied an intermediate position, without a statistically significant difference between the other two groups.<sup>2255</sup>

Analysing the weak and strong evidence groups separately, no statistically significant differences were found between the three groups who received the strong evidence case. However, among the three groups who received the weak evidence case, the additional evidence ‘exerted a profound influence on judicial decisions’, whether the damaging evidence was ruled admissible or inadmissible by the judge.<sup>2256</sup>

The authors concluded that evidence that is introduced and yet ruled inadmissible caused bias for the mock jurors in the case with weak evidence, but it had no effect on mock jurors where the evidence against the defendant was already strong. The authors suggested that the biasing effect of damaging inadmissible evidence was greatest when there was little other evidence on which to make a decision, but mock jurors who found the defendant innocent despite *strong* evidence against him might not be influenced by additional evidence.<sup>2257</sup>

The authors discussed a number of limitations of the study, including that usually the damaging tape recording would have been ruled inadmissible by the judge and it would not have been presented to the jury.<sup>2258</sup>

## **12. Efran, ‘The effect of physical appearance on the judgment of guilt, interpersonal attraction and severity of recommended punishment in a simulated jury task’ (1974)<sup>2259</sup>**

This article reported on an opinion survey of 108 students and an experimental study with 66 students who did not participate in the survey. The students were required to participate as part of an introductory psychology course.<sup>2260</sup> The survey revealed that substantial majorities of those polled believed that:

- a defendant’s character and previous history should influence jurors’ decisions (79 per cent)
- a defendant’s physical appearance should not bias jurors’ decisions (93 per cent).

The experimental study was conducted in small group sessions with either all male or all female mock jurors. The scenario involved a student–faculty court at a university established to handle faculty misconduct and student cheating. Each mock juror was asked to play the role of a student member of the court, and the case involved a student accused of cheating on an examination. The defendant was a male for female mock jurors and a female for male mock jurors. The judge’s instructions were given in 150 words and the fact summary was given in 650 words, with details both favouring and against the defendant’s case.<sup>2261</sup> One-third of students were given the fact summary with a photograph of an attractive defendant attached; one-third were given the fact summary with a photograph of an unattractive defendant attached; and one-third were given no photograph. Photographs of two different individuals rated equally for attractiveness were randomly assigned within these groups.<sup>2262</sup> Mock jurors rated the defendant’s guilt and appropriate punishment on six point scales. After completing these scales, each mock juror completed a scale measuring attraction and rated the defendant on a six-point scale of physical attractiveness.

The mock jurors evaluated attractive defendants with less certainty of guilt, less severe recommended punishment and greater attraction compared to unattractive defendants. The survey finding that mock jurors considered the defendant's character and history to be relevant suggested that such information should not be used in a simulation to test the impact of information that mock jurors considered should be irrelevant. Male mock jurors appeared to be more affected by attractiveness than female mock jurors.<sup>2263</sup>

The authors interpreted the results as offering strong support for the hypothesis that male mock jurors were biased by the physical attractiveness of a fictitious female defendant, in spite of the survey showing that fewer than 10 per cent of those surveyed believed that physical attractiveness should affect judicial decisions.<sup>2264</sup>

### **13. Doob and Kirshenbaum, 'Some empirical evidence on the effect of s 12 of the Canada Evidence Act upon an accused' (1972–73)<sup>2265</sup>**

This article examined the Canadian provision that allowed the criminal record of an accused person who gave evidence to be entered as evidence. The authors stated that the provision assumed that a person who had been found guilty of a criminal offence was more likely to give untrue evidence than was a person without a criminal record and that the judge or jury would use the information concerning previous convictions to determine credibility and not guilt.<sup>2266</sup> The authors report on a mock jury experiment where 48 mock jurors read a hypothetical case, approximately 400 words long, involving a charge for breaking and entering. Half the jurors were then told that the accused had a criminal record and the other half were told nothing about previous convictions. Of the jurors told that the accused had a criminal record, half were told that it could be used to determine credibility and not guilt and the other half were given no such instructions. Of the jurors told nothing about previous convictions, half were told that the accused did not give evidence because there was no need for it and the other half were given no such information.<sup>2267</sup>

The prior conviction information was that the accused 'had been convicted five different times of breaking and entering private homes and had also been convicted twice of being in possession of stolen property'.<sup>2268</sup>

There was no jury or jury deliberation; each mock juror read the relevant condition they were randomly assigned to and they answered a questionnaire on likelihood of guilt, ranging from 1 (definitely guilty) to 7 (definitely not guilty).

The authors reported that the effect of the criminal record was statistically significant. The mean for the mock jurors who heard nothing about previous convictions was slightly more than 4 (the midpoint of the scale), while the mock jurors who received information about the accused's previous criminal record had an average of approximately 3 (probably guilty).<sup>2269</sup> The judge's instructions not to use the convictions to determine guilt had no effect.<sup>2270</sup>



#### 14. Griew, 'The behaviour of the jury – A review of the American evidence' (1967)<sup>2271</sup>

This article outlined and commented on Kalven and Zeisel's *The American jury*, which was the 'central product of the University of Chicago Law School Jury Project'.<sup>2272</sup> The research is described in 1 above.

Griew outlined some substantial differences between the relevant positions in America and England as to selection of juries; the cases then tried by juries; matters such as procedure, rules of evidence – noting particularly the significant difference in relation to the admissibility of the defendant's criminal record, forensic style particularly for prosecutors and the mood and manner of trial; functions of the judges; and different social contexts.<sup>2273</sup>

Griew reported that the researchers concluded that the jury follows the evidence and understands the case,<sup>2274</sup> although Griew expressed some doubt and disagreement.<sup>2275</sup>

Griew reported that the researchers found that the jury is 'an institution which is stubbornly non-rule minded' in the sense that the jury might acquit even where the law required conviction in a form of 'criminal equity'.<sup>2276</sup> Griew referred to juries using considerations relevant to tort law and stated:

A layman, asking of his own motion questions of a similar sort, will express them in broader language, going beyond the tort concepts but legitimately generalising from them. Did the victim 'have it coming to him'? Was he 'playing with fire'? What real harm was done? Is the litigation 'a storm in a teacup'?<sup>2277</sup>

Griew then gave examples that resulted in 'a virtual rewriting of the criminal law' as follows:

The evidence reveals an almost total unwillingness of the jury to convict of what the authors designate as 'simple rape' – that is, rape committed by a single assailant without evidence of 'extrinsic violence', the defendant and the victim not being complete strangers. The jury will often convict of a less serious offence if given the opportunity, but will not call it rape. The jury sentiment against the risk-taking victim even moves it on occasion to acquit in the teeth of clear evidence of brutal violence. Other examples in the field of sexual offences, which are prolific in the stimulation of jury equity, concern statutory rape (acquittal by the jury is often explained as based on the unchaste character of the 'victim') and indecent exposure (the figures suggest that the jury distinguishes in a way that a judge cannot between exposure to a child and exposure to an adult; the jury does not easily see the latter as involving a harm properly the subject of criminal liability. Converse situations occur in cases of statutory rape, leading the authors to formulate a jury principle that 'a gross sexual approach to a young girl is a sufficient crime in itself and that its gravity need not be graduated according to the completeness of the sexual act.' The jury's non-rule mindedness is not purely a pro-defence phenomenon.<sup>2278</sup> [References omitted.]

Griew also discussed a number of possible implications of ‘jury equity’ as juries appeared to make their own law;<sup>2279</sup> the material suggesting the juries considered factors legally relevant to punishment as being relevant to guilt (considering that the defendant has been punished enough already or fearing that the defendant may be too severely punished);<sup>2280</sup> the material suggesting the juries tended to ignore the distinction between wilful and negligent conduct;<sup>2281</sup> and material relevant to the issue of majority verdicts.<sup>2282</sup>

#### **15. Cross, ‘The behaviour of the jury: A comment’ (1967)<sup>2283</sup>**

This short article commented on Kalven and Zeisel’s *The American jury* and Griew’s article on it, particularly in relation to the inability to ‘bug’ jury deliberations or even to interview jurors after the trial in England and the resulting inability to know how juries use previous convictions or what assumptions they make about an accused’s decision not to give evidence.

#### **16. MacKenna, ‘The behaviour of the jury: A comment’ (1967)<sup>2284</sup>**

This short article also commented on Kalven and Zeisel’s *The American jury* and Griew’s article on it, particularly in relation to reasons for disagreement between the judge’s opinion and the jury’s verdict. Sir Bernard MacKenna suggested that the judge might place less meaning on the presumption of innocence, even in respect of a defendant who has no record, and this might lead the judge to reject the defendant’s evidence in cases where the jury would accept it. MacKenna stated: ‘The judge will almost always know the defendant’s record, which may be a bad one: the jury, at least in England, hardly ever does’.<sup>2285</sup> MacKenna identified an additional category to explain disagreement on the basis of the jury (or judge) misunderstanding or forgetting a point.<sup>2286</sup> MacKenna also discussed methodological problems with Kalven and Zeisel’s research and questioned their theory.<sup>2287</sup>

#### **17. Heald, ‘The behaviour of the jury: A comment’ (1967)<sup>2288</sup>**

This short article also commented on Kalven and Zeisel’s *The American jury* and Griew’s article on it, particularly in relation to reasons for disagreement between the judge’s opinion and the jury’s verdict and whether disagreement could be reduced. One of the five grounds identified by Kalven and Zeisel as explaining disagreement was ‘Facts only the judge knew’, in respect of which Heald stated:

If the object of a trial is to secure justice as between the public and the accused, the task of the jury becomes almost impossible if it knows only half the facts. It should not surprise us if the result is unsatisfactory, by reason of the jury’s lack of knowledge. At present we conduct a trial with the jury in the dark about many vital matters, which would weigh heavily with the members if they were taking a decision in their everyday lives. Thus if one has to decide whether or not one is to believe someone, the first thing one wants to know is his character, but the jury is rigidly prevented from knowing this. Indeed, because of the rules about putting character in issue it is often ignorant of the fact of the unsatisfactory character of some prosecution witnesses. If we consider that juries are the best means of deciding issues of fact, then we should allow them to know anything that may be relevant to their deliberations and not keep back from them vital information.<sup>2289</sup>

### 18. Hastie, Penrod and Pennington, *Inside the jury* (1983)<sup>2290</sup>

This book reported on a mock jury experiment involving more than 1,000 citizens who were called for jury duty in state trial courts. A judge and one of the researchers described the study to the relevant jury pool and sought volunteers.<sup>2291</sup> Mock jurors were asked to view a three-hour filmed re-enactment of a murder trial. They then deliberated in groups of 12 to reach a verdict.<sup>2292</sup> The filmed trial was based on an actual murder trial transcript.<sup>2293</sup> There was no time limit on deliberation, except for a practical limit of one week. The median deliberation time was 138 minutes.<sup>2294</sup>

The variation to be studied was introduced in the judge's instruction on the decision rule governing the number of jurors who must agree on a verdict. One-third of juries were given a unanimous decision rule, one-third were given a majority decision rule requiring the agreement of 10 of the 12 jurors, and one-third were given a majority decision rule requiring the agreement of eight of the 12 jurors.<sup>2295</sup>

The research studied the mock jury deliberations, as well as the outcomes reached.<sup>2296</sup>

In discussing the implications of the research, the authors make a number of points, including:

- the effect of the decision rule (unanimous or various majorities) on verdict accuracy is 'not dramatic', but juries in majority rule conditions are more likely to reach improper first-degree murder verdicts<sup>2297</sup>
- other findings on the thoroughness of deliberation and the jury's accuracy on the evidence and the law favour the unanimous decision rule<sup>2298</sup>
- in their task of fact finding, juries perform efficiently and accurately<sup>2299</sup>
- juries can manage abstract legal concerns such as beyond reasonable doubt<sup>2300</sup>
- 'the major conceptual obstacles to reaching a proper verdict arise from jurors' inability to keep the verdict categories and their elements in order', with the researchers suggesting that providing the jury with a written transcript or summary of the final charge would assist<sup>2301</sup>
- the judge's instructions to disregard inadmissible evidence were strictly followed in deliberations, with jurors blocking other jurors' attempts to introduce inadmissible evidence, although the researchers stated that 'it would be unwise to generalize from these observations to actual jury behaviour, for experimental juries may be abnormally well-behaved when dealing with the inadmissibility issue while under observation by social scientists'.<sup>2302</sup>

## 19. Doob, 'Evidence, procedure, and psychological research' (1976)<sup>2303</sup>

Doob introduced his chapter by arguing that it is 'clear that it would be too much of a luxury for a court of law' to allow character evidence, giving the example of a man accused of assault wanting to rely on evidence of good character, while the prosecution would want to rely on evidence of bad character and a psychologist would probably want to know about specific incidents particularly drawn from situations very similar to the one for which the accused was on trial.<sup>2304</sup> Doob referred to reasons relating to the need to confine the trial to the incident in question and to the risk of prejudice.<sup>2305</sup>

Doob discussed the example of research on the effect of evidence of the accused's prior criminal convictions on the outcome of a trial, using the research reported in the article by Doob and Kirshenbaum discussed in 13 above.<sup>2306</sup> Doob discussed the potential limitations of this research<sup>2307</sup> and then described a second experiment that was designed to deal with two of the limitations: by using a different hypothetical case, the findings could be generalised; and by having groups of four people deliberate rather than using only individual mock jurors. This experiment used one previous conviction. The prior criminal record did not have a statistically significant effect on individual mock juror verdicts, but it did have an effect on verdicts of the four-person mock juries: 40 per cent of mock juries that were informed of the accused's criminal record convicted, while none of the mock juries that were not informed of the record convicted.<sup>2308</sup>

Doob suggested that the failure to find the effect for individual mock jurors reflected that it was not a very salient fact in the case and that the individual mock jurors made their decision immediately after reading the case and without 'weighing' the evidence. Doob reported that the mock jury deliberations for juries that were informed of the accused's record started with statements more unfavourable to the accused, and these mock juries were more likely to discuss matters that hurt the accused's case.<sup>2309</sup> Doob stated that these results were quite similar to those reported by Cornish and Sealy, discussed in 4 and 5 above.<sup>2310</sup>

Doob reported the conclusion that 'evidence of prior criminal convictions can hurt the accused and ... our limiting instructions offer him no real protection'.<sup>2311</sup> In relation to possible law reform, Doob stated:

It seems to me, then, that the policymaker could go in one of two directions. Criminal record of an accused could be kept out of the trial completely unless there is an overriding reason in particular circumstances to let it in. Alternatively, it is possible that it does have some predictive value – that is, a person who was once convicted is more likely than someone with a 'clean' record to commit crimes. If this is shown to be the case then one could logically argue that the jury should hear about previous criminal convictions in *all* cases, not just the ones where the defendant testifies. The obvious problem with this second alternative is that it tends to support the notion that a man should be convicted, in part, on the evidence of the kind of person he is, rather than what he has done in the case for which he is being tried.

The choice between these two alternatives is not one that can easily be based on empirical evidence. It is a philosophical or ethical decision and the psychologist has no particular expertise to bring to bear on the decision. Obviously, I favor the more or less complete exclusion of evidence of previous criminal activity. It would be deceptive of me, however, to suggest that this position follows directly from the results of the experiments that I just described.<sup>2312</sup>

Doob also discussed research in relation to decisions to grant or refuse bail and the effect of the accused already being in custody when the judge made the decision.<sup>2313</sup>

Doob suggested that there were at least three ways in which evidence that is not directly related to the fact in issue – in this case said to be prior criminal convictions – could be used by the jury:

- to make an inference as to the accused's credibility, following the judge's instructions
- to see the accused as a 'bad' person and, as bad people do bad things, convict
- to shift the standard of proof so that it could be relaxed from 'very sure' to 'reasonably sure' if the accused has a criminal record, as there would be greater 'disutility' in convicting an innocent man with no record than an innocent man with a record or in allowing a guilty man to go free if he has a record.<sup>2314</sup>

# Appendix K: Additional jury research referred to by the ALRC, NSW LRC and VLRC

In section 28.1.5, we discuss the additional jury research referred to by the Australian Law Reform Commission (ALRC), New South Wales Law Reform Commission (NSW LRC) and Victorian Law Reform Commission (VLRC) in their *Uniform Evidence Law report in 2005*.

## 1. Lloyd-Bostock, 'The effects on juries of hearing about the defendant's previous criminal record: A simulation study' (2000)<sup>2315</sup>

Lloyd-Bostock's study is summarised in the appendices to the Law Commission's report, *Evidence of bad character in criminal proceedings* Report 273 (2001). Lloyd-Bostock separately published a report of the study as it related to juries (as opposed to magistrates), which is reviewed here.

The author provides the following summary of her article:

Evidence of a defendant's previous criminal record is generally excluded at trial on the basis that its prejudicial effects outweigh any probative value. This paper reports on an experiment examining the effects of revealing a previous conviction to simulated jurors. The results indicate that the information evokes stereotypes of typical criminality, and that caution over revealing a defendant's criminal record is well justified.<sup>2316</sup>

The paper reported on an experimental study funded by the Home Office at the request of the Law Commission as part of its inquiry into the previous misconduct of the defendant.<sup>2317</sup>

The author stated that, where previous convictions are admitted under the 1898 Act, 'jurors are instructed that the information is to be used only in relation to the question of the *credibility* of the defendant, and not to assess the *likelihood* that the defendant committed the crime he or she is now charged with' – the latter being 'forbidden reasoning'.<sup>2318</sup> The author also referred to an 'additional matter of special interest to the Law Commission' being 'concern over cases of child sex abuse, where there has been some pressure to relax the law to allow in previous convictions for related offences'.<sup>2319</sup> One of the questions examined was: 'what are the effects of learning of previous convictions for sexual offences against children and, hence, what would be the likely effects of a relaxation in the rules?'<sup>2320</sup>

The study involved mock jurors viewing videos of a condensed, reconstructed trial. There were three trials as follows:

- trial for handling stolen goods
- trial for indecent assault on a women (accused hospital technician admits he put his arm around a junior nurse in a hospital lift and touched her breast; he claims they had a date and she consented; she denies consent and claims he has been pestering her)
- trial for deliberate stabbing.

Within each trial, the experiment investigated the effect of a single conviction for either:

- a similar offence (the same offence as that currently charged)
- a dissimilar offence (for the indecent assault trial, handling stolen goods)
- indecently assaulting a child.

The conviction was either 'recent' (18 months old) or 'old' (five years old).

There were also variations involving no mention of previous convictions or good character; and mention that the defendant has no previous convictions (that is, the defendant is of good character).

The information about prior record was given twice:

- first 'in commentary as the defendant took the stand to give evidence', which referred to the conviction, what it was for and how long ago the conviction was
- second, the judge referred to it in his summing-up, followed by a standard direction on the way the jury should use the information.

The video of each trial lasted approximately half an hour.<sup>2321</sup>

Each of the 24 variations was shown to a group of 12 mock jurors (or 10 mock jurors in one variation).<sup>2322</sup> It seems therefore that the research involved 286 mock jurors and that each variation was only tested with one mock jury.

Immediately after viewing the film, the mock jurors completed a questionnaire with initial verdict and ratings of the likelihood that the defendant committed the offence. The mock jury then deliberated for half an hour. The mock jurors then completed a further short questionnaire, again with verdict and rating of likelihood that the defendant had committed the offence. There was then a longer questionnaire about their impressions of the defendant.<sup>2323</sup>

The author set out the results in detail,<sup>2324</sup> including the following:

- There was a statistically significant higher likelihood of guilt for the recent similar previous conviction trials before and after deliberation.<sup>2325</sup>
- There was a statistically significant lower likelihood of guilt for the dissimilar previous conviction trials after deliberation when compared with the trials with no information about previous convictions and the trials with good character.<sup>2326</sup>
- In relation to verdicts, the initial majority position before deliberation was always not guilty and deliberation generally reduced the number of guilty verdicts.<sup>2327</sup>
- The only statistically significant result was for verdicts after deliberation, where a recent similar previous conviction increased the likelihood of a guilty verdict and a dissimilar previous conviction reduced the likelihood of a guilty verdict.<sup>2328</sup>

The author concluded:

The results clearly confirm that evidence of previous convictions can have a prejudicial effect, especially where there is a recent previous conviction for a similar offence. Significant effects were found even though no information about the previous conviction other than the offence was provided, and where there was only one previous conviction. It may well be that greater effects would be found for a longer criminal record, especially one including several similar previous convictions. The findings concerning the effects of a previous conviction for indecent assault on a child in particular show the potential for such convictions to be highly prejudicial. It appears that, in addition to any effect of similarity to the current charge, the nature of the offence produces a more general negative evaluation, including a perceived propensity to commit a range of other offences.

The effects of dissimilar as compared with similar previous convictions are particularly interesting for what they tell us about the decision processes underlying the effects of information about previous convictions. Participants appear to be drawing on beliefs about typical offenders and patterns of offending which include not only beliefs about the likelihood that offenders will commit similar offences in future, but also beliefs that offenders who commit certain types of crime typically *do not* commit certain others. ...

The study throws yet further doubt on the usefulness of the common law rule outlined earlier, whereby a direct inference of guilt from propensity is forbidden, but an indirect inference mediated by an assessment of likely truthfulness is permitted. The results for similarity and dissimilarity of previous convictions strongly suggest that the effects of previous conviction evidence is mediated by stereotypes of typical criminality. ...<sup>2329</sup>

After referring to some of the limitations of the study, the author stated:

the central findings of this and already existing research are consistent and make theoretical sense. Very thin information about a previous conviction (the name of the offence) is evidently sufficient to evoke a quite rich stereotype, so that a similar recent conviction (especially for sexual abuse of a child) is potentially damaging for no reason that the law permits.<sup>2330</sup>

It is not clear what the 'similar recent conviction' is in relation to sexual abuse of a child because there was no similar offence tested.<sup>2331</sup>

The author then concluded:

If we assume that, amongst defendants with similar previous convictions, some are innocent of the current offence, we have good grounds to infer that routinely revealing previous convictions would indeed increase the risk of convicting an innocent man.<sup>2332</sup>



## 2. Hunt and Budesheim, 'How jurors use and misuse character evidence'<sup>2333</sup>

The abstract for Hunt and Budesheim's article stated:

The Federal Rules of Evidence allow defendants to offer testimony about their good character, but that testimony can be impeached with cross-examination or a rebuttal witness. It is assumed that jurors use the defense's character evidence (CE) to form guilt and conviction judgments but use impeachment evidence only to assess the character witness's credibility. Two experiments tested these assumptions by presenting mock jurors with various forms of CE and impeachment. Participants made trait ratings for the character witness and defendant and guilt and conviction judgments. Positive CE did not affect guilt or conviction judgments, but cross-examination caused a backlash in which judgments were harsher than when no CE was given. Using path analysis, the authors tested a model of the process by which CE and impeachment affect defendant and witness impressions and guilt and conviction judgments. Implications for juror decision making are discussed.<sup>2334</sup>

Hunt and Budesheim outline the federal rules of evidence in the United States governing character evidence, including that the prosecution may only rebut the defendant's evidence of good character in relation to the character traits introduced by the defendant.<sup>2335</sup> They stated that:

the FRE's rules for CE are based on the assumption that the defense's ability to choose whether to introduce positive CE and the prosecution's ability to impeach the defense's character witness with the defendant's specific bad acts achieves a balance in which neither the prosecution nor the defense is given an unfair advantage.<sup>2336</sup>

Hunt and Budesheim discussed the psychological research that calls into question the assumptions underlying the Federal Rules of Evidence rules:

the FRE makes three fundamental assumptions about the use of CE: (a) that general information about a defendant's personality and behavioral patterns is useful for determining guilt in a specific instance, (b) that jurors will use CE to evaluate the defendant's traits, credibility, and guilt, and (c) that the forms of CE available to the prosecution and defense do not create an unfair bias on either side.<sup>2337</sup>

In their research, Hunt and Budesheim focus on two concerns about character evidence:

- Jurors may use character evidence primarily to evaluate the character witness and not the defendant.
- Specific 'bad acts' cross-examination of the character witness may cause a backlash in which the jurors' impressions of the defendant may become more negative than they would have been had no character evidence been introduced at all.<sup>2338</sup>

Hunt and Budesheim tested the following six hypotheses about jurors' use of character evidence:

- Jurors will form more positive impressions of a character witness when she or he testifies about a defendant's specific acts in addition to general characteristics (which is not permitted under Federal Evidence Rules).
- Jurors will form more negative impressions of a character witness when she or he is cross-examined concerning the defendant's specific negative actions.
- Jurors' judgments about a defendant will not be affected by general character evidence.
- Jurors' judgments about a defendant will be more positive when a character witness describes specific positive acts.
- Jurors' judgments about a defendant will be more negative when a character witness is cross-examined concerning specific negative acts.
- The effects of character evidence on judgments about the defendant will be at least partially mediated by impressions of the character witness.<sup>2339</sup>

Hunt and Budesheim used two experiments to test the hypotheses. In each experiment, a number of introductory and advanced psychology students participated in the study for extra course credit. They read excerpts of a transcript of a fictitious trial (which they were told were from a real trial), then rated the defendant's guilt and their likelihood of voting to convict him and made several 'trait' judgments about the defendant and the character witness. Each trial was varied across six conditions, including no character evidence as a control.

The two trials were:

- a burglary trial, in which 188 students participated
- a robbery and assault trial, in which 224 students participated.

Hunt and Budesheim reported the results of the experiments in detail. In relation to the results of experiment 1 (the burglary trial), they stated:

The results of Experiment 1 are consistent with previous findings that general secondhand accounts of another person's character traits have little influence on individuals' impressions of that person, that positive information carries less weight than negative information, and that general information is considered less informative than is information about specific acts. One might argue, however, that the nature of the crime for which the defendant stands accused might moderate these effects. First, it is possible that the seriousness of the crime might affect the overall weight given to CE. For example, it may be that jurors are willing to use more types of information to reach their verdicts in cases involving particularly heinous crimes and or severe potential punishments. In addition, the diagnosticity of evidence on particular traits may differ across various types of offenses. Whereas evidence of honesty may be particularly influential in a burglary (i.e., property-oriented) trial, evidence of warmth may carry more weight in an assault (i.e., person-oriented) case. To test these possibilities, we replicated Experiment 1, changing the crime from burglary to assault and robbery.<sup>2340</sup>

In relation to the results of experiment 2 (the robbery and assault trial), they stated:

Experiment 2 replicated the findings that general CE does not influence jurors' judgments, that positive specific acts CE influences some personality judgments, but not guilt and conviction judgments, and that specific bad acts cross-examination increases judgments of guilt and conviction and lowers ratings of trustworthiness. We conducted Experiment 2 to investigate whether jurors use CE to a greater extent in trials involving more serious crimes. This prediction was not supported. Although the diagnosticity of the trial evidence was the same across studies as evidenced by the statistically equivalent guilt and conviction judgments in the control conditions, CE had similar effects on impressions of the defendant and the character witness, as well as guilt and conviction judgments. This pattern suggests that the influence of CE on jurors' decisions does not vary across (at least these two) criminal offenses.<sup>2341</sup>

In general discussion, Hunt and Budesheim returned to their concerns that:

- the Federal Rules of Evidence, in allowing the defence to present only general information about a defendant's positive traits while permitting the prosecution to impeach the defence's character witness with specific examples of the defendant's previous negative behaviour, does not achieve a fair balance – which was confirmed by their research finding that positive character evidence does little to help a defendant, while permissible negative character evidence in the form of cross-examination can hurt a defendant considerably<sup>2342</sup>
- the Federal Rules of Evidence assume that jurors will use the character evidence to form an impression of the defendant's character, whereas research suggested that it might be used to judge the character witness rather than the defendant – which was partially confirmed by their research finding that, while character evidence does influence jurors' impressions of the defendant, this is partially mediated by jurors' impressions of the character witness, suggesting that jurors' judgments about the credibility and intelligence of a character witness have powerful effects on the weight they accord to character evidence.<sup>2343</sup>

Hunt and Bundesheim also tested a general model of the process by which character evidence and impeachment influence juror decision-making. They reported:

This model thus demonstrates that information provided through CE and impeachment does not directly influence guilt and conviction judgments; instead, it indirectly influences those judgments by shaping jurors' evaluations of the character witnesses and the defendant. This finding has both positive and negative implications for the way we view juror decision making.<sup>2344</sup>

They identified the positive aspects as follows:

- The fact that character evidence and impeachment do not directly influence guilt and conviction judgments suggests that jurors do not rely on the faulty heuristic that people always act consistently with their general traits.
- The impressions of the defendant's trustworthiness influence guilt and conviction judgments far more than do impressions of his warmth and intelligence, suggesting that jurors use character evidence about the defendant's trustworthiness to evaluate the evidence rather than to make decisions on the basis of their affective reactions to the defendant.<sup>2345</sup>

They identified the negative aspect as follows:

the fact that specific bad acts cross-examination directly influenced impressions of the defendant replicates previous research that has shown that jurors misuse impeachment evidence to evaluate defendants ... This misuse of CE is especially problematic given that the cross-examination of CE can be used as a back door for the introduction of evidence that otherwise would be inadmissible, such as previous arrests that did not result in convictions. Previous research has indicated that jurors are more likely to convict a defendant who previously has been convicted, especially if the conviction was for a crime similar to the current allegation ...<sup>2346</sup> [References omitted.]

Hunt and Bundesheim discussed the legal implications as being:

- that defence attorneys should be extremely cautious about introducing character evidence, as it does little to help the defence but may do substantial damage to the defendant through cross-examination
- that there may be no viable method of reforming rules governing the use of character evidence.<sup>2347</sup>

In discussing limitations of their research, Hunt and Bundesheim refer to the fact that they investigated individual juror decisions and not jury deliberations. They noted recent research that 'demonstrated that the influence of inadmissible evidence is reduced through jury deliberation'. They also noted that their study did not include judicial instructions regarding the proper uses of character evidence, although they argued instructions are not very effective and may even increase the use of inadmissible evidence.<sup>2348</sup>

# Appendix L: Jury research referred to in *Cross on Evidence*

In section 28.1.5, we discuss the empirical evidence cited in *Cross on evidence* as supporting the belief that tendency and coincidence evidence is very influential in its effect upon a jury.

In the chapter on ‘similar fact evidence’ in *Cross on evidence*, it is stated:

This subject [the rule which prevents a party, usually the prosecutor, from leading evidence in chief showing the discreditable disposition of the other, usually the accused, as derived from the discreditable acts, record, possessions or reputation of the latter] is at its most important in criminal proceedings because such evidence is believed to be very influential in its effect upon a jury.<sup>2349</sup> [Reference omitted.]

The footnote at the end of this sentence reads:

This belief [that such evidence is very influential in its effect upon a jury] is largely confirmed by the results of empirical investigation: see ‘Juries and the Rules of Evidence’ [1973] *Crim LR* 208; S McCabe and R Purves, *The Jury at Work*, 1972, Table 4, p 39; S Lloyd-Bostock, ‘The effects on Juries of Hearing About the Defendant’s Previous Criminal Record: A Simulation Study’ [2000] *Crim LR* 734. The goals of the law are explained by McHugh J in *Pfennig* ...<sup>2350</sup>

We summarise below these three sources of empirical evidence cited in *Cross on evidence*.

## **Sealy and Cornish, ‘Juries and the rules of evidence: LSE Jury Project’ (1973)<sup>2351</sup>**

The London School of Economics Jury Project involved groups of mock jurors listening to a tape recording re-enacted from the transcript of a real trial and then reaching a verdict on what they had heard.<sup>2352</sup> The project tested two mock trials, with slightly shortened versions of actual cases, ‘selected for their brevity and uncertainty’.<sup>2353</sup> One involved alleged theft of £10 worth of meat. The other involved a charge of rape of a 16-year-old girl with two co-defendants. Twenty-two juries heard the rape case.<sup>2354</sup>

Each mock juror recorded their verdict and the degree of certainty they felt about it immediately after the summing up, then the mock jury deliberated. If they had not reached a verdict after 100 minutes, they were treated as hung. At the end of deliberations, the mock jurors were asked to complete a questionnaire in which they recorded their final verdict, the reasons for it, and their views on the conduct of the case. The questionnaire also included scales designed to measure attitude and personality.<sup>2355</sup>

The experiment was designed to test two rules of evidence:

- the rule rendering inadmissible the accused’s previous convictions
- the rule requiring the judge to instruct the jury about the standard of proof.<sup>2356</sup>

The previous convictions rule was tested by the following variations:

- Condition X – convictions for similar offences:
  - previous record for similar offences (theft: convictions for stealing meat; rape: convictions for indecent assaults on girls)
  - no instruction by the judge to disregard the evidence
  - previous conviction in the theft case introduced either by defence asking the prosecution witness about his own criminal record and the defendant admitting his previous convictions in cross-examination; or by the defendant putting his good character in evidence then admitting previous convictions in cross-examination
  - previous conviction in the rape case introduced by the record being ‘let slip’ by the co-defendant.<sup>2357</sup>
- Condition Y – convictions for dissimilar offences:
  - previous record for dissimilar offences (theft: indecency; rape: dishonesty)
  - previous conviction in the theft case introduced by the defendant putting his good character in evidence then admitting previous convictions in cross-examination
  - previous conviction in the rape case introduced by the record being ‘let slip’ by the co-defendant.<sup>2358</sup>
- Condition Z – convictions for similar offences with judge instructing jury to disregard:
  - previous record for similar offences the same as for condition X
  - previous conviction in the theft case introduced by the record being ‘let slip’ by a prosecution witness (police)
  - previous conviction in the rape case introduced by the record being ‘let slip’ by the co-defendant.<sup>2359</sup>
- Condition Co: control, with no previous record mentioned.

Each variation of the defendant’s previous record was designed to be tested with each of the various variations of the standard of proof instruction, although not every combination was employed in the rape case. Instead, they tested variations omitting the judge’s warning in relation to conviction on the uncorroborated evidence of the victim or omitting the instruction to treat evidence of early complaint as showing consistency and not corroboration.<sup>2360</sup>

This paper reported on final verdicts by individual mock jurors and set out the experimental results in detail.<sup>2361</sup> There was no evaluation of mock jury deliberations.

In respect of the rules of evidence that formed the basis of this part of the research, the authors concluded:

we would tentatively suggest the following conclusions.

- (1) The admission of previous convictions does increase the chance of a guilty verdict, but only if those convictions are for offences similar to that charged. If they are dissimilar it is possible for them to have an effect that is positively favourable to the accused. Similar previous convictions may adversely affect the outcome for a co-accused.
- (2) Contrary to common supposition, juries give real weight to an instruction to disregard relevant previous record wrongly admitted.
- (3) None of the instructions – on standard of proof, corroboration or recent complaint – showed the kind of variation that lawyers apparently suppose will follow ...<sup>2362</sup>

### **McCabe and Purves, *The jury at work* (1972)<sup>2363</sup>**

The research of which this paper formed part was prompted by the publication of data by the Association of Chief Police Officers that showed nearly 40 per cent of those tried in the higher courts in England and Wales were acquitted. The research considered whether this suggested that too many innocent people were being tried unnecessarily or whether guilty people were being acquitted.<sup>2364</sup>

Between March 1968 and July 1970, the researchers were present during jury trials in selected courts of Quarter Sessions and Assize for cases where, at least until the morning of the trial, the defendant had expressed an intention to plead not guilty.<sup>2365</sup> After an acquittal, a questionnaire was sent to counsel and solicitors and, where he agreed, to the judge, recorder or chairman. It had been intended to obtain police and solicitors' views in advance of the trial, but this was not possible as the study proceeded.<sup>2366</sup> It was also not possible to obtain the views of the jury, so the research used 'shadow' juries to be present in court for the trial and then to withdraw and reach a decision about the guilt or innocence of the accused.<sup>2367</sup>

Of the 475 defendants who were brought to trial in the sessions and hearings covered:

- 112 changed their pleas to guilty
- 58 were the subject of directed verdicts of acquittal
- 151 were convicted
- some had their cases transferred to other courts or were otherwise dealt with (including by hung jury)
- 115 defendants were acquitted by verdict of the jury – and it is these defendants who were the particular focus of this paper.<sup>2368</sup>

The researchers allocated each acquittal – including directed verdicts – into one of the following categories to explain the reason for the acquittal:

- directed verdicts
- ‘policy’ prosecutions – prosecutions brought by police for policy reasons because of the type of offence involved or to satisfy particular types of complainants, even if the evidence was not strong and police did not expect a conviction
- other weak cases – prosecutions brought where there were difficulties proving *mens rea* or identification or cases with no corroborating evidence (acquittal for an indecent assault of an adult woman was included here)
- failure of prosecution witnesses – some prosecution witnesses did not turn up to court or were very unsympathetic, some changed their evidence and, in one case, the defendant produced a ‘witness’ to support the defence who the police doubted was present
- defendant’s explanation – in some cases, the defendant gave an explanation sufficient to create reasonable doubt and/or the defendant looked respectable and sounded plausible
- ‘wayward’ verdicts – in some cases it seemed likely that the jury was influenced by an element of provocation of the defendant (even where provocation was not available as a defence); in other cases the jury seemed reluctant to convict on strong evidence in ‘domestic’ or ‘local’ disputes; and in some cases the defendant was particularly sympathetic or pathetic.

The table to which *Cross on evidence* referred is reproduced as Table L.1.

**Table L.1: Percentage of defendants with and without previous convictions\***<sup>2369</sup>

	Previous convictions %	No previous convictions %	N
Directed verdicts	38	62	58
Policy prosecutions	57	43	44
Other weak cases	30	70	20
Failure of witnesses	100	-	8
Defendant’s explanation	75	25	28
‘Wayward’ verdicts	40	60	15
All acquittals	51	49	173
Convictions	81	19	151

\* The difference between these percentages is highly significant  $p \leq .001$



In the paragraphs following this table, the authors stated:

From these figures it is clear that defendants who are convicted are much more likely to have a previous record of conviction than defendants who are acquitted either by judge or jury.

But among those who are acquitted there are significant differences between one category and another, for example between cases that we called ‘weak’ and cases where the defendant’s explanation of what happened convinced the jury, although most other observers remained sceptical about his innocence.

If the relationship between a record of criminal convictions and current conviction has some strength, then our spectrum of acquittals should reflect this by exhibiting an increasing rate of previous offences, as the categories of acquittal draw nearer to possible conviction.

To some extent this is true. Directed verdicts and cases categorised as ‘weak’ show the lowest rates of previous conviction. Cases where the prosecution witnesses failed in court to come up to the expectation of the police, and cases where the defendant carried the jury with him in his explanation of what happened, between them show a rate of previous conviction (80%) which almost exactly matches that of the defendants tried and convicted by the same courts in the same period.

What is puzzling is the rate of previous convictions of defendants whose acquittal we have called ‘wayward’, which is close to the figure for ‘directed’ verdicts. It is, of course, quite possible that this categorisation is itself inaccurate, but we have reasonable grounds for claiming that in this group of cases, more than any other, a conviction rather than an acquittal was the expected and probably the appropriate verdict. ... The explanation of this anomaly may be that the presence of a clean record is of considerable influence in reaching a verdict of not guilty. Defence counsel usually introduce the blameless character of their client if this is possible. Thus, *although previous convictions are not usually brought up, absence of previous convictions almost invariably is.*

The connection between ‘directed’ verdicts and a low rate of previous convictions is not amendable to such reasoning unless the judge, too, is affected by his knowledge of the criminal history of the defendant.<sup>2370</sup> [Emphasis added.]

McCabe and Purves also reported on whether the defendant had any prior conviction regardless of whether the conviction was for an offence of the same or different category as the offence for which the defendant was on trial. To the extent that tendency and coincidence evidence relies on evidence of ‘bad character’ (including convictions) that is relevant to the particular offence being tried, many prior convictions may be irrelevant to the offence being tried. In discussing a number of the particular cases included in the research, McCabe and Purves gave information about prior convictions which would appear to have been relevant or potentially relevant and about which the relevant jury was not informed.<sup>2371</sup>

**Lloyd-Bostock, 'The effects on juries of hearing about the defendant's previous criminal record: A simulation study' (2000)<sup>2372</sup>**

The author provides the following summary of her article:

Evidence of a defendant's previous criminal record is generally excluded at trial on the basis that its prejudicial effects outweigh any probative value. This paper reports on an experiment examining the effects of revealing a previous conviction to simulated jurors. The results indicate that the information evokes stereotypes of typical criminality, and that caution over revealing a defendant's criminal record is well justified.<sup>2373</sup>

The paper reported on an experimental study funded by the Home Office at the request of the Law Commission as part of its inquiry into the previous misconduct of the defendant.<sup>2374</sup>

The author stated that, where previous convictions are admitted under the 1898 Act, 'jurors are instructed that the information is to be used only in relation to the question of the *credibility* of the defendant, and not to assess the *likelihood* that the defendant committed the crime he or she is now charged with' – the latter being 'forbidden reasoning'.<sup>2375</sup> The author also referred to an 'additional matter of special interest to the Law Commission' being 'concern over cases of child sex abuse, where there has been some pressure to relax the law to allow in previous convictions for related offences'.<sup>2376</sup> One of the questions examined was: 'what are the effects of learning of previous convictions for sexual offences against children and, hence, what would be the likely effects of a relaxation in the rules?'<sup>2377</sup>

The study involved mock jurors viewing videos of a condensed, reconstructed trial. There were three trials as follows:

- trial for handling stolen goods
- trial for indecent assault on a women (accused hospital technician admits he put his arm around a junior nurse in a hospital lift and touched her breast; he claims they had a date and she consented; she denies consent and claims he has been pestering her)
- trial for deliberate stabbing.

Within each trial, the experiment investigated the effect of a single conviction for either:

- a similar offence (the same offence as that currently charged)
- a dissimilar offence (for the indecent assault trial, handling stolen goods)
- indecently assaulting a child.

The conviction was either 'recent' (18 months old) or 'old' (five years old).

There were also variations involving no mention of previous convictions or good character; and mention that the defendant has no previous convictions (that is, the defendant is of good character).

The information about prior record was given twice:

- first 'in commentary as the defendant took the stand to give evidence', which referred to the conviction, what it was for and how long ago the conviction was
- second, the judge referred to it in his summing-up, followed by a standard direction on the way the jury should use the information.

The video of each trial lasted approximately half an hour.<sup>2378</sup>

Each of the 24 variations was shown to a group of 12 mock jurors (or 10 mock jurors in one variation).<sup>2379</sup> It seems therefore that the research involved 286 mock jurors and that each variation was only tested with one mock jury.

Immediately after viewing the film, the mock jurors completed a questionnaire, with initial verdict and ratings of the likelihood that the defendant committed the offence. The mock jury then deliberated for half an hour. The mock jurors then completed a further short questionnaire, again with verdict and rating of likelihood that the defendant had committed the offence. There was then a longer questionnaire about their impressions of the defendant.<sup>2380</sup>

The author set out the results in detail,<sup>2381</sup> including the following:

- There was a statistically significant higher likelihood of guilt for the recent similar previous conviction trials before and after deliberation.<sup>2382</sup>
- There was a statistically significant lower likelihood of guilt for the dissimilar previous conviction trials after deliberation when compared to the trials with no information about previous convictions and the trials with good character.<sup>2383</sup>
- In relation to verdicts, the initial majority position before deliberation was always not guilty and deliberation generally reduced the number of guilty verdicts.<sup>2384</sup>
- The only statistically significant result was for verdicts after deliberation, where a recent similar previous conviction increased the likelihood of a guilty verdict and a dissimilar previous conviction reduced the likelihood of a guilty verdict.<sup>2385</sup>

The author concluded:

The results clearly confirm that evidence of previous convictions can have a prejudicial effect, especially where there is a recent previous conviction for a similar offence. Significant effects were found even though no information about the previous conviction other than the offence was provided, and where there was only one previous conviction. It may well be that greater effects would be found for a longer criminal record, especially one including several similar previous convictions. The findings concerning the effects of a previous conviction for indecent assault on a child in particular show the potential for such convictions to be highly prejudicial. It appears that, in addition to any effect of similarity to the current charge, the nature of the offence produces a more general negative evaluation, including a perceived propensity to commit a range of other offences.

The effects of dissimilar as compared with similar previous convictions are particularly interesting for what they tell us about the decision processes underlying the effects of information about previous convictions. Participants appear to be drawing on beliefs about typical offenders and patterns of offending which include not only beliefs about the likelihood that offenders will commit similar offences in future, but also beliefs that offenders who commit certain types of crime typically *do not* commit certain others. ...

The study throws yet further doubt on the usefulness of the common law rule outlined earlier, whereby a direct inference of guilt from propensity is forbidden, but an indirect inference mediated by an assessment of likely truthfulness is permitted. The results for similarity and dissimilarity of previous convictions strongly suggest that the effects of previous conviction evidence is mediated by stereotypes of typical criminality. ...<sup>2386</sup>

After referring to some of the limitations of the study, the author stated:

the central findings of this and already existing research are consistent and make theoretical sense. Very thin information about a previous conviction (the name of the offence) is evidently sufficient to evoke a quite rich stereotype, so that a similar recent conviction (especially for sexual abuse of a child) is potentially damaging for no reason that the law permits.<sup>2387</sup>

It is not clear what the 'similar recent conviction' is in relation to sexual abuse of a child because there was no similar offence tested.<sup>2388</sup>

The author then concluded:

If we assume that, amongst defendants with similar previous convictions, some are innocent of the current offence, we have good grounds to infer that routinely revealing previous convictions would indeed increase the risk of convicting an innocent man.<sup>2389</sup>

## Appendix M: Jury research referred to by Kirby J

In section 28.1.5, we refer to the empirical evidence cited by Kirby J in *Zoneff v R*.<sup>2390</sup>

### **Schaefer and Hansen, ‘Similar fact evidence and limited use instructions: An empirical investigation’ (1990)<sup>2391</sup>**

The authors summarise this research as follows:

To test the effects on verdicts of testimony regarding previous acts of misconduct by an accused (similar fact evidence) and of judicial instructions to make limited use of such evidence, 98 subjects read descriptions of a manslaughter trial in which inadmissible similar fact evidence, admissible similar fact evidence, or no similar fact evidence was introduced. Across conditions in which admissible similar fact evidence was present, the judge’s charge to the jury was varied so that no reference was made to the target evidence, reference was made only to its admissible aspect, reference was made only to its normally inadmissible aspect, reference was made to both these aspects, or the legally correct instruction to make limited use of the evidence was given. It was found that subjects in the latter condition rendered significantly fewer ‘guilty’ verdicts than subjects in any of the other conditions in the study. Two possible explanations of this overcorrection effect are presented: subjects misinterpret the limited use instruction or, alternatively, subjects reverse preliminary decisions to convict when a previously overlooked unfair aspect of the evidence is made salient to them. The necessity for researchers to include relevant control groups when assessing the effects of judicial instructions to ignore or make limited use of target evidence is highlighted by the findings.<sup>2392</sup>

The authors provide a detailed review of earlier jury research.

In terms of their own experiment, the accused was charged with manslaughter in respect of the death of the child of his de facto wife. The accused’s defence was that the child had fallen accidentally while in his care.<sup>2393</sup> The variations involved:

- admissible evidence of the accused’s prior violence towards the deceased child, which they stated was often admitted at trial for the purpose of showing design or malice in homicide cases with a warning against propensity reasoning<sup>2394</sup>
- inadmissible evidence of the accused’s violence towards siblings of the deceased child, which they stated would most likely be ruled irrelevant and inadmissible at trial<sup>2395</sup>
- a control condition where no evidence was given of the accused’s mistreatment of any children in the family.<sup>2396</sup>

Further, the judge’s charge to the jury was varied for the admissible similar fact evidence condition with five different summaries used.<sup>2397</sup>

The 98 subjects were students in introductory psychology classes who received course credit for participation. Fourteen subjects were tested in each of the seven conditions. They read written summaries relevant to the condition to which they were assigned. There was no deliberation. After reading the materials, the students completed a questionnaire, giving their verdict and rating on a six-point scale their confidence in it. If they found the accused guilty, they recommended a sentence on a scale from one year to life imprisonment. Students other than those assigned to the control condition also rated on a seven-point scale various aspects of the evidence and legal factors in the case, including the extent to which evidence by family members concerning disciplinary practices used by the accused had influenced them in rendering their verdicts.<sup>2398</sup>

The research found that students given the limited use direction gave statistically significantly lower guilty verdicts. The authors reported the results in some detail.<sup>2399</sup>

The researchers stated:

Several unexpected results emerged in this study. Most surprising was the finding that the presentation of similar fact evidence with instructions to make limited use of it resulted in a strong *decrease* in the proportion of 'guilty' verdicts, relative to conviction rates in all of the other conditions in the study, including the control condition in which similar fact evidence was not introduced at all.<sup>2400</sup> [Emphasis original.]

The researchers had expected relatively few guilty verdicts in the control condition, but 64.3 per cent (nine out of 14) of the students in the control condition gave guilty verdicts.<sup>2401</sup>

They stated:

Given the high base-line conviction rate in the control condition, one must be cautious in interpreting the effects of introducing relevant (admissible) or irrelevant (inadmissible) similar fact evidence. For subjects receiving either kind of similar fact evidence, those who voted 'guilty' rated the factor of 'accused's disciplinary practices' (that is, the similar fact evidence presented) as more important to their decision than did subjects who voted 'not guilty'. Nevertheless, the introduction of such evidence failed to translate into a statistically significant prejudicial effect on verdict: none of the conditions that included similar fact evidence produced conviction rates significantly higher than that in the control condition. Specifically, even when the judge made no reference to the similar fact evidence ... or actually stressed the prejudicial aspect of admissible similar fact evidence ... conviction rates did not exceed that found in the control condition. Given the lack of prejudicial effects on verdict in all these conditions, we believe it is unwarranted to conclude that subjects possessed an ability to counteract precisely the prejudicial effects of the similar fact evidence introduced. It appears more likely that since subjects already had a strong tendency to convict as a function of the evidence in the basic case, the presentation of any additional potentially prejudicial information could have no further impact on the conviction rate.

The interpretation of our results is supported by the findings of Sue et al. They reported that when the basic case against the defendant was strong, the introduction of further potentially damaging evidence, whether ruled admissible or inadmissible, had no further effect upon verdict.<sup>2402</sup> [Reference omitted.]

The reference to Sue et al is a reference to S Sue, R Smith and C Caldwell, 'Effects of inadmissible evidence on the decisions of simulated jurors: A moral dilemma', discussed in Appendix J.<sup>2403</sup>

The authors suggest that the results led them to suspect that the similar fact evidence 'may not even have had a prejudicial effect'.<sup>2404</sup>

The authors discussed the literature as to the effect of judges' instructions to make limited use of evidence.<sup>2405</sup> The limited use warning seemed to cause students to overcorrect to the advantage of the accused, and the authors discussed a number of possible reasons as to why this might have occurred.<sup>2406</sup>

# Appendix N: Draft provisions in relation to tendency and coincidence evidence

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## **Royal Commission into Institutional Responses to Child Sexual Abuse**

### **Evidence (Tendency and Coincidence) Model Provisions**

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**1 Name of model provisions**

These model provisions are the *Evidence (Tendency and Coincidence) Model Provisions*.

**2 Purpose of model provisions**

- (1) The purpose of these provisions is to set out model amendments to the Uniform Evidence Law to permit tendency evidence or coincidence evidence to be admitted in a criminal proceeding for a child sexual offence or the murder or manslaughter of a child if it is relevant to an important evidentiary issue in the proceeding.
- (2) In these provisions, the **Uniform Evidence Law** is the set of provisions that forms the basis for the Uniform Evidence Acts enacted by the Commonwealth and certain other Australian jurisdictions.

**Note.** As at May 2017, each of the following Acts is based on the *Uniform Evidence Law*:

- (a) the *Evidence Act 2011* of the Australian Capital Territory,
- (b) the *Evidence Act 1995* of the Commonwealth,
- (c) the *Evidence Act 1995* of New South Wales,
- (d) the *Evidence (National Uniform Legislation) Act* of the Northern Territory,
- (e) the *Evidence Act 2001* of Tasmania,
- (f) the *Evidence Act 2008* of Victoria.

These Acts have uniform numbering. Accordingly, amendments set out in these provisions are by reference to that numbering.

- (3) It is also intended that the model amendments to the Uniform Evidence Law be used as the basis for new laws in those jurisdictions that do not apply the Law.

**Note.** As at May 2017, Queensland, South Australia and Western Australia have not applied the Uniform Evidence Law.

**3 Model amendments to Uniform Evidence Law**

Schedule 1 sets out the model amendments to the Uniform Evidence Law.

## Schedule 1 Model amendments to Uniform Evidence Law

### [1] Section 92 Exceptions

Insert after section 92 (2):

- (2A) In a child sexual offence proceeding (and without limiting subsection (2)), section 91 (1) does not prevent the admission or use of a defendant's conviction for an offence as tendency evidence or coincidence evidence.

### [2] Section 96A

Insert after section 96:

#### 96A Special provisions for defendants in child sexual offence proceedings

- (1) For the purposes of this Part, each of the following kinds of evidence is *relevant to an important evidentiary issue* in a child sexual offence proceeding:
  - (a) evidence that shows a propensity of the defendant to commit particular kinds of offences if the commission of an offence of the same or a similar kind is in issue in the proceeding,
  - (b) evidence that is relevant to any matter in issue in the proceeding if the matter:
    - (i) concerns an act or state of mind of the defendant, and
    - (ii) is important in the context of the proceeding as a whole.
- (2) In applying section 97 (1A) (a), 98 (1A) (a) or 100A (1) (a) to evidence about a defendant in a child sexual offence proceeding, the court is to determine whether the test referred to in the provision is satisfied assuming the evidence were to be accepted as credible and reliable.
- (3) To avoid doubt, any principle or rule of the common law or equity that prevents or restricts the admission of evidence about propensity or similar fact evidence in a proceeding on the basis of its inherent unfairness or unreliability is not relevant when applying this Part to tendency evidence or coincidence evidence about a defendant in a child sexual offence proceeding.
- (4) Without limiting subsection (3), evidence is not inadmissible as tendency evidence or coincidence evidence about a defendant in a child sexual offence proceeding only because it is about:
  - (a) the conviction before or by an Australian court or a foreign court of a party charged with an offence, or
  - (b) an act for which a party has been charged with an offence in Australia or a foreign country, but not convicted (except if it was because of an acquittal before or by an Australian court or a foreign court).

**Note.** Paragraph (b) includes situations where charges are withdrawn or an offence has been proven and no conviction entered by the court.
- (5) Any fact that is relied on as tendency or coincidence evidence about a defendant in a child sexual offence proceeding does not have to be proved beyond a reasonable doubt.

### [3] Section 97 The tendency rule

Omit section 97 (1) (b). Insert instead:

- (b) the tendency evidence admissibility test for the evidence is satisfied.

**[4] Section 97 (1A)**

Insert after section 97 (1):

- (1A) The *tendency evidence admissibility test* for the purposes of subsection (1) (b) is:
- (a) for evidence about the defendant in a child sexual offence proceeding—that the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, be relevant to an important evidentiary issue in the proceeding, or
  - (b) for evidence about any other person—that the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

**[5] Section 98 The coincidence rule**

Omit section 98 (1) (b). Insert instead:

- (b) the coincidence evidence admissibility test for the evidence is satisfied.

**[6] Section 98 (1A)**

Insert after section 98 (1):

- (1A) The *coincidence evidence admissibility test* for the purposes of subsection (1) (b) is:
- (a) for evidence about the defendant in a child sexual offence proceeding—that the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, be relevant to an important evidentiary issue in the proceeding, or
  - (b) for evidence about any other person—that the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

**[7] Section 100A**

Insert after section 100:

**100A Exclusion of tendency evidence and coincidence evidence in child sexual offence proceeding**

- (1) Despite sections 97 and 98, the court in a child sexual offence proceeding may, on the application of a defendant, refuse to admit tendency evidence or coincidence evidence about the defendant if the court thinks, having regard to the particular circumstances of the proceeding, that:
  - (a) admission of the evidence is more likely than not to result in the proceeding being unfair to the defendant, and
  - (b) if there is a jury, the giving of appropriate directions to the jury about the relevance and use of the evidence will not remove the risk.
- (2) The admission of evidence is not unfair to a defendant in a child sexual offence proceeding merely because it is tendency evidence or coincidence evidence.  
**Note.** See also section 96A (3) and (4).
- (3) If directions about the relevance and use of tendency evidence or coincidence evidence will remove the risk of unfairness of the kind referred to subsection

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Evidence (Tendency and Coincidence) Model Provisions  
Schedule 1 Model amendments to Uniform Evidence Law

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(1) (b), the court must give those directions rather than refuse to admit the evidence.

- (4) Tendency evidence or coincidence evidence about a party that is admissible under this Part in a child sexual offence proceeding cannot be excluded under section 135 or 137 on the ground that it is unfairly prejudicial to the party

**[8] Section 101 Further restrictions on tendency evidence and coincidence evidence adduced by prosecution non-child sexual offence proceeding**

Insert “(other than a child sexual offence proceeding)” after “criminal proceeding” in section 101 (1).

**[9] Dictionary**

Insert in alphabetical order:

***child sexual offence*** means any of the following offences (however described) regardless of when it occurred:

- (a) an offence against, or arising under, a law of this State involving sexual intercourse with, or any other sexual assault of, a person under 18 years if that person’s age at the time of the offence is an element of the offence,
- (b) an offence against, or arising under, a law of this State involving indecent conduct with, or directed towards, a person under 18 years if that person’s age at the time of the offence is an element of the offence,
- (c) an offence against, or arising under, a law of the Commonwealth, another State, a Territory or a foreign country that, if committed in this State, would have been an offence of a kind referred to in paragraph (a) or (b),

but does not include conduct of a person that has ceased to be an offence since the time when the person engaged in the conduct.

**Jurisdictional note.** Paragraphs (a) and (b) of this definition are suggested as an alternative to listing specific offences. If they prefer, jurisdictions may choose instead to list specific offences (including historical ones).

***child sexual offence proceeding*** means:

- (a) a criminal proceeding for a child sexual offence, or
- (b) a criminal proceeding for the murder or manslaughter of a person under 18 years of age if the commission of a child sexual offence by the defendant (whether in relation to that child or another child) is a fact in issue.

# Endnotes

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- 8 Exhibit 38-0043, 'Statement of T Henning', Case Study 38, STAT.0950.001.0001\_R at [9].
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- 21 Transcript of CDG, Case Study 38, 21 March 2016, T17930:5-7.
- 22 Transcript of CDG, Case Study 38, 21 March 2016, T17927:44-47.
- 23 Transcript of M Wieszyk, Case Study 38, 21 March 2016, T17939:16-22.
- 24 Transcript of M Wieszyk, Case Study 38, 21 March 2016, T17939:24-27.
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- 26 Transcript of CDK, Case Study 38, 22 March 2016, T17990:24-36, T17992:7-23.
- 27 See transcript of S Fontana, Case Study 38, 22 March 2016, T17995:11-T18013:2.
- 28 Transcript of CDN, Case Study 38, 22 March 2016, T18023:42-45.
- 29 Transcript of CDP, Case Study 38, 22 March 2016, T18036:43-T18037:5.
- 30 Transcript of H Baker, Case Study 38, 23 March 2016, T18084:32-T18085:26.
- 31 Transcript of S Chandler, Case Study 38, 24 March 2016, T18236:17-44.
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- 40 *Criminal Procedure Act 1986* (NSW) ss 294B, 294C.
- 41 *Children (Criminal Proceedings) Act 1987* (NSW) s 10.
- 42 *Criminal Procedure Act 1986* (NSW) ss 306M, 306P.
- 43 *Criminal Procedure Act 1986* (NSW) ss 306S, 306U.
- 44 *Criminal Procedure Act 1986* (NSW) sch 2, pt 29. The three-year pilot is operating in the District Court in Newcastle and Sydney from 31 March 2016.
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48 New South Wales Government, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation paper: Criminal justice*, 2016, p 16.  
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- 1103 Transcript of J Cashmore, Case Study 46, 28 November 2016, T23884:21-27.
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- 1109 County Court of Victoria, *Annual report 2014–15*, 2015, p 16.
- 1110 Director of Public Prosecutions, Australian Capital Territory, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation paper: Criminal justice*, 2016, pp 4-5.
- 1111 Victorian Government, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation paper: Criminal justice*, 2016, p 19.
- 1112 See, for example, Parliament of New South Wales, Joint Select Committee on Sentencing of Child Sexual Assault Offenders, *Every sentence tells a story – Report on sentencing of child sexual assault offenders*, 2014, pp 63-4; P Poletti, P Mizzi and H Donnelly, ‘Sentencing for the offence of sexual intercourse with a child under 10’, *Sentencing Trends and Issues*, Judicial Commission of NSW, no 44, 2015, p 32, which observes that since early 2000 the overall full-term median sentence for this offence had increased from five to nine years. However, it has been observed by the Victorian Sentencing Advisory Council that current sentence lengths of imprisonment imposed for sexual penetration of a child under 12 offences are not long enough to reflect current community standards: Dr S Krasnostein, *Sentencing of offenders: Sexual penetration with a child under 12*, Sentencing Advisory Council, Victoria, 2016, pp 2, 37.
- 1113 A Freiberg, H Donnelly and K Gelb, *Sentencing for child sexual abuse in institutional contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, p 53. For an example of changes that have occurred in Victoria, see Dr S Krasnostein, *Sentencing of offenders: Sexual penetration with a child under 12*, Sentencing Advisory Council, Victoria, 2016, Table 3, p 6. For further detail on the current penalties for child sexual abuse offences, see H Boxall and G Fuller, *Brief review of contemporary sexual offence and child sexual abuse legislation in Australia: 2015 update*, Australian Institute of Criminology for the Royal Commission into Institutional Responses to Child Sexual Abuse, 2015.
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- 1123 A Freiberg, H Donnelly and K Gelb, *Sentencing for child sexual abuse in institutional contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, pp 169–70.
- 1124 A Freiberg, H Donnelly and K Gelb, *Sentencing for child sexual abuse in institutional contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, p 165.
- 1125 A Freiberg, H Donnelly and K Gelb, *Sentencing for child sexual abuse in institutional contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, p 165.
- 1126 A Freiberg, H Donnelly and K Gelb, *Sentencing for child sexual abuse in institutional contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, pp 52, 53.
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- 1130 A Freiberg, H Donnelly and K Gelb, *Sentencing for child sexual abuse in institutional contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, pp 80–3.
- 1131 A Freiberg, H Donnelly and K Gelb, *Sentencing for child sexual abuse in institutional contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, pp 89, 90.
- 1132 See for example *Penalties and Sentences Act 1992* (Qld) s 9(4) in relation to mandatory sentencing; *Sentencing Act* (NT) s 55 and *Sentencing Act 1991* (Vic) s 11A in relation to mandatory non-parole periods; and A Freiberg, H Donnelly and K Gelb, *Sentencing for child sexual abuse in institutional contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, pp 189–91.
- 1133 A Freiberg, H Donnelly and K Gelb, *Sentencing for child sexual abuse in institutional contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, pp 83, 84.
- 1134 A Freiberg, H Donnelly and K Gelb, *Sentencing for child sexual abuse in institutional contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, pp 91–3.
- 1135 A Freiberg, H Donnelly and K Gelb, *Sentencing for child sexual abuse in institutional contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, p 88–9.
- 1136 A Freiberg, H Donnelly and K Gelb, *Sentencing for child sexual abuse in institutional contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, pp 126, 127.
- 1137 'Form 1' is a procedure in New South Wales where, during sentencing proceedings, the prosecutor may file a document with the court listing other offences with which the offender has been charged but not convicted and for which the offender wishes to plead guilty: *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 3, div 3. The term 'Form 1' comes from the now superseded *Crimes (Sentencing Procedure) Regulation 2000* (NSW). The legislation now requires that the document be in the approved form.
- 1138 A Freiberg, H Donnelly and K Gelb, *Sentencing for child sexual abuse in institutional contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, pp 122–4, 126.
- 1139 K Gelb, *A statistical analysis of sentencing for child sexual abuse in institutional contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p viii.
- 1140 K Gelb, *A statistical analysis of sentencing for child sexual abuse in institutional contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, pp viii–ix.
- 1141 K Gelb, *A statistical analysis of sentencing for child sexual abuse in institutional contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, pp 6, 8, 16.
- 1142 K Gelb, *A statistical analysis of sentencing for child sexual abuse in institutional contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 6.
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- 1145 K Gelb, *A statistical analysis of sentencing for child sexual abuse in institutional contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 68.
- 1146 K Gelb, *A statistical analysis of sentencing for child sexual abuse in institutional contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 11.
- 1147 K Gelb, *A statistical analysis of sentencing for child sexual abuse in institutional contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, pp ix, 12.
- 1148 K Gelb, *A statistical analysis of sentencing for child sexual abuse in institutional contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, pp 13-4.
- 1149 K Gelb, *A statistical analysis of sentencing for child sexual abuse in institutional contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 15.
- 1150 K Gelb, *A statistical analysis of sentencing for child sexual abuse in institutional contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 24.
- 1151 K Gelb, *A statistical analysis of sentencing for child sexual abuse in institutional contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 16.
- 1152 K Gelb, *A statistical analysis of sentencing for child sexual abuse in institutional contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, pp 19, 20, 25, 53, 54.
- 1153 K Gelb, *A statistical analysis of sentencing for child sexual abuse in institutional contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, pp 26-32. While not an impact on whether a custodial sentence would be issued, it was found that, the less time between an offender's last known offence and the most recent sentence, the longer the total effective sentence.
- 1154 K Gelb, *A statistical analysis of sentencing for child sexual abuse in institutional contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 40.
- 1155 *Criminal Law (Sentencing) Act 1988 (SA) s 10(2)(c)*.
- 1156 A 'serious sexual offender' is defined to mean 'an offender (other than a young offender) – (a) who has been convicted of two or more sexual offences for each of which he or she has been sentenced to a term of imprisonment or detention in a youth justice centre; or (ab) who has been convicted of an offence to which clause 1(a)(viii) of Schedule 1 applies [relating to *Crimes Act 1958* (Vic) s 47A(1) persistent sexual abuse of a child under 16] for which he or she has been sentenced to a term of imprisonment or detention in a youth justice centre; or (ac) who has been convicted of committing the incidents of a sexual offence included in a course of conduct charge (within the meaning of clause 4A of Schedule 1 to the *Criminal Procedure Act 2009* (Vic)) for which he or she has been sentenced to a term of imprisonment or detention in a youth justice centre; or (b) who has been convicted of at least one sexual offence and at least one violent offence arising out of the one course of conduct for each of which he or she has been sentenced to a term of imprisonment or detention in a youth justice centre': *Sentencing Act 1991* (Vic) s 6B(2).
- 1157 A 'relevant offence' is defined as a sexual offence or a violent offence in the case of a serious sexual offender: *Sentencing Act 1991* (Vic) s 6B(3)(c).
- 1158 *Sentencing Act 1991* (Vic) s 6D(a)-(b).
- 1159 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(g) and *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(g). Most sentencing acts require the court to take into account the harm caused to the victim or the community as a factor in sentencing. See, for example, *Penalties and Sentences Act 1992* (Qld) s 9(2)(c)(i).
- 1160 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A; *Sentencing Act 1991* (Vic) s 5; *Penalties and Sentences Act 1992* (Qld) s 9; *Crimes (Sentencing) Act 2005* (ACT) s 7; *Sentencing Act* (NT) s 5(1).
- 1161 The Law Reform Commission of Western Australia recommended the addition of a statutory statement of the purposes of sentencing to the *Sentencing Act 1995* (WA) in Law Reform Commission, Western Australia, *Court intervention programs: Final report*, Project No 96, 2009, recommendation 11, p 43.
- 1162 *Criminal Law (Sentencing) Act 1988* (SA) s 10(2)(a)-(e).
- 1163 *Sentencing Act 1997* (Tas) s 3.
- 1164 See for example *Sentencing Act 1991* (Vic) s 48A(a).
- 1165 A Freiberg, H Donnelly and K Gelb, *Sentencing for child sexual abuse in institutional contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, p 37.
- 1166 *Criminal Law (Sentencing) Act 1988* (SA) s 20BA(1)(a).
- 1167 *Green v The Queen*; *Quinn v The Queen* [2011] HCA 49, [28]; (2011) 244 CLR 462, 472-3 (French CJ, Crennan and Kiefel JJ).
- 1168 See New South Wales Law Reform Commission, *Sentencing: Report 139*, 2013, p 48.
- 1169 See New South Wales Law Reform Commission, *Sentencing: Report 139*, 2013, p 48.
- 1170 See, for example, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5(1); *Sentencing Act 1991* (Vic) s 5(4); *Penalties and Sentences Act 1992* (Qld) s 9(2)(a); *Sentencing Act 1995* (WA) s 6(4).
- 1171 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5(1).
- 1172 *Sexual Offences (Protection of Children) Amendment Act 2003* (Qld) s 28(2).
- 1173 *Penalties and Sentencing Act 1992* (Qld) s 9(4).
- 1174 *R v De Simoni* [1981] HCA 31, [8]; (1981) 147 CLR 383, 389 (Gibbs CJ, Mason and Murphy JJ agreeing).
- 1175 See, for example, *Sentencing Act 1991* (Vic) s 5(3).
- 1176 *Blundell v R* [2008] NSWCCA 63, [46]-[47]; (2008) 70 NSWLR 660, 666-7 (Simpson J, Grove and Hulme JJ agreeing); *Leach v The Queen* [2008] NSWCCA 73, [8]-[9]; (2008) 183 A Crim R 1, 4, 5, (Basten JA).
- 1177 *Blundell v R* [2008] NSWCCA 63, [47]; (2008) 70 NSWLR 660, 667 (Simpson J, Grove and Hulme JJ agreeing [47]); *Kelly v The Queen* [2007] NSWCCA 357 (18 December 2007), [30] (Basten JA, Barr and Adams JJ agreeing).

1178 See, for example, *Sentencing Act 1991* (Vic) s 5(1)(f); *Penalties and Sentences Act 1992* (Qld) s 9(1)(f); *Sentencing Act* (NT) s 5(1)(f).

1179 *Crimes (Sentencing) Act 2005* (ACT) s 7(2): ‘To remove any doubt, nothing about the order in which the purposes appear in subsection (1) implies that any purpose must be given greater weight than any other purpose.’

1180 *Muldrock v The Queen* [2011] HCA 39 [20]; (2011) 244 CLR 120, 129.

1181 See, for example, A Freiberg, H Donnelly and K Gelb, *Sentencing for child sexual abuse in institutional contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, pp 54-6, which sets out child sexual assault offences at July 2015 and their associated statutory maximums.

1182 K Gelb, *A statistical analysis of sentencing for child sexual abuse in institutional contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 7.

1183 Sexual intercourse with a child under 10 years (*Crimes Act 1900* (NSW) s 66A(2)); Carnal knowledge of a child under 12 with an impairment of the mind (*Criminal Code* (Qld) s 215(4A)); Sexual intercourse with a child under 14 years (*Criminal Law Consolidation Act 1935* (SA) s 49(1)).

1184 Judicial Commission of New South Wales, *Sentencing bench book*, [5-030].

1185 *Child Protection (Offenders Registration) Act 2000* (NSW); *Sex Offenders Registration Act 2004* (Vic); *Child Protection (Offender Reporting) Act 2004* (Qld); *Community Protection (Offender Reporting) Act 2004* (WA); *Child Sex Offenders Registration Act 2006* (SA); *Community Protection (Offender Reporting) Act 2005* (Tas); *Crimes (Child Sex Offenders) Act 2005* (ACT); *Child Protection (Offender Reporting and Registration) Act* (NT).

1186 See for example *Sex Offenders Registration Act 2004* (Vic) s 11.

1187 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A.

1188 *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 21A(2)(b)–(cb), 21A(2)(e)–(ib), 21A(2)(m)–(p).

1189 *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 21A(2)(d), 21A(2)(j).

1190 *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 21A(2)(a), 21A(2)(h), 21A(2)(l).

1191 *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 21A(3)(c)–(d), 21A(3)(j).

1192 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(f)–(i).

1193 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(a).

1194 See, for example, *Sentencing Act 1991* (Vic) s 5(2); *Penalties and Sentences Act 1992* (Qld) s 9(2); *Crimes (Sentencing) Act 2005* (ACT) s 33.

1195 See for example *Sentencing Act 1995* (WA) ss 6(2), 6(3), 7, 8.

1196 *Anderson v The Queen* [1993] HCA 59, [15], [19]; (1993) 177 CLR 520, 536, 539-40 (Deane, Toohey and Gaudron JJ); *R v Olbrich* [1999] HCA 54, [27]; (1999) CLR 270, 281 (Gleeson CJ, Gaudron, Hayne and Callinan JJ).

1197 See, for example, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2).

1198 A Freiberg, H Donnelly and K Gelb, *Sentencing for child sexual abuse in institutional contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, p 52.

1199 A Freiberg, H Donnelly and K Gelb, *Sentencing for child sexual abuse in institutional contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, p 57.

1200 A Freiberg, H Donnelly and K Gelb, *Sentencing for child sexual abuse in institutional contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, p 52.

1201 A Freiberg, H Donnelly and K Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, p 56.

1202 A Freiberg, H Donnelly and K Gelb, *Sentencing for child sexual abuse in institutional contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, p 53.

1203 A Hoel and K Gelb, *Sentencing matters: Mandatory sentencing*, Sentencing Advisory Council, Victoria, 2008, p 1.

1204 *Corrective Services Act 2006* (Qld) s 181A.

1205 *Criminal Law (Two Strike Child Sex Offenders) Amendment Act 2012* (Qld) s 3.

1206 *Penalties and Sentences Act 1992* (Qld) s 161E(2).

1207 *Penalties and Sentences Act 1992* (Qld) s 161E(3).

1208 Sentencing Advisory Council, Tasmania, *Mandatory sentencing for serious sex offences against children*, Final Report No 7, 2016, p 9.

1209 Sentencing Advisory Council, Tasmania, *Mandatory sentencing for serious sex offences against children*, Final Report No 7, 2016, pp vii-x.

1210 The Hon. M Groom MP, *Minimum Mandatory Sentences for Serious Sex Offences Against Children*, media release, Acting Attorney-General, 3 May 2016.

1211 New South Wales Law Reform Commission, *Interim report on standard minimum non parole periods: Report 134*, 2012, p 3.

1212 *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 4, Table to div 1A.

1213 *DPP v Walters (a pseudonym)* [2015] VSCA 303, [60].

1214 Sentencing Advisory Council, Victoria, *Baseline sentencing*, <https://www.sentencingcouncil.vic.gov.au/about-sentencing/baseline-sentencing> (viewed 22 May 2017).

1215 Victorian Government, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation paper: Criminal justice*, 2016, p 30.

1216 Victorian Government, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation paper: Criminal justice*, 2016, p 31.

1217 A Freiberg, H Donnelly and K Gelb, *Sentencing for child sexual abuse in institutional contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, p 61.

- 1218 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(k); *Crimes (Sentencing) Act 2005* (ACT) s 33(1)(u); A Freiberg, H Donnelly and K Gelb, *Sentencing for child sexual abuse in institutional contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, p 64.
- 1219 A Freiberg, H Donnelly and K Gelb, *Sentencing for child sexual abuse in institutional contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, p 108.
- 1220 *Muldock v The Queen* [2011] HCA 39, [54]; (2011) 244 CLR 120, 139; A Freiberg, H Donnelly and K Gelb, *Sentencing for child sexual abuse in institutional contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, pp 589.
- 1221 See, for example, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(i).
- 1222 A Freiberg, H Donnelly and K Gelb, *Sentencing for child sexual abuse in institutional contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, pp 60, 78.
- 1223 NSW Sentencing Council, *Sentencing for child sexual assault*, 2015, p 27.
- 1224 *Crimes (Sentencing Procedure Act) 1999* (NSW) s 24A.
- 1225 *Sentencing Act 1991* (Vic) s 5(2BC).
- 1226 *Criminal Law (Sentencing) Act 1988* (SA) s 10(3)(b).
- 1227 A Freiberg, H Donnelly and K Gelb, *Sentencing for child sexual abuse in institutional contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, p 76.
- 1228 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(d).
- 1229 *Veen v The Queen* (No 2) [1988] HCA 14, [14]; (1988) 164 CLR 465, 477-8 (Mason CJ, Brennan, Dawson, Toohey JJ); A Freiberg, H Donnelly and K Gelb, *Sentencing for child sexual abuse in institutional contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, p 77.
- 1230 See, for example, *Penalties and Sentences Act 1992* (Qld) ss 9(10), 9(11).
- 1231 *Ryan v R* [2001] HCA 21, [29]; (2001) 206 CLR 267, 276 (McHugh J); A Freiberg, H Donnelly and K Gelb, *Sentencing for child sexual abuse in institutional contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, p 79.
- 1232 See, for example, *Crimes Act 1914* (Cth) s 16A(2)(m); *Sentencing Act 1991* (Vic) ss 5(2)(f), 6(b), 6(c); *Penalties and Sentences Act 1992* (Qld) s 9(2)(f); *Crimes (Sentencing Act) 2005* (ACT) s 33(1)(m); *Sentencing Act* (NT) s 5(2)(e).
- 1233 NSW Sentencing Council, *Penalties relating to sexual assault offences in New South Wales: Volume 1*, 2008, p 120.
- 1234 *Ryan v R* [2001] HCA 21, [23]-[25]; (2001) 206 CLR 267, 275 (McHugh J).
- 1235 NSW Sentencing Council, *Penalties relating to sexual assault offences in New South Wales: Volume 1*, 2008, p 127.
- 1236 See, for example, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(l).
- 1237 NSW Sentencing Council, *Sentencing for child sexual assault*, 2015, p 21.
- 1238 A Freiberg, H Donnelly and K Gelb, *Sentencing for child sexual abuse in institutional contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, p 67.
- 1239 See *Penalties and Sentences Act* (Qld) s 9(3)(c); *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(d); *Crimes Sentencing Act* (ACT) s 33(1)(d).
- 1240 A Freiberg, H Donnelly and K Gelb, *Sentencing for child sexual abuse in institutional contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, p 69.
- 1241 A Freiberg, H Donnelly and K Gelb, *Sentencing for child sexual abuse in institutional contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, pp 679.
- 1242 *Crimes Act 1914* (Cth) s 16A(2)(ea); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28; *Sentencing Act 1991* (Vic) s 8K; *Penalties and Sentences Act 1992* (Qld) s 9(2)(c)(i); *Victims of Crime Assistance Act 2009* (Qld) s 15; *Sentencing Act 1995* (WA) s 24; *Criminal Law (Sentencing) Act 1988* (SA) s 7A; *Sentencing Act 1997* (Tas) s 81A; *Crimes (Sentencing) Act 2005* (ACT) s 49; and *Sentencing Act 1995* (NT) s 106B.
- 1243 See, for example, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28(1); *Sentencing Act 1991* (Vic) s 8K(1).
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- 1245 *The Queen v De Simoni* [1981] HCA 31, [8]; (1981) 147 CLR 383, 389 (Gibbs CJ, Mason and Murphy JJ agreeing).
- 1246 *R v H* [2005] NSWCCA 282.
- 1247 *R v H* [2005] NSWCCA 282, [56]-[58]; Judicial Commission of New South Wales, *Sentencing bench book*, [12-836].
- 1248 See for example *Report of Case Study No 15: Response of swimming institutions, the Queensland and NSW Offices of the DPP and the Queensland Commission for Children and Young People and Child Guardian to allegations of child sexual abuse by swimming coaches*, 2015, p 159.
- 1249 *Crimes (Sentencing) Act 2005* (ACT) s 53(3); *Sentencing Act* (NT) s 106B(9).
- 1250 See, for example, *Sentencing Act 1991* (Vic) s 8K(2); *Sentencing Act 1995* (WA) s 25(1); *Criminal Law (Sentencing) Act 1988* (SA) s 7A(3)(a); *Sentencing Act 1997* (Tas) s 81A(2).
- 1251 See, for example, *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 30(2), 30A(1); *Sentencing Act 1991* (Vic) ss 8K(3)(a)-(b), 8Q (1)(a)(i)-(ii); *Sentencing Act 1995* (WA) s 24(2); *Sentencing Act* (NT) ss 106B(1)(b), 106B(2)(aa), 106B(3).
- 1252 E Wren and L Bartels, "Guilty your honour": Recent legislative developments on the guilty plea discount and an Australian Capital Territory case study on its operation', *Adelaide Law Review*, vol 35, 2014, pp 361-84, 361.
- 1253 *R v Thomson; R v Houlton* [2000] NSWCCA 309, [160]-[162]; (2000) 49 NSWLR 383, 419 (Spigelman CJ, Wood CJ at CL, Foster AJA and Grove and James JJ agreeing).
- 1254 New South Wales Law Reform Commission, *Sentencing: Report 139*, 2013, p 123.
- 1255 South Australia: *Criminal Law (Sentencing) Act 1988* (SA) ss 10B, 10C.
- 1256 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 23; in Victoria, the *Sentencing Act 1991* (Vic) ss 5(2AB), (2AC) recognises the availability of a discount for future assistance; *Penalties and Sentences Act 1992* (Qld) ss 13A, 13B.
- 1257 See New South Wales Law Reform Commission, *Sentencing: Report 139*, 2013, pp 128-9.
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- 1263 NSW Sentencing Council, *Penalties relating to sexual assault offences in New South Wales: Volume 1*, 2008, p 131; Sentencing Advisory Council, Queensland, *Sentencing of child sexual offences in Queensland: Final report*, 2012, p 70.
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- 1265 *Ryan v R* [2001] HCA 21, [20]; (2001) 206 CLR 267, 274 (McHugh J).
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- 1289 Sentencing Advisory Council, Tasmania, *Sex offence sentencing: Final report*, 2015, recommendation 12, p 104.
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- 1315 A Freiberg, H Donnelly and K Gelb, *Sentencing for child sexual abuse in institutional contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, p 100.
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- 1323 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 55(2).
- 1324 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 53(1).
- 1325 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 47(2)(b); New South Wales Law Reform Commission, *Sentencing: Report 139*, 2014, p 138.
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- 1328 *Sentencing Act 1991* (Vic) s 9; *Criminal Law (Sentencing) Act 1988* (SA) s 18A; *Sentencing Act 1997* (Tas) s 11; *Sentencing Act 1995* (NT) s 52.
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- 1330 *Magnuson v R* [2013] NSWCCA 50, [142] (Button J, McClellan CJ at CL and Bellew J agreeing).
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- 1332 *Sentencing Act 1991* (Vic) s 16(1).
- 1333 *Sentencing Act 1991* (Vic) s 6A.
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1336 *Sentencing Act 1991* (Vic) s 6B(2).  
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 1345 Care Leavers Australasia Network, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation paper: Criminal justice*, 2016, p 19.  
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 1367 *Stalio v R* [2012] VSCA 120, [18]; (2012) 46 VR 426, 434-435 (Neave and Osborn JJA and King AJA).  
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1434 J Cashmore, A Taylor, R Shackel and P Parkinson, *The impact of delayed reporting on the prosecution and outcomes of child sexual abuse cases*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 191.

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1439 *Sexual Offences (Protection of Children) Amendment Act 2003* (Qld); see Sentencing Advisory Council, Queensland, *Sentencing of child sexual offences in Queensland: Final report*, 2012, p 35.

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1442 Sentencing Advisory Council, Queensland, *Sentencing of child sexual offences in Queensland: Final report*, 2012, p 35.

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 1447 *Director of Public Prosecutions v Dalglish (a Pseudonym)* [2016] VSCA 148, [128].  
 1448 *Director of Public Prosecutions v Dalglish* [2016] HCATrans 312.  
 1449 *Director of Public Prosecutions v Dalglish* [2016] HCATrans 312.  
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 1452 Commissioner for Victims' Rights, South Australia, Submission 2 to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation paper: Criminal justice*, 2016, p 16.  
 1453 Commissioner for Victims' Rights, South Australia, Submission 2 to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation paper: Criminal justice*, 2016, p 16.  
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 1455 Victims of Crime Commissioner, Victoria, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation paper: Criminal justice*, 2016, p 14.  
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1556 [1996] HCA 35; (1996) 190 CLR 348, 367.  
 1557 *Mackenzie v The Queen* (1996) 190 CLR 348, 367-368 quoting King CJ in *R v Kirkman* (1987) 44 SASR 591, 593: 'Juries cannot always be expected to act in accordance with strictly logical considerations and in accordance with the strict principles of the law which are explained to them, and courts, I think, must be very cautious about setting aside verdicts which are adequately supported by the evidence simply because a judge might find it difficult to reconcile them with the verdicts which had been reached by the jury with respect to other charges. Sometimes juries apply in favour of an accused what might be described as their innate sense of fairness and justice in place of the strict principles of law. Sometimes it appears to a jury that although a number of counts have been alleged against an accused person, and have been technically proved, justice is sufficiently met by convicting him of less than the full number. This may not be logically justifiable in the eyes of a judge, but I think it would be idle to close our eyes to the fact that it is part and parcel of the system of administration of justice by juries. Appellate courts therefore should not be too ready to jump to the conclusion that because a verdict of guilty cannot be reconciled as a matter of strict logic with a verdict of not guilty with respect to another count, the jury acted unreasonably in arriving at a verdict of guilty.'

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 1564 [1997] HCA 56; (1997) 191 CLR 339, 455.  
 1565 *MFA v The Queen* [2002] HCA 53, [97]; (2002) 213 CLR 606, 634.  
 1566 [1994] HCA 63; (1994) 181 CLR 487. The test is: 'Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty' (Mason CJ, Deane, Dawson and Toohey JJ).

1567 *MFA v The Queen* [2002] HCA 53 [25], [36], [60]-[61]; (2002) 213 CLR 606, 614, 618 (Gleeson CJ, Hayne and Callinan JJ); 624 (McHugh, Gummow and Kirby JJ).  
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- 1672 *Crimes (High Risk Offenders) Act 2006* (NSW) ss 5H-5J, 6(2), 9, 13A-13C, 17, 24A, noting that no Regulation has been made under the Act to authorise another person to act on behalf of the state; *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) s 7; *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 5; *Dangerous Sexual Offenders Act 2006* (WA) s 8 (which also allows the Director of Public Prosecutions to make an application); *Criminal Law (High Risk Offenders) Act 2015* (SA) ss 7(1)-(2) (an order can be made within 12 months of the expiry date); Northern Territory legislation permits an application within 12 months of finalisation of sentence: *Serious Sex Offenders Act 2013* (NT) s 23.
- 1673 New South Wales legislation defines custody as full-time detention, intensive correction order, home detention and release on parole: *Crimes (High Risk Offenders) Act 2006* (NSW) s 5I(3); Victorian legislation states that an offender on parole is still serving a custodial sentence for the purpose of the Act: *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) s 5; other jurisdictions do not so define – for example, *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 5(2)(c); *Dangerous Sexual Offenders Act 2006* (WA) s 8 (3).
- 1674 See, for example, *Crimes (High Risk Offenders) Act 2006* (NSW), where the Supreme Court must be satisfied 'to a high degree of probability' that the offender poses an unacceptable risk of committing a serious sex offence to be considered a 'high risk sex offender' (s 5B). See also s 9(2) of the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic). See also P Keyzer and B McSherry, 'The preventive detention of "dangerous" sex offenders in Australia: Perspectives at the coalface', *International Journal of Criminology and Sociology*, vol 2, 2013, pp 296-305, 296.
- 1675 *Crimes (High Risk Offenders) Act 2006* (NSW) s 9(3); *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) s 9(3); *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 13(4); *Dangerous Sexual Offenders Act 2006* (WA) s 7(3); *Criminal Law (High Risk Offenders) Act 2015* (SA) ss 7(3) and 7(6); *Serious Sex Offenders Act 2013* (NT) s 14.
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- 1725 *Crimes (Child Sex Offenders) Act 2005* (ACT) ch 4.
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- 1729 *Child Protection (Offenders Registration) Act 2000* (NSW) s 14A; *Sex Offenders Registration Act 2004* (Vic) s 34; *Community Protection (Offender Reporting) Act 2004* (WA) s 46; *Child Sex Offenders Registration Act 2006* (SA) s 34; *Community Protection (Offender Reporting) Act 2005* (Tas) s 24; *Crimes (Child Sex Offenders) Act 2005* (ACT) pt 3.5; *Child Protection (Offender Reporting and Registration) Act* (NT) s 37. Note that in Queensland the reporting period is slightly varied: *Child Protection (Offender Reporting) Act 2004* (Qld) s 36: five years, 10 years or life.
- 1730 See, for example, *Child Protection (Offenders Registration) Act 2000* (NSW) s 9; *Sex Offenders Registration Act 2004* (Vic) s 14.
- 1731 See, for example, *Child Protection (Offenders Registration) Act 2000* (NSW) s 16C; *Sex Offenders Registration Act 2004* (Vic) s 66V if the court considered that it is necessary to monitor the registrable offender’s compliance with any conditions it can impose in relation to s 66Q of that Act.
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- 1775 *Regina v Skaf, Ghanem & Hajeid* [2004] NSWCCA 74.
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