

CRIMINAL JUSTICE REPORT



Royal Commission
into Institutional Responses
to Child Sexual Abuse

PARTS III - VI

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PARTS III - VI

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PART III
CHILD SEXUAL
ABUSE OFFENCES

10 Child sexual abuse offences

10.1 Introduction

All Australian states and territories have a range of offences relevant to child sexual abuse. While there are some differences between them, they generally criminalise similar conduct. The differences between states and territories may seem anomalous but they reflect the fact that much of the criminal law in Australia that is relevant to child sexual abuse is regulated by the states and territories and not the Commonwealth. However, there are also Commonwealth child sexual abuse offences which are particularly relevant to online grooming.

The research report *Brief review of contemporary sexual offence and child sexual abuse legislation in Australia: 2015 update* by Ms Hayley Boxall and Ms Georgina Fuller of the Australian Institute of Criminology (AIC) provides a description of child sexual abuse offences by jurisdiction at 31 December 2015.

We know that delayed reporting is a feature of child sexual abuse cases. Many survivors will take years, even decades, to report the abuse they suffered. This means that historical offences are also important, because generally an accused can only be charged with an offence that existed at the time the alleged abuse was committed.

The research report *Historical review of sexual offence and child sexual abuse legislation in Australia: 1788–2013* by Ms Hayley Boxall, Dr Adam Tomison and Ms Shann Hulme of the AIC provides an overview of relevant historical offences that have applied for different periods since 1950 in each Australian jurisdiction.

In our work on child sexual abuse offences, we have focused on issues that we think are particularly important for institutional child sexual abuse, although they may also be relevant for non-institutional child sexual abuse.

In the Consultation Paper, we focused on:

- the effectiveness of current persistent child sexual abuse offences
- the effectiveness of current grooming offences
- whether there is sufficient coverage of key institutional relationships – particularly ‘person in position of trust or authority’ offenders – in current offences
- whether further reform is needed to remove limitation periods that might still prevent prosecutions from being brought for historical child sexual abuse.

We stated that we were not examining child sexual abuse offences more broadly. However, we also indicated that we would welcome submissions identifying any other issues in child sexual abuse offences that interested parties consider are of particular importance to institutional child sexual abuse that the Royal Commission should examine. We note submissions that raised other areas for reform in section 10.3.

We discuss particulars and persistent child sexual abuse offences in Chapter 11, grooming offences in Chapter 12, position of authority offences in Chapter 13 and limitation periods and immunities in Chapter 14.

We discuss third party offences – that is, offences applying to persons other than the perpetrator of the abuse – in Part IV.

In the remainder of this introductory chapter, we briefly outline the development of current child sexual abuse offences and other areas for reform raised with us in submissions.

10.2 Development of current offences

There are currently many different offences that are used to prosecute child sexual abuse.¹ These offences generally aim to criminalise all conduct that sexually exploits or otherwise sexually harms children.

Offences generally criminalise the following conduct or attempts at the following conduct:

- penetrative and non-penetrative sexual assaults against a child, including indecent assaults
- indecent acts against or in the presence of a child or exposing a child to indecent material or acts
- child prostitution
- possession and production of child pornography or child exploitation material
- grooming.

Each jurisdiction provides different maximum penalties for different offences depending upon the seriousness of the offence. For example, penetrative sexual assault offences generally have higher maximum penalties than indecent assault offences or acts of indecency. Similarly, offences against younger children generally have higher maximum penalties than offences against older children or adults.²

The seriousness of offending conduct can also be recognised by the presence of aggravating factors, which attract a higher maximum penalty than the ‘simple’ offence. Some child sexual abuse offences have aggravating factors, such as offences that are committed in company (with other people present) or against a child with a cognitive impairment.³

An offence will generally be aggravated where the victim was under the authority of the offender. This is particularly relevant to offending in an institutional context where the offender was in a position of authority – such as a carer, teacher or coach – in relation to the victim. Parents can also be in a position of authority in relation to children.

Child sexual abuse offences have changed significantly over time. Governments have often updated their child sexual abuse offences, including to:

- reflect changing community values
- recognise additional types of offending
- better recognise the impact of child sexual abuse
- respond to court decisions.

In the *Historical review of sexual offence and child sexual abuse legislation in Australia: 1788–2013*,⁴ the authors identified the following six key developments in child sexual abuse offences since the 1980s:

- **The removal of gendered language:** Gendered language was replaced with gender-neutral terms such as ‘offender’ and ‘child’. This recognised that sexual abuse can be committed against boys and can be perpetrated by females. It widened the application of child sexual abuse offences to include all offenders and child victims, with amendments generally implemented by the early 2000s.⁵
- **Changes to the definition of sexual penetration:** These changes ensure that entering, to any extent, of an anus, vagina, mouth or genitalia by an object or any part of an offender’s body is included within the definition of penetration. Also included is the offender committing fellatio or cunnilingus on the victim. These changes occurred in stages from the mid-1980s. As a result, penetration, other than vaginal/penile penetration, can now be prosecuted under sexual assault provisions rather than under indecent assault provisions, which are generally treated as less serious than penetrative offences and generally attract lower maximum penalties.
- **The decriminalisation of homosexual sexual acts:** Homosexual sexual acts between consenting male adults were decriminalised in jurisdictions from the mid-1970s, with Tasmania the last to repeal their laws.
- **The creation of offences where the accused was in a position of trust or authority:** These offences recognise that child sexual abuse by a person in a position of trust or authority in relation to the child makes the offence more serious. Position of trust or authority offences may also prohibit teachers, carers, employers, coaches, counsellors, custodial officers and health professionals from having sexual relationships with children who are over the age of consent but who are under their care. This type of offence has only recently been implemented, but previous provisions on the sexual assault of a child under 16 years old and the sexual abuse of intellectually disabled children by a person in a position of trust and authority were introduced in most jurisdictions the 1980s. The definition of ‘a person in a position of trust and authority’ once included only schoolteachers, but it has expanded over time to include a wider variety of relationships.

- **The creation of offences relating to child abuse material:** These offences cover the possession, creation and dissemination of child pornography or child exploitation material. The offences have expanded since the mid-1980s and target the creators and consumers of pornographic material involving children.
- **The introduction of mandatory reporting rules:** These are described briefly in section 16.2.1.

Recently introduced offences tend to expand criminal liability beyond the act of sexual offending to criminalise behaviour that may facilitate child sexual abuse, such as procuring, intoxicating and grooming a child.⁶ There are also recently introduced third-party offences, which we discuss in Part IV.

States and territories have also enacted offences in relation to female genital mutilation,⁷ and the Commonwealth *Criminal Code Act 1995* contains offences regarding forced marriage, with the offences being aggravated if the victim is under 18 years of age.⁸

The most recent amendments to child sexual abuse offences during the life of the Royal Commission include:

- In New South Wales:
 - more child sexual abuse offences have been included in the standard non-parole scheme,⁹ which is likely to increase the non-parole period imposed at sentencing
 - any sexual intercourse with a child under 10 years of age is now subject to a maximum penalty of life imprisonment, without the need for elements of aggravation.¹⁰
- In Victoria:
 - a 'course of conduct' charge has been introduced for persistent child sexual abuse offences (discussed in Chapter 11)¹¹
 - a much broader range of conduct is now covered by grooming offences and the new offence of encouraging a child to engage in sexual activity (discussed in Chapter 12)¹²
 - third-party offences have been introduced to criminalise failures to disclose child sexual abuse¹³ and failures to protect a child from sexual abuse (discussed in Part IV)¹⁴
 - the *Crimes Amendment (Sexual Offences) Act 2016* reforms sexual offences against children generally.¹⁵
- In Queensland:
 - a broader grooming offence has been introduced (discussed in Chapter 12)¹⁶
 - maximum penalties have been increased for the offences of making child exploitation material and involving a child in the making of child exploitation material.¹⁷
- In Tasmania, the victim being under the care, supervision or authority of the offender (discussed in Chapter 13) or a person with a disability have been introduced as aggravating circumstances for sentencing certain sexual offenders.¹⁸

10.3 Further reforms

In its submission in response to the Consultation Paper, the New South Wales Government stated that it is currently undertaking a Child Sexual Offences Review through the New South Wales Department of Justice in response to recommendations made by the Parliamentary Joint Select Committee on Sentencing Child Sexual Assault Offences. It stated:

The Joint Select Committee recommended that the NSW Government carry out a review of child sexual assault offences with a view to consolidating and simplifying the current framework, identifying areas where current offences could be consolidated or revised, and identifying whether any new offences should be created to fill any gaps in the existing framework.¹⁹

The New South Wales Government stated that the review was being conducted over the course of 2016 and 2017 and would involve extensive stakeholder consultation. The Department of Justice is intending to release a discussion paper for public input.²⁰

In its submission in response to the Consultation Paper, the New South Wales Office of the Director of Public Prosecutions submitted that it would be desirable to restructure the *Crimes Act 1900* (NSW) to provide for a separate regime of sexual offences relating to children that do not require the Crown to prove lack of consent. It submitted that these offences should be structured so that they are not defined by the particular age of the child because often it is not possible to prove the exact age of the child when the abuse is alleged to have occurred during a period of time. It also submitted that the hierarchy of penalties within child and adult sexual offences needs to be reviewed.²¹

It may be that some of these issues will be considered by the current New South Wales Child Sexual Offences Review.

In its submission in response to the Consultation Paper, the Tasmanian Government stated that it 'has been actively considering the effectiveness and the appropriateness of the current offences for prosecuting child sexual abuse in Tasmania'.²²

In its submission in response to the Consultation Paper, the Law Society of New South Wales raised a number of other aspects of offences that it submitted required reform. In particular, it submitted that:

- the age of consent should be uniform, regardless of the type of sexual activity²³
- alternative approaches should be explored to ensure that consensual sexting does not continue to be criminalised under Commonwealth child pornography offences and New South Wales child sexual abuse material offences, noting that Victoria has recently introduced an exception to its child pornography offences for a child under the age of 18 years to take, store or send images of a child not more than two years younger²⁴

- there should be consistency across jurisdictions in the definition of the age of a child, as it affects the age of consent for sexting; and it should be set at 16 years of age²⁵
- there should be a similar-age consent defence where the sexual activity involves a child who is under the age of consent and it is consensual and the difference in age between the offender and the victim is three years or less.²⁶

The Law Society of New South Wales submitted that this Royal Commission should consider whether a similar-age consent defence should be available for sexual activity with a child in an institutional context, referring to the prevalence of peer-on-peer abuse in institutional settings.²⁷

The issue that has generally been raised with us in relation to children who sexually abuse other children in an institutional context is risk of failing to recognise the seriousness of and respond adequately to non-consensual sexual activity. 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 sexual abuse. 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 generally. We express no view in favour of or against the defence proposed by the Law Society of New South Wales. We discuss a possible limited similar-age consent defence in relation to position of authority offences in Chapter 13 and recommendation 29.

Two other issues were raised in submissions.

Judge Berman SC, a Judge of the District Court of New South Wales, raised the issue of the common law presumption that a boy under the age of 14 was incapable of having sexual intercourse, which has been abolished in New South Wales but not with retrospective effect. We discuss this in Chapter 37.

The Victorian Director of Public Prosecutions (DPP) raised an issue in relation to the Victorian historical offences of 'gross indecency', being the offences of:

- gross indecency with or in the presence of a person under the age of 16 – *Crimes Act 1958 (Vic)*, section 50 – which was introduced on 1 March 1981 and repealed on 1 June 1983
- gross indecency with or in the presence of a girl aged under 16 – *Crimes Act 1958 (Vic)* section 69 – which was repealed on 1 March 1981.²⁸

The Victorian DPP stated that the offences are still charged, and some 51 gross indecency matters were prosecuted in 2015–2016.²⁹

The Victorian DPP submitted that difficulties arise in prosecuting charges of gross indecency with a male person under section 69(4) of the *Crimes Act 1958 (Vic)* for the period before 1 March 1981 because:

It has been held in at least one Victorian County Court decision that pursuant to *Crompton v R* (2000) 206 CLR 161, the charge targets consensual homosexual activity, and is thus inappropriate for situations involving child sexual abuse, where there is no consent or capacity to consent.

That prosecution was permanently stayed by the trial judge as a result.

This interpretation has the potential effect of rendering acts of gross indecency against male children between 1958 and 1981 essentially unprosecutable. The number of matters affected by this limitation is, by definition, low and decreasing.³⁰

It is not apparent to us why the High Court's decision in *Crompton v R*³¹ (*Crompton*) should limit the interpretation of the Victorian offence in this way. In *Crompton*, the court construed section 81A of the *Crimes Act 1900* (NSW) as it stood in 1978, which provided:

Whosoever, being a male person, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of indecency *with* another male person shall be liable to imprisonment for two years.³² [Emphasis added.]

The High Court held that conduct 'with' a person did not include conduct 'towards' a person and that 'with' requires 'consensual participatory acts' or 'acts done in concert'.³³ The New South Wales offence was later amended to cover an act of indecency 'with or towards' another male person.

However, the Victorian offence covers conduct 'with or in the presence of' another person, which does not appear to require any participatory act by the other person or any act to be done in concert.

Justices Gaudron, Gummow and Callinan grouped 'in the presence of' with 'towards' rather than 'with' when they stated:

Her Honour the trial judge's summing up did not need, in view of the fact that the point was not raised before, to draw any relevant distinction between the commission of an offence with a person, and an offence committed in the presence of, or towards, a person.³⁴

It would be unfortunate if the Victorian offence continued to be interpreted more narrowly than appears to be required on its terms, particularly if this has the effect of preventing the prosecution of some historical child sexual abuse offences. However, we note the Victorian DPP's submission that the number of matters affected by this interpretation of the offence is low and decreasing.

We anticipate that states and territories will continue to reform their child sexual abuse offences generally – and, where any particular difficulties arise, to ensure that they remain as effective as possible – in addition to considering the particular reforms we recommend in this Part III.

11 Particulars and persistent child sexual abuse offences

11.1 Introduction

One of the difficulties in successfully prosecuting child sexual abuse offences arises from the need to provide details – called ‘particulars’ – of the alleged abuse with which the alleged perpetrator will be charged.

As discussed in Chapter 2, the accused is entitled to a fair trial, or at least a right not to be convicted other than after a fair trial. One element of a fair trial for the accused is being given information sufficient to know the case against him or her.

However, it is often difficult for victims or survivors to give adequate or accurate details of the offending against them because:

- young children may not have a good understanding of dates, times and locations or an ability to describe how different events relate to each other across time
- delay in reporting may cause memories to fade or events to be (wrongly) attributed to a particular time or location when they in fact occurred earlier or later, or at another location
- the abuse may have occurred repeatedly and in similar circumstances, so the victim or survivor is unable to describe specific or distinct occasions of abuse.

These difficulties do not mean that the allegations about the acts of sexual abuse perpetrated on the victim or survivor are untrue. Rather, there may be gaps, uncertainty, confusion or even errors in the details the victim or survivor is able to give of the circumstances surrounding the abuse.

These difficulties can arise in any child sexual abuse cases. However, features of institutional child sexual abuse mean that they are likely to arise in these cases. In particular:

- Institutional abuse is often not reported for years, even decades, after it occurred. Abuse by a person in authority is particularly associated with long delays in reporting.³⁵
- Perpetrators of institutional child sexual abuse may have access to a child over a lengthy period of time and may repeatedly abuse the child in similar circumstances.

Particularly in cases of repeated abuse – which occur often in familial as well as institutional contexts – there is a real risk that the most extensive abuse will be the hardest to charge and prosecute.

In late 2016, we commissioned research in relation to memory and the requirements of the law that are relevant to child sexual abuse cases. We have recently published Professor Goodman-Delahunty, Associate Professor Nolan and Dr Evianne van Gijn-Grosvenor’s report, *Empirical guidance on the effects of child sexual abuse on memory and complainants’ evidence* (Memory Research).³⁶ The Memory Research confirms the many difficulties for complainants in providing adequate particulars, particularly in cases of repeated abuse. We discuss this research in section 11.7.

States and territories have tried to address at least some of these concerns by introducing persistent child sexual abuse offences. The offences have different names and some different requirements across jurisdictions.

However, it is not clear that these offences have adequately addressed these concerns.

In *R v Johnson*³⁷ (*Johnson*) in November 2015, the South Australian Court of Criminal Appeal overturned a conviction for persistent sexual exploitation of a child. On this charge, the complainant had given evidence that her brother sexually assaulted her every week or so over a period of two years. She said, 'There was nothing to differentiate between one assault to the – sexual assault to the other'.³⁸

Justice Peek held (with Sulan and Stanley JJ agreeing³⁹) that, for the jury to agree that the accused committed the same two or more acts of sexual exploitation, in order to convict:

there must be a minimum amount of evidence adduced by the prosecution to enable jurors in the jury room to delineate two offences (at least) *and* to agree that *those* two offences were committed.⁴⁰ [Emphasis original.]

Justice Peek held that the complainant's evidence did not allow identification of any act, let alone two acts, which could be delineated and agreed upon by the jurors.⁴¹

Justices Sulan and Stanley agreed with the reasons of Peek J but also gave reasons commenting on the offence of persistent exploitation of a child. They stated:

If the evidence rises no higher than a general statement such as that given in this case, even though the jury may be satisfied that there occurred numerous acts of sexual exploitation over a number of years, but it is impossible to identify two or more acts so that the conclusion can be reached that the jury, either unanimously or by majority, agreed on the same two or more acts, then the defendant is entitled to an acquittal. *As the reasons of Peek J demonstrate, the operation of [this offence] can produce the perverse paradox that the more extensive the sexual exploitation of a child, the more difficult it can be proving the offence.*⁴² [Emphasis added.]

The South Australian Director of Public Prosecutions (DPP) subsequently brought an appeal in the case of *R v Hamra*⁴³ (*Hamra*) before a bench of five judges in the South Australia Court of Criminal Appeal so that it could reconsider the decision in *Johnson*.⁴⁴ While the court in *Hamra* distinguished *Johnson* and appears essentially to have confined *Johnson* to its facts, it seems likely that the requirement for the jury to be unanimous as to the commission of the same acts may continue to create difficulties in some cases. We discuss *Johnson* and *Hamra* in section 11.4.2.

We have heard evidence in some of our case studies about the extent to which persistent child sexual abuse offences may overcome the difficulties of providing sufficient particulars to prosecute institutional child sexual abuse:

- In Case Study 11 on the Christian Brothers institutions in Western Australia, the Western Australian Deputy DPP gave evidence about the Western Australian offence.⁴⁵
- In Case Study 26 on St Joseph’s Orphanage, Neerkol, a consultant Crown prosecutor and in-house counsel for the Queensland Office of the Director of Public Prosecutions (ODPP) gave evidence about the Queensland offence.⁴⁶
- In Case Study 33 on The Salvation Army (Southern Territory), the South Australian DPP gave evidence about the South Australian offence.⁴⁷
- In Case Study 38, in relation to criminal justice issues, a New South Wales Crown prosecutor and the South Australian DPP gave evidence illustrating the limited use of the provision in its current form.⁴⁸

In the Consultation Paper, we identified the importance of making these offences as effective as possible for child sexual abuse cases without making the trial unfair for the accused.

Many of the submissions in response to the Consultation Paper discussed persistent child sexual abuse offences.

In Case Study 46, we examined the experiences of a survivor, FAB, in the recent prosecution of Brother Christopher Rafferty for child sexual abuse offences in New South Wales. A number of the witnesses who gave evidence in Case Study 46 commented on the difficulties for survivors in particularising child sexual abuse, the example provided by the prosecution of Brother Rafferty and the effectiveness of persistent child sexual abuse offences.

11.2 The prosecution of Brother Rafferty

In August 2016, Brother Rafferty was tried in relation to six counts of child sexual abuse alleged to have been committed between 1984 and 1987 against one complainant, FAB. Three counts were for indecent assault and three counts were for sexual assault.⁴⁹ The trial proceeded before a judge sitting alone without a jury.

FAB alleged that Brother Rafferty, a teacher at St Patrick’s College in Goulburn, sexually abused him while he was a student at that school and taking music lessons from Brother Rafferty.⁵⁰

Brother Rafferty was acquitted on all six counts.

In the public hearing in Case Study 46, we heard evidence from FAB about the abuse and its impact on him.⁵¹ He gave evidence of his attendance at a private session conducted by the Royal Commission and the Royal Commission’s referral of his allegations to police.⁵²

FAB gave evidence about his experiences of reporting the abuse to police.⁵³ FAB gave the following evidence about his experiences in giving evidence in the trial:

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.⁵⁴

FAB also referred to how difficult and traumatic it is to try to remember details about incidents that happened 30 years earlier. He told the public hearing:

I understand that charges need to be proven beyond reasonable doubt. But in the context of trying to remember events that happened so many years ago, some leeway needs to be given to victims of child sexual abuse when they give evidence. It is often very difficult, and very traumatic, to try and remember details about incidents that happened thirty-odd years ago. It is especially difficult doing so in a court environment, where everything is unfamiliar and you feel like your credibility is on the line.⁵⁵

In relation to how Brother Rafferty was charged, FAB gave the following evidence:

I believe that if Rafferty had been charged with a single charge in relation to a number of incidents of sexual abuse, then my evidence would have been more compelling and there would be a better chance that he would have been found guilty.⁵⁶

In spite of his experiences in the trial and the acquittal of Brother Rafferty on all counts, FAB told the public hearing:

If I had to go through the criminal process again, I would, because it would help somebody else. I don't think doing it again for me would change anything, but I'm more concerned about this happening to some other child.⁵⁷

Mr Lou Lungo, the Crown prosecutor in the prosecution of Brother Rafferty, gave evidence in the public hearing in Case Study 46.

Mr Lungo said of FAB's difficulties in particularising the six counts:

with [FAB], the offending was so consistent that he would be saying, 'Well, it happened every time we had a music lesson', and the difficulty was that he was unable to particularise, particularly in relation to count 2, that particular event, the circumstances surrounding it, such as, 'It happened on my birthday' or 'It happened because of a particular event.'⁵⁸

Because the trial proceeded before a judge alone, the judge was required to provide reasons for the acquittal.

What is particularly striking about this case is that the judge, in acquitting the accused on all counts, 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.⁵⁹

Relevant to the law's requirements for particulars and detailed evidence, the judge said:

The Crown has to prove the particular incident that is said to support the count on the indictment. It is not sufficient for the Crown to establish some generalised sexual misconduct by the accused towards the complainant.⁶⁰

Mr Lungo gave evidence about FAB's difficulties in the witness box and inconsistencies between the account that FAB gave to the court and the earlier account he had given to the Catholic Church's Professional Standards Office.⁶¹

The judge described FAB's evidence as follows:

When I look at the complainant's evidence generally, the complainant did present to me as psychologically damaged. I am not an expert obviously. He said he had suffered depression; he had been suicidal. The evidence was replete with confusion and inconsistency. Indeed he gave evidence in support of only three of the six counts ultimately, but confusion and inconsistency is probably what one would expect had he been sexually abused as he says.⁶²

Mr Lungo gave evidence that, in his experience, it is not unusual for witnesses in child sexual abuse cases to give inconsistent evidence and to become confused under cross-examination, including where the witness is an adult and the alleged abuse happened some time ago.⁶³

The judge also said that FAB's evidence 'gave the impression of a global recollection rather than an individual recollection' and that part of the difficulty with the evidence in relation to one of the counts was 'that the flavor is very general'.⁶⁴

Mr Lungo gave evidence that it is not unusual, in cases where there is an allegation of sustained abuse involving many incidents of abuse, that the complainant tends to merge them all together.⁶⁵

In relation to FAB's evidence on one count, the judge referred to inconsistency between the count and the evidence and said, 'I have to be satisfied that the complainant is recalling an actual event'.⁶⁶

The judge concluded in relation to FAB's evidence as follows:

I accept that he genuinely believes he was sexually assaulted by the accused at the college and I do accept that at some point he was.⁶⁷

While the judge said that evidence of earlier complaint suggested that FAB's allegations were true and that evidence from FAB's then wife of a conversation she had with the accused suggested that the accused had abused the complainant, the judge concluded as follows:

What is the conclusion of it all? I need to look at all the evidence and the concern here is I need to be satisfied of the particular incidents and I need to be satisfied of those particular incidents on the totality of all the evidence in the trial. That is the difficulty here but I should say that *I am well satisfied that the accused did sexually abuse the complainant at school and I reject his blanket denial as a reasonable possibility. I do not believe him on that.* The complainant made a complaint way back in 1999 which was not properly dealt with. The circumstances of that complaint in my view are strongly indicative of truth. The conversation with [FAB's former wife] in 2004 with the accused is only explicable on the basis that abuse did take place and with the complainant and as I said I accept her version beyond reasonable doubt.

Having said all that I cannot be satisfied of the particular incidents that are said to found the particular charges, I just cannot be satisfied of those incidents beyond reasonable doubt. The complainant has only given evidence of three of the six counts, and as to the others, the evidence is too imprecise and vague and inconsistent to accept beyond reasonable doubt in a criminal trial. The accused is acquitted. He is found not guilty on all the counts.⁶⁸ [Emphasis added.]

The example of the prosecution of Brother Rafferty, who was acquitted in circumstances where the judge said that he was 'well satisfied that the accused did sexually abuse the complainant at school', is particularly relevant to the consideration of the need for particulars and the extent to which a persistent child sexual abuse offence might address the difficulties many complainants will have in giving details about abuse that is alleged to have occurred many years earlier.

The particular forms of the persistent child sexual abuse offences that apply in New South Wales and in Queensland are discussed in section 11.4. Mr Lungo said that, if the persistent child sexual abuse offence in New South Wales was charged, there might still be difficulties for complainants in identifying particular events occurring on particular occasions.⁶⁹ Mr Lungo thought that the offence in Queensland might address the problem apparent in the prosecution of Brother Rafferty.⁷⁰

11.3 Sufficient particulars

A person accused of a criminal act is entitled to know the case against him or her, and the rules of evidence generally require the prosecution to provide particulars that identify the ‘act, matter or thing’, including details of the time, place and manner of an alleged offence.⁷¹

At the very least, a complainant in a child sexual abuse matter must be able to identify and describe a particular occasion of abuse. If a victim or survivor of child sexual abuse cannot give sufficient particulars of the abuse, this reduces the likelihood of a successful prosecution and it may be instrumental in the decision of police or prosecutors not to prosecute.⁷²

Particulars lessen the risk of duplicity, enabling the accused to know the nature of the charges alleged against him or her.⁷³ The rule against duplicity prevents the prosecution from alleging two or more counts in a single charge on an indictment. One count must be proved under one charge.⁷⁴

There are two types of duplicity:

- *patent* duplicity occurs when two counts are charged against one person on the same charge
- *latent* duplicity occurs when there are more transactions or events in the evidence fitting the description of the charged offences than there are charges – creating uncertainty about which transactions or events the prosecution has charged.

Historically, latent duplicity (also referred to as ‘latent ambiguity’) has impeded the prosecution’s ability to charge instances of repeated sexual assaults where the complainant does not accurately remember the particulars of each instance but can describe a course of conduct.

Particulars also define the issues so that the relevance and admissibility of evidence can be accurately determined at trial.⁷⁵

All jurisdictions have legislative requirements that particulars be presented on the indictment or other form in which the charge is lodged with the court.⁷⁶

The *sufficiency* of particulars is decided by the court on a case-by-case basis.⁷⁷

Where insufficient particulars are given, the court may rule that the accused cannot receive a fair trial, and the matter may be delayed, retried or stayed. An accused may not have a fair trial where they are embarrassed by having to defend themselves against an indeterminate number of offences that occurred on unspecified dates. They may be unable to present their defence or test the complainant if sufficient particulars are not given.

Insufficient particulars may also make it difficult for the court to:

- determine the admissibility of evidence
- determine the unanimity in a jury verdict
- identify the appropriate offence and punishment.⁷⁸

As a result, a charge must identify the essential factual ingredients of the offence,⁷⁹ which will usually include the time, place and manner of the accused's alleged acts or omissions.⁸⁰ The prosecution should provide as much specificity of the time of the alleged offence as is available in the circumstances of the case.⁸¹

In some circumstances, it may be essential to provide the date of an alleged offence – for example, where:

- the offence is subject to a limitation period, and specifying a period of time would include dates before and after the limitation period expired
- the offence has been repealed, and specifying a period of time would include dates before and after the offence was repealed
- the age of the complainant is an essential element, and specifying a period of time would include dates either side of the complainant's birthday
- the accused has a potential alibi.

In other circumstances, it is possible to charge an offence as having occurred between certain dates within a stated period. If a period of months or years is given, it may be necessary to particularise a distinguishing fact or event that happened close to the time of the alleged offence – for example, it happened in a specified year 'during the school camp'.

If the sexual abuse is alleged to have been committed repeatedly on many occasions, charges could be brought for the first and last occasions of offending if the complainant can remember them most clearly and can give sufficient particulars of those occasions.

In 1989 in *S v The Queen*,⁸² the High Court held that offending that could not be sufficiently particularised could not be successfully prosecuted. This case involved allegations of familial child sexual abuse, which was said to have occurred 'every couple of months for a year'. The accused was convicted in the District Court of Western Australia on three counts of carnal knowledge against his daughter. Each count on the indictment charged one act of carnal knowledge occurring within a different 12-month period, effectively charging one act per year over three years. The trial judge had rejected the accused's application for further particulars.

The High Court quashed the conviction and ordered a new trial. The High Court found that framing the charges in this manner, with one offence per year, was acceptable and did not give rise to duplicity.⁸³ However, the complainant gave evidence of two specific occasions of intercourse and of numerous other uncharged acts that were alleged to have occurred over a two-year period, happening 'every couple of months for a year'. The acts about which the complainant gave evidence were not linked to the counts on the indictment. The High Court held that the prosecution could not lead evidence equally capable of referring to a number of occasions, any one of which might constitute the offence described in the charge, and invite the jury to convict on any one of them. This latent ambiguity required correction if the accused was to have a fair trial.⁸⁴

11.4 Persistent child sexual abuse offences

11.4.1 Background

The High Court's decision in *S v The Queen* gave impetus to legislative reform,⁸⁵ and between 1989 and 1999 all Australian jurisdictions introduced persistent child sexual abuse offences.

Queensland was the first jurisdiction to introduce the offence in 1989,⁸⁶ followed by Victoria and the Australian Capital Territory in 1991;⁸⁷ Western Australia in 1992;⁸⁸ Tasmania, South Australia and the Northern Territory in 1994;⁸⁹ and New South Wales in 1999.⁹⁰ The Model Criminal Code also produced a persistent child sexual abuse offence in 1996. These offences had various titles, including 'persistent sexual abuse of a child',⁹¹ 'persistent sexual conduct with a child'⁹² and 'maintaining a sexual relationship with a child/young person'.⁹³

The drafting of the provisions varied, but each provision sought to 'allow prosecution to proceed in cases where there is evidence of a course of unlawful conduct over time, but the evidence lacks the particularity required to permit charges to be laid for each of the separate criminal acts'.⁹⁴

Each provision contained a requirement for the prosecution to prove the sexual relationship by showing three distinct occasions of unlawful sexual conduct, to be proved beyond reasonable doubt. There was no requirement for particulars such as date and the exact circumstance and order of offences. The Queensland Law Reform Commission expressed the view that the requirement to prove three offences was an 'important safeguard for ensuring a fair trial for the accused'.⁹⁵

When they were first introduced, each offence operated prospectively. That is, it applied only in relation to sexual offending that occurred after the offence commenced.

The Queensland offence of 'maintaining a sexual relationship with a child/young person' under section 229B of the *Criminal Code Act 1899* (Qld) schedule 1 (*Criminal Code* (Qld)) was considered by the High Court in 1997 in *KBT v The Queen*⁹⁶ (*KBT*).

At the time relevant to the offences alleged to have been committed from 1989 to 1991, section 229B of *Criminal Code* (Qld) provided:

- (1) Any adult who maintains an unlawful relationship of a sexual nature with a child under the age of 16 years is guilty of a crime and is liable to imprisonment for 7 years.
- (1A) A person shall not be convicted of the offence defined in subsection (1) unless it is shown that the offender, as an adult, has, during the period in which it is alleged that the offender maintained the relationship in issue with the child, done an act defined to constitute an offence of a sexual nature in relation to the child, other than an offence defined in section 210(1)(e) or (f), on 3 or more occasions and evidence of the doing of any such act shall be admissible and probative of the maintenance of the relationship notwithstanding that the evidence does not disclose the dates or the exact circumstances of those occasions.

In *KBT*, the accused was alleged to have maintained an unlawful sexual relationship with the complainant from when she was 14 to almost 16 years old. He was charged under section 229B of the *Criminal Code* (Qld). The complainant's evidence was not specific as to dates. Rather, she gave evidence of a general course of sexual misconduct by the accused which fell into six broad categories, including acts that 'occurred while riding the farm motorcycle' with the appellant and acts that occurred 'during afternoon rests on a bean bag'.⁹⁷ Within these categories, the evidence did not identify specific incidents.

The prosecution conceded, and the High Court agreed, that the offence in section 229B required the jury to be satisfied beyond reasonable doubt as to the commission of the same three acts which constituted relevant sexual offences. This meant that three occasions of abuse must be clearly articulated and particularised, albeit without requiring dates and exact circumstances. This was because it was the commission of the three acts that would constitute individual offences that was found to constitute the offence under section 229B.⁹⁸

KBT was a decision about the Queensland offence. However, the offences in other jurisdictions were relevantly in the same form as the Queensland offence, so *KBT* effectively applied to all of the persistent child sexual abuse offences. Justice Kirby described the position in the High Court's later decision in *KRM v The Queen* as being that:

[The relevant persistent child sexual abuse offence (in this case the Victorian offence)] relieves the complainant of the need, or the prosecution of the requirement, to prove the 'dates or the exact circumstances of the alleged occasions'. But 'occasions' there must still be.⁹⁹ [Reference omitted.]

In its consultation paper *Review of sexual offences* (2013), the Victorian Department of Justice stated that, since *KBT*:

It is not known how many complainants have their evidence rejected, either by police, prosecutors or judges, as being insufficiently particular for the purposes of a trial. Nonetheless, it can be assumed that there is a significant number of such cases and that in those cases the law has not been able to do justice to victims/survivors of long-term sexual abuse. Such failure to do justice is essentially due to the fact that the evidence was not in the same form as the evidence found in single episode offences, and is not necessarily due to there being any less certainty that repeated offending in fact took place.¹⁰⁰

Following the decision in *KBT*, Queensland and South Australia made substantive amendments to their persistent child sexual abuse offences.¹⁰¹

In 2003, Queensland amended its offence so that the unlawful sexual relationship, rather than individual acts, constitutes the offence. The then Queensland Attorney-General described the amended offence as follows:

The offence as redrafted removes the requirement to prove three particular acts of a sexual nature. Instead the offence is established by proof of the relationship. For a person to be convicted of the offence, the jury must be satisfied beyond a reasonable doubt that the evidence establishes that an unlawful sexual relationship existed, but they do not have to agree unanimously on particular acts comprising it.¹⁰²

A discussion paper released in 2006 by the then South Australian Attorney-General stated that, because it was subject to the restrictions of *KBT*, the offence of persistent child sexual abuse in section 74 of the *Criminal Law Consolidation Act 1935* (SA) was rarely charged. The discussion paper noted that it was 'necessary for the prosecution to prove (and therefore to particularise) three separate instances of sexual offending in order to sustain a s 74 offence' and stated that:

Logically, if a child is able to particularise three occasions (as required by s 74) then those three occasions could be separately charged (as three counts on the Information) rather than all encompassed in the s 74 offence (with one count on the Information of persistent sexual abuse). Indeed, a separate charging practice would be preferable as it would allow for some guilty verdicts in the situation where a jury was satisfied about one or two of the occasions but not all three occasions.¹⁰³

South Australia amended its offence in 2008 to reduce, from three to two, the number of occasions that needed to be proved to prove the offence. Conviction still relies upon proving at least two unlawful acts to show the relationship and the jury must agree on the same two or more acts.¹⁰⁴

South Australia also renamed the offence ‘persistent sexual exploitation of a child’ instead of ‘persistent sexual abuse of a child’. The Australian Law Reform Commission and the New South Wales Law Reform Commission have suggested that this change was intended to focus the offence on acts of sexual exploitation that comprise a course of conduct rather than on a series of separate particularised offences.¹⁰⁵

South Australia¹⁰⁶ and Tasmania¹⁰⁷ amended their offences to make them retrospective in operation. That is, the offence could only be charged prospectively, but it could rely on occasions of abuse that occurred before the offence commenced.

Western Australia amended its offence to provide that the jury need not be satisfied of the same unlawful sexual acts where more than three acts are alleged.¹⁰⁸

11.4.2 Current persistent child sexual abuse offences

Table 11.1 outlines the current offence in each jurisdiction.

Table 11.1: Overview of current persistent child sexual abuse provisions

| Jurisdiction | Title | Legislation | Summary of offence | Jury to agree on occasions | Retrospective |
|-------------------------------------|--|--|--|----------------------------|---------------|
| New South Wales | Persistent sexual abuse of a child | <i>Crimes Act 1900</i> , s 66EA | 3 or more separate occasions engages in conduct that constitutes a sexual offence against a child | Yes | No |
| Victoria | Persistent sexual abuse of a child under the age of 16 | <i>Crimes Act 1958</i> , s 47A – to be replaced by s 49J | 3 or more separate occasions engages in conduct that constitutes a sexual offence against a child | Yes (<i>KBT</i> applies) | No |
| Queensland | Maintaining a sexual relationship with a child | <i>Criminal Code</i> , s 229B | Maintains an unlawful sexual relationship with a child, involving more than 1 unlawful sexual act | No | No |
| Western Australia | Persistent sexual conduct with a child under 16 | <i>Criminal Code</i> , s 321A | 3 or more separate occasions engages in conduct that constitutes a sexual offence against a child | No | No |
| South Australia | Persistent sexual exploitation of a child | <i>Criminal Law Consolidation Act 1935</i> , s 50 | 2 or more separate occasions engages in conduct that constitutes a sexual offence against a child | Yes (<i>KBT</i> applies) | Yes |
| Tasmania | Maintaining a sexual relationship with young person | <i>Criminal Code</i> , s 125A | Maintains an unlawful sexual relationship with a child, involving more than 3 unlawful sexual acts | Yes (<i>KBT</i> applies) | Yes |
| Australian Capital Territory | Maintaining a sexual relationship with young person | <i>Crimes Act 1900</i> , s 56 | Maintains a sexual relationship with a child, involving more than 3 unlawful sexual acts | Yes (<i>KBT</i> applies) | No |
| Northern Territory | Sexual relationship with a child | <i>Criminal Code</i> , s 131A | Maintains a relationship of a sexual nature with a child, involving more than 3 unlawful sexual acts | Yes (<i>KBT</i> applies) | No |

Required number of unlawful acts

In most jurisdictions, the offence continues to require proof of the occurrence of at least a prescribed number of unlawful sexual acts. In New South Wales, Victoria, Western Australia, Tasmania, the Australian Capital Territory and the Northern Territory, three or more unlawful sexual acts must be proved. In South Australia, more than one unlawful sexual act must be proved.

In Queensland, more than one unlawful sexual act is also required to constitute an unlawful sexual relationship, but the actus reus of the offence is the unlawful sexual relationship and not particular unlawful sexual acts.

The Queensland offence under section 229B of the *Criminal Code* (Qld) relevantly provides:

- (2) An unlawful sexual relationship is a relationship that involves more than 1 unlawful sexual act over any period.
- (3) For an adult to be convicted of the offence of maintaining an unlawful sexual relationship with a child, all the members of the jury must be satisfied beyond reasonable doubt that the evidence establishes that an unlawful sexual relationship with the child involving unlawful sexual acts existed.
- (4) However, in relation to the unlawful sexual acts involved in an unlawful sexual relationship –
 - (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 jury 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; and
 - (c) all the members of the jury are not required to be satisfied about the same unlawful sexual acts.

Decisions of the Queensland Court of Criminal Appeal establish that:

- the unlawful relationship provides the key element of the offence¹⁰⁹
- the indicia of maintaining a relationship include the duration of the alleged relationship, the number of acts and the nature of acts engaged in. (The court held that seven instances of improper touching inside and outside of clothes over five years did not amount to ‘maintaining a relationship’¹¹⁰)
- the rules of procedural fairness are ‘sufficiently flexible to accommodate different degrees of particularisation being required in different circumstances’¹¹¹

- the amendment does not remove the trial judge’s power to ensure a fair trial¹¹²
- the amendment does not remove the court’s power to set aside a conviction on the grounds that there was a miscarriage of justice where the accused is given so little information about the charge as to render it impractical to prepare a defence¹¹³
- the provision allowing the jury not to agree on two or more unlawful sexual acts does not offend Chapter III of the Commonwealth Constitution.¹¹⁴

In relation to the constitutional argument, the Queensland Court of Criminal Appeal held:

There is no such conflict. The jurors could be unanimously satisfied that the defendant maintained an unlawful sexual relationship with the child involving more than one unlawful sexual act whilst at the same time disagreeing about which two or more of numerous alleged unlawful sexual acts were proved beyond reasonable doubt.¹¹⁵

The offender in that case applied to the High Court for special leave to appeal in relation to the constitutional argument. He argued that the offence of maintaining an unlawful sexual relationship under section 229B offended Chapter III of the Constitution and that he was unable to receive a fair trial under the provision.¹¹⁶ In 2012, the High Court refused special leave, with French CJ stating:

[The applicant] argues that section 229B of the Code is invalid in light of Chapter III of the Constitution of the Commonwealth because, in effect, it deprives a court hearing a trial of an accused, under that section, of the ability to provide procedural fairness in relation to the provision of particulars and because it authorises a jury to return a verdict where all members of the jury are not required to be satisfied about the same unlawful sexual acts underpinning the alleged relationship.

The Court of Appeal held that the section does not preclude the court directing the provision of sufficient particulars of the offence so that an accused person is in a position to answer the case against him at trial. It also held that section 229B requires jury unanimity upon the essential allegation that the defendant maintained a sexual relationship with a child that involved more than one unlawful sexual act. In our opinion, the decision of the Court of Appeal is not attended with sufficient doubt to warrant the grant of special leave. Special leave will be refused.¹¹⁷

In 2008, in *MAW v The Queen*, the High Court also refused an application for special leave to appeal in relation to a conviction under section 229B.¹¹⁸

In 2014, the Northern Territory Government produced a draft Bill for consultation, which, if enacted, would adopt the Queensland approach where the maintenance of the relationship, rather than particular unlawful sexual acts, constitutes the offence.¹¹⁹ It appears that the draft Bill remains under consideration.¹²⁰

Requirement for extended jury unanimity

As discussed above, the Queensland offence does not require that all members of the jury be satisfied about the same unlawful sexual acts in order to find the offence proved – the jury must be satisfied that the unlawful sexual relationship was maintained, but they can be so satisfied relying on different sexual acts.

Section 229B of the *Criminal Code* (Qld) relevantly provides:

- (4) However, in relation to the unlawful sexual acts involved in an unlawful sexual relationship –

...

- (c) all the members of the jury are not required to be satisfied about the same unlawful sexual acts.

The requirement that the jury unanimously (or by majority, where allowed) agrees not only that the accused committed the offence but also that the accused committed the same particular acts that constitute the offence is sometimes referred to as the requirement for ‘extended jury unanimity’.

The requirement for extended jury unanimity appears to have influenced the decision of the South Australian Court of Criminal Appeal in *Johnson*,¹²¹ which we discussed in section 11.1. In that case, Peek J held (with Sulan and Stanley JJ agreeing¹²²) that, in order for the jury to agree that the accused committed the same two or more acts of sexual exploitation required to convict:

there must be a minimum amount of evidence adduced by the prosecution to enable jurors in the jury room to delineate two offences (at least) *and* to agree that *those* two offences were committed.¹²³ [Emphasis original.]

Justice Peek held that the complainant’s evidence did not allow identification of any act, let alone two acts, which could be delineated and agreed upon by the jurors.¹²⁴

Justices Sulan and Stanley agreed with the reasons of Peek J but also gave reasons commenting on the offence of persistent exploitation of child. They stated:

If the evidence rises no higher than a general statement such as that given in this case, even though the jury may be satisfied that there occurred numerous acts of sexual exploitation over a number of years, but it is impossible to identify two or more acts so that the conclusion can be reached that the jury, either unanimously or by majority, agreed on the same two or more acts, then the defendant is entitled to an acquittal.¹²⁵

The South Australian DPP subsequently brought an appeal in the case of *Hamra*¹²⁶ before a bench of five judges in the South Australia Court of Criminal Appeal so that it could reconsider the decision in *Johnson*.¹²⁷ While the court in *Hamra* distinguished *Johnson* and appears essentially to have confined *Johnson* to its facts, it seems likely that the requirement for the jury to be unanimous as to the commission of the same acts may continue to create difficulties in some cases.

The South Australian Court of Criminal Appeal handed down its decision in *R v Hamra* on 8 December 2016.¹²⁸

The accused, Mr Stephen Hamra, was a family friend of the complainant's family. He was charged with one count of persistent exploitation of a child contrary to section 50 of the *Criminal Law Consolidation Act 1935 (SA)*.

The following is taken from the headnote of the decision:

BT, the complainant, alleged that between 30 October 1977 and 1 November 1982 the respondent committed more than one act of sexual exploitation at Morphett Vale and another place. It was specifically alleged that the respondent touched BT's genitals, placed his penis between BT's bottom, caused BT to touch his penis and performed fellatio on BT.

At trial, certain parts of BT's evidence were vague, other parts conflicted with evidence given by BT's mother.

BT gave evidence that while living at home he slept in two different bedrooms during different periods of his life. BT's evidence included that the respondent interfered with him in each of those bedrooms, and that the offending was more frequent while he lived in the second bedroom. BT also gave evidence that at one stage his parents went on holiday to Fiji, and that while they were away the respondent's offending increased in severity. The instances of fellatio only occurred while BT's parents were on holiday.¹²⁹

The trial judge, sitting without a jury, accepted the defence submission that there was no case to answer and acquitted the accused. The DPP appealed against that decision. The Court of Criminal Appeal unanimously held that the complainant's evidence, when taken at its highest, was capable of proving two or more offences over a period of three or more days and set aside the verdict of acquittal. By majority (Peek J dissenting), the matter was remitted to the District Court for a new trial (Peek J would have remitted the matter to the trial judge to complete the trial according to law).

Chief Justice Kourakis delivered the leading judgment. Justices Kelly and Lovell agreed with Kourakis CJ's proposed order and reasons.¹³⁰ Justice Nicholson agreed with Kourakis CJ's proposed order and agreed with the reasons of both Kourakis CJ and Peek J.¹³¹ Justice Peek agreed with Kourakis CJ that the trial judge erred in finding that there was no case to answer, but he delivered separate reasons and proposed a different order to that proposed by Kourakis CJ.¹³²

Chief Justice Kourakis identified what is required to prove the offence under section 50 as follows:

- It is not necessary to prove – whether as an element of the offence, a matter of particularisation or by necessary implication from the extended unanimity rule – that the acts of sexual exploitation occurred in circumstances so peculiar that each occasion of abuse can be separately identified.¹³³
- If the complainant is unable to describe any surrounding circumstances peculiar to any of the occasions, this may bear on the complainant’s reliability or credit but, if the complainant’s evidence is accepted, the section 50 offence is proved.¹³⁴
- Unlike the Victorian form of the offence considered in *KRM v The Queen*¹³⁵ and *R v SLJ*.¹³⁶
[Section 50] does not incorporate as an element of the offence the commission of a prescribed sexual act on *particular occasions*. On the contrary, s 50(2) of the CLCA [*Criminal Law Consolidation Act 1935 (SA)*] contemplates that it may not be possible to particularise the occasion of the act in a way which would allow it to be the subject matter of a charge of a prescribed sexual offence¹³⁷ [Emphasis original.]
- That particular occasions are not required is underscored by section 50(4)(b), which requires a course of conduct to be alleged with particularisation of the nature and period of time over which the acts constituting the course of conduct were committed,¹³⁸ and section 50(4)(b)(ii) goes further than the Victorian form of the offence considered in *KRM v The Queen*¹³⁹ in this regard:
The abrogation by s 50(4)(b)(ii) of the CLCA of any requirement to identify particular acts and/or occasions, or to particularise the order in which they occurred, much more effectively remedies the mischief to which the enactment of offences of this kind is directed.¹⁴⁰

The respondent on the appeal – the accused at trial – contended that the decision in *Johnson* decided to the contrary – that is, that it is necessary that the acts of sexual exploitation be identified in a way which distinguishes each act from other acts of sexual exploitation.

Chief Justice Kourakis quoted passages from the reasons of Peek J and Sulan and Stanley JJ in *Johnson*¹⁴¹ and made a number of observations about them.¹⁴² He distinguished *Johnson* and essentially limited it to its facts, stating:

the appeal ground in *Johnson* was that the verdict was unreasonable. The question was therefore whether it was open to the jury to agree either unanimously or by majority, that the same two or more acts were proved beyond reasonable doubt on the complainant’s testimony. The appeal was not brought on the ground of a failure to give the extended jury unanimity direction which is mandated by *Little*.¹⁴³ The application of the proviso which was in issue in *Little* was not an issue in *Johnson*. The statements in *Little* concerning the jury’s need to be able to identify two prescribed offences on which they must,

unanimously or by majority have agreed, are referable to what is required before the proviso can be applied in a case in which the extended unanimity direction has not been given. By contrast, in *Johnson*, the onus was on the appellant to persuade the court that there was necessarily a doubt about the appellant's guilt because the lack of particularity precluded a finding of the commission of two or more discrete acts separated by the prescribed period of time.

The decision in *Johnson* setting aside the conviction reflects the finding by the Court of Criminal Appeal that the evidence failed to prove beyond reasonable doubt the commission of two or more such acts. In considering that question, the Court, not unnaturally, referred to the difficulty faced by the jury in reaching a verdict given the lack of particularity. However, whether or not a verdict is unreasonable turns on the evaluation of the evidence by the Court of Criminal Appeal. *Minds might differ over the factual question of whether the evidence in Johnson proved that two or more acts of sexual exploitation occurred over the prescribed period of time. However, it is on that factual question which the decision in Johnson rests and must be confined.* The decision does not touch the question of principle which must here arise.¹⁴⁴ [Emphasis added.]

Chief Justice Kourakis held that the evidence of the complainant in this case, if believed, was capable of proving the commission of two or more prescribed sexual offences over a period of three days or more, so the trial judge erred in directing himself that the evidence was not capable of making out the elements of the offence and in acquitting the accused.¹⁴⁵

Justice Peek gave separate reasons for his conclusion that the trial judge erred in finding that there was no case to answer and in acquitting the accused.

Justice Peek quoted largely the same passages from *Johnson* as quoted by Kourakis CJ, and stated:

I remain firmly of the view that these statements of all three members of the court in *Johnson* are correct, as was the conclusion that the necessary minimum degree of specificity was not present and that the ground of appeal was made out.¹⁴⁶

Justice Peek stated that *Hamra* is a very different case to *Johnson*, partly because the trial did not involve a jury but also because the issue here is whether there was, as a matter of law, a case to answer.¹⁴⁷ Justice Peek agreed that various acts of which BT gave evidence satisfied the requisite minimum level of specificity required and that the trial judge erred in finding that there was no case to answer.¹⁴⁸

Justice Peek gave a number of examples of how the requirement for 'extended jury unanimity' applies to a section 50 charge:

To first take a simple example, say the prosecution case is that over a 12 month period the defendant committed one act of vaginal intercourse and one act of oral intercourse and one act of anal intercourse. The defendant could not be convicted if eight jurors found the defendant committed one act of vaginal intercourse and one act of oral intercourse (but not the anal intercourse) and four jurors found that the defendant committed one act of vaginal intercourse and one act of anal intercourse (but not the oral intercourse).

There is, of course, no magic in the different ‘types’ of intercourse used in the above example; it is simply a convenient illustration of a situation in which three ‘acts’ of sexual exploitation led in evidence readily exhibit an obvious differentiating characteristic. Thus, the situation would be the same if the prosecution case were that over a 12 month period the defendant committed three acts of vaginal intercourse, one being at the defendant’s home, one being at the defendant’s office and one being while on a picnic in Belair National Park. Again, the defendant could *not* be convicted if eight jurors found the defendant committed the acts at home and at the office (but not the alleged act at the picnic) and four jurors found that the defendant committed the acts at home and at the picnic (but not the alleged act at the office).

To take a less simple example, say the complainant gives evidence of considerably more than two acts of sexual exploitation – let us say ten in total – and the defence contends that there are uncertainties and inconsistencies associated with the evidence relating to various of those alleged acts.

Always depending upon the facts, one possible outcome is that various of the jurors may have doubts about various of the alleged acts, and even though there may be general consensus that sexual exploitation occurred more than once, the jurors may be unable to agree on two particular acts, and therefore may be unable to convict of a charge under s 50 of the Act.¹⁴⁹ [Emphasis original.]

These examples suggest a number of risks arising from the requirement for ‘extended jury unanimity’ as follows:

- ‘even though the jury may be satisfied that there occurred numerous acts of sexual exploitation over a number of years’,¹⁵⁰ they may not be able to deliver a guilty verdict despite being satisfied that the accused is a perpetrator of child sexual abuse and perhaps quite extensive child sexual abuse
- it acts against the common experience of complainants who have suffered ongoing repeated abuse that delineating separate acts may be, at best, an artificial exercise that does not convey the nature of the abuse they endured and, at worst, impossible
- it may encourage appeal courts to overturn jury verdicts too readily where the appeal court is uncertain as to what particular occasions in an ongoing course of largely indistinguishable occasions of abuse the jury must have agreed upon.

Retrospective operation

Another difference between jurisdictions in persistent child sexual abuse offences is whether the offence can operate in respect of unlawful sexual acts committed before the offence commenced. In South Australia and Tasmania, the offence applies to unlawful sexual acts, whether they were committed before or after the offence commenced.¹⁵¹

The evidence of the South Australian DPP in Case Study 33 identified the potential application of the offence to historical institutional child sexual abuse if the alleged offender had been prosecuted today.¹⁵² A consultant Crown prosecutor and in-house counsel for the Queensland ODPP gave evidence in Case Study 26 that the inability to charge the offence in Queensland in respect of unlawful acts that occurred before the offence commenced prevents prosecution for persistent child sexual abuse where historical abuse does not have sufficient particulars for individual offences to be charged.¹⁵³

11.4.3 Use of persistent child sexual abuse offences

In most jurisdictions – other than Queensland and Tasmania – the persistent child sexual abuse offence is not often charged.

Institutional child sexual abuse

There is only very limited data on the use of these offences in matters involving institutional child sexual abuse.

In the research report *A statistical analysis of sentencing for child sexual abuse in an institutional context*, of 283 sentenced matters of institutional child sexual abuse, in only 13 cases (4.6 per cent) were offenders sentenced for persistent child sexual abuse offences.¹⁵⁴ Across the 283 sentenced matters, the average number of offences per matter was 8.5.¹⁵⁵ However, it is unclear how many indictments with multiple offences had only one victim.¹⁵⁶ It is also unclear if some of these matters could not have been charged as persistent child sexual abuse offences because the offending occurred in jurisdictions where, or at a time when, the offence operated prospectively only and the offending predated the commencement of the offence.

New South Wales

In New South Wales, the offence is rarely prosecuted.

The Judicial Commission of New South Wales Judicial Information Research System database indicates that 16 cases where persistent child sexual abuse was the primary offence were finalised to sentence in the New South Wales District Court in the seven years from April 2008 to March 2015.¹⁵⁷

The submission by the New South Wales ODPP to the Australian Law Reform Commission and New South Wales Law Reform Commission inquiry into family violence stated that, between August 1999 and August 2008, prosecutions under section 66EA represented 1.89 per cent (45 in number) of all child sexual abuse matters prosecuted in New South Wales, observing that prosecutions under the provision had decreased in number over time and describing the offence as ‘profoundly under utilised’.¹⁵⁸

The New South Wales ODPP referred to the ‘widely held notion that there is no particular advantage for the prosecution to use the offence’.¹⁵⁹ Maximum penalties are the same as for a single substantive offence, and the technicalities involved in proving the offence may complicate the prosecution’s case.¹⁶⁰

The New South Wales Court of Criminal Appeal has found that the persistent child sexual abuse charge provides for a more serious offence than the offences which comprise the individual unlawful sexual acts.¹⁶¹ However, it has also held that Parliament did not intend that sentencing for offences constituting a persistent child sexual abuse charge should be harsher in outcome than for a conviction for a number of representative offences.¹⁶²

In *R v Fitzgerald*,¹⁶³ the New South Wales Court of Criminal Appeal stated that, where a conviction for an offence under s 66EA is secured:

what has been established is not a miscellany of substantive offences ... What has been established is, rather, one offence contravening s 66EA.

When that position has been reached, and when the particular offender stands for sentence accordingly, the ultimate question for the sentencing judge is where a sentence that is just according to proper sentencing principles should stand on a statutory scale, the highest point of which is a sentence of imprisonment for 25 years.

It does not seem to me to be logical to answer that question by considering what sentence(s) might or might not, or could or could not, or should or should not, have been passed had the offender been convicted of precisely particularised contraventions of [other particular sexual offence provisions], those contraventions having been charged as isolated offences ...

In my opinion, there is nothing in the New South Wales s 66EA, just as there is nothing in the South Australian s 74, to suggest that Parliament intended that the sentencing for a course of conduct which has crystallised into a s 66EA conviction, should be more harsh in outcome than sentencing for the same course of conduct had it crystallised into convictions for a number of representative offences.¹⁶⁴

Victoria

In Victoria, the persistent child sexual abuse offence does not appear to have been used extensively.

The Victorian Sentencing Advisory Council reported that, from 2009–10 to 2013–14, 43 people were sentenced in the higher courts for a principal offence of persistent sexual abuse of a child under 16.¹⁶⁵

Queensland

In Queensland, the persistent child sexual abuse offence is regularly prosecuted. From 2010 to 2016, 518 prosecutions under the provision were finalised as set out in Table 11.2.

Table 11.2: Prosecutions under section 229B of the Criminal Code (Qld)¹⁶⁶

| Year | Guilty verdict | Guilty plea | Discontinued | Not guilty | Total |
|--------------|----------------|-------------|--------------|------------|------------|
| 2010 | 9 | 31 | 5 | 4 | 49 |
| 2011 | 6 | 47 | 16 | 2 | 71 |
| 2012 | 10 | 58 | 10 | 8 | 86 |
| 2013 | 11 | 41 | 8 | 13 | 73 |
| 2014 | 10 | 32 | 8 | 11 | 61 |
| 2015 | 12 | 54 | 5 | 11 | 82 |
| 2016 | 13 | 55 | 15 | 13 | 96 |
| Total | 71 | 318 | 67 | 62 | 518 |

The majority (61 per cent) of these prosecutions under the Queensland provision were resolved by a guilty plea and 14 per cent of cases resulted in a jury verdict of guilty. In 12 per cent of cases, the jury entered a verdict of not guilty (in one case, the not guilty verdict was directed by the trial judge).

South Australia

The South Australian DPP gave evidence in Case Study 33 that the current South Australian persistent child sexual abuse offence had assisted with prosecuting matters that otherwise would not have had the required particulars. He stated that the offence is now ‘commonly’ used and, where there are repeat occasions of abuse, it has the advantage of enabling all the conduct that can be particularised in a general way to be ‘caught up’ within the charge.¹⁶⁷

The South Australian Office of Crime Statistics and Research provided us with data on use of the provision.¹⁶⁸

In the 2013–14 financial year, 114 charges of persistent child sexual exploitation were finalised. Of these 114 charges:

- 23 (20.2 per cent) resulted in a conviction
- 79 (69.3 per cent) were withdrawn or dismissed
- 11 (1 per cent) resulted in a not guilty finding
- one resulted in a not guilty finding due to mental incapacity.

Of the 23 charges that resulted in a conviction, 15 offenders received a penalty of immediate imprisonment. The average period of imprisonment was nine years.¹⁶⁹ Two other offenders received a suspended sentence.

The South Australian Court of Criminal Appeal has found that the actus reus of the offence remains the committing of the (two) offences and that a conviction requires the jury's agreement as to which offences constitute the offence.¹⁷⁰

It is not clear whether these decisions, the November 2015 Court of Criminal Appeal decision in *R v Johnson*¹⁷¹ and the December 2016 Court of Criminal Appeal decision in *R v Hamra*,¹⁷² discussed above, will affect the efficacy or use of the offence in South Australia.

In evidence to the Royal Commission, the South Australian DPP stated that 'The requirement for the jury to be unanimous as to the same two or more acts of sexual exploitation might, in theory, limit the utility of this provision'.¹⁷³

In *R v Johnson*, Sulan and Stanley JJ stated:

We consider that if it is the intention of the legislature to create an offence of persistent sexual exploitation involving the maintenance of a sexual relationship with a child, then consideration should be given to amending s 50 along similar lines to the Queensland provision.¹⁷⁴

We stated in the Consultation Paper that we understood the South Australian Government was reviewing its offence.¹⁷⁵ We do not know if this review is continuing following the decision in *R v Hamra*,¹⁷⁶ which was handed down after the South Australian DPP gave evidence in Case Study 46.

The High Court has recently granted special leave to appeal from the decision of the South Australian Court of Criminal Appeal in *R v Chiro*,¹⁷⁷ in relation to the issue of special verdicts and sentencing for the offence of persistent sexual exploitation of a child.¹⁷⁸ The appellant, a former high school teacher, was convicted of the offence of persistent sexual exploitation of a child under section 50(1) of the *Criminal Law Consolidation Act 1935* (SA) in relation to a girl who was his student when the abuse commenced. The acts of sexual exploitation particularised by the prosecution ranged from kissing on the lips to digital and oral penetration.¹⁷⁹

The appellant argued in the South Australian Court of Criminal Appeal that, given the wide range of acts alleged, the trial judge should have taken one or more special verdicts to determine in respect of which acts the jury had found the accused guilty.¹⁸⁰ The appellant also argued that, if a special verdict was not taken, the judge should have sentenced on the basis that only the lower level of offending had been proved.¹⁸¹ The South Australian Court of Criminal Appeal held that a special verdict was not required,¹⁸² and Vanstone J stated that asking for one or more special verdicts ‘would potentially have detracted from the jury’s focus on its real task.’¹⁸³ It also held that the sentence imposed was not manifestly excessive.¹⁸⁴

Tasmania

Tasmania records frequent use of its persistent child sexual abuse offence.

From 2001 to 2014, the Tasmanian Sentencing Advisory Council reported that 199 convictions under the provision were recorded.¹⁸⁵ During this period, convictions for maintaining a sexual relationship with a young person constituted 39 per cent (199) of all sexual assault convictions (509).¹⁸⁶ The Sentencing Advisory Council noted the suggestion that rapes against children may be being charged under the persistent child sexual abuse offence rather than as individual rape offences.¹⁸⁷ The Sentencing Advisory Council also reported that some 35 per cent of convictions under the persistent child sexual abuse provision had been for offences where the court characterised the offender and complainant as being in a ‘consensual’ relationship.¹⁸⁸

Other jurisdictions

The Royal Commission does not have statistics on use of persistent child sexual abuse offences in Western Australia, the Northern Territory or the Australian Capital Territory.

We understand that in these jurisdictions the provision is rarely used, except perhaps on occasion following a negotiated guilty plea.

The Western Australian Court of Appeal recently discussed the approach to sentencing for the Western Australian offence of persistently engaging in sexual conduct with a child under the age of 16 years, under section 321A of the *Criminal Code Act Compilation Act 1913* (WA) Appendix B, schedule 1 (*Criminal Code* (WA)). Justice Mitchell (with Buss and Mazza JJA agreeing) discussed a number of sentencing decisions in relation to section 321A and stated:

There is no ‘tariff’ for the offence prescribed by s 321A (or for sex offences generally) because of the great variation that is possible in the circumstances of the offending and the offenders. The sentence to be imposed in a particular case depends on its individual facts and circumstances, having regard to the maximum penalty.¹⁸⁹

[Reference omitted.]

Justice Mitchell also stated:

The appellant cited a number of cases dealing with individual counts of indecent dealing with a child. In my view, those cases are not comparable to the present. The criminal conduct for which the appellant has been convicted and must be punished involves engaging in sexual conduct with each victim on many occasions over a period of years. Conviction of a single indecent dealing offence or a number of individual offences is not comparable. Even when individual offences are charged as representative counts, the offender is only to be sentenced and punished for the counts on the indictment, and the representative nature of the charge prevents the offender finding mitigation on the basis that the offending conduct was isolated and uncharacteristic. *By contrast, under s 321A the offender is to be sentenced and punished for the whole course of criminal conduct.* The essence of the criminality involved in the offence created by s 321A is the persistent and ongoing nature of the sexual conduct with a child.¹⁹⁰ [Reference omitted. Emphasis added.]

11.5 The Victorian course of conduct charge

11.5.1 Course of conduct charges

A ‘course of conduct’ charge may be another way of dealing with repeated offending where it is difficult for a victim or survivor to distinguish particular occasions of offending from each other.

In July 2015, Victoria introduced a course of conduct charge provision in the *Criminal Procedure Act 2009* (Vic).¹⁹¹ The provision does not constitute a substantive offence but gives expression to multiple charges of the same offence on the indictment.¹⁹² The Victorian course of conduct charge was based on a similar provision in England and Wales.¹⁹³

In England and Wales, rule 14.2(2) of the *Criminal Procedure Rules 2010* states:

More than one incident of the commission of the offence may be included in a count if those incidents taken together amount to a course of conduct having regard to the time, place or purpose of commission.

The United Kingdom *Criminal Practice Directions 2013* provide the following instructions:

- Each incident must relate to the same complainant.
- There must be a ‘marked degree’ of repetition in the method employed or location or both.
- Incidents must have taken place over a clearly defined period – usually no more than a year.

- The defence is such as to apply to every alleged incident without differentiation. Where what is in issue differs between different incidents, a single 'multiple incidents' count will not be appropriate, although it may be appropriate to use two or more such counts according to the circumstances and to the issues raised by the defence.
- Where the penalty for the offence has changed during the period of the alleged abuse, additional 'multiple incident' counts should be used so that each count only alleges incidents that have the same maximum penalty.

New Zealand has a similar charge. In 2011, New Zealand introduced a 'representative charge' under section 20 of the *Criminal Procedure Act 2011* (NZ). Section 20 is available where:

- multiple offences of the same type are alleged and are committed in similar circumstances over a period of time
- the nature and the circumstances are such that the complainant cannot reasonably be expected to particularise dates or other details of the offence.

The New Zealand Court of Appeal has considered the use of representative charges. It held:

- where there is sufficient evidence to do so or where the repetitive acts can be distinguished, the prosecution should charge specific acts
- representative charges are appropriate where there is a pattern of repeated behavior, and the complainant cannot distinguish the dates or details.¹⁹⁴

11.5.2 The Victorian course of conduct charge

The Victorian course of conduct charge is a charge for an offence that involves more than one occasion of the same offence. It could be charged for unlawful sexual acts that might otherwise be charged as persistent child sexual abuse, provided that they otherwise meet the requirements for a course of conduct charge. However, an accused cannot be charged with a course of conduct charge and a persistent child sexual abuse charge.

Under the course of conduct charge, more than one incident of the commission of a sexual offence may be included in a single course of conduct charge if:

- each incident constitutes an offence under the same provision
- each incident relates to the same complainant
- the incidents took place on more than one occasion over a specified period
- the incidents together amount to a course of conduct, 'having regard to their time, place or purpose of commission and any other relevant matter'.¹⁹⁵

The prosecution must prove beyond reasonable doubt that the occasions constituting an offence committed by the accused, taken together, amount to a course of conduct having regard to their time, place or purpose of commission or any other relevant matter.¹⁹⁶ It is not necessary to prove the number of incidents, dates, times, places, circumstances or occasions. It is also not necessary to prove that there were any distinctive features differentiating any of the incidents or the general circumstances of any particular incident.¹⁹⁷

The Explanatory Memorandum to the amending Bill explains ‘time, place and purpose of commission and any other relevant matter’ as follows:

In relation to time, the complainant may give evidence that the offending occurred on a regular basis (such as every week or month, or whenever mum went on night shift). Where there is a large gap in time between offending, it may be difficult to conclude there was a course of conduct. However, it may be that there are two episodes of offending separated by a 12 month gap.

In relation to place, there may have been a regular place where these offences occur, such as the child’s bedroom. However, if the incidents occurred in different places, this will not preclude a course of conduct from being established, as the course of conduct may be completely opportunistic. In such circumstances, a higher degree of regularity may be more important in establishing the course of conduct.

In relation to purpose of commission, in most cases, the purpose will be sexual gratification or exercising power over the victim.¹⁹⁸

‘Any other relevant matter’ allows for flexibility – it may include evidence of similarity in the method employed in offending or evidence of attempts to stop the child from complaining.¹⁹⁹

An indictment cannot contain a course of conduct charge and a charge under the persistent child sexual abuse provision. A charge sheet may contain another offence charged in the alternative, and an acquittal on the course of conduct charge does not constitute a ‘previous acquittal’ in regard to the alternative charge for the purposes of protection against double jeopardy. An accused can enter a guilty plea to part of the ‘course of conduct’ charge.²⁰⁰

A course of conduct charge can be charged regardless of when the incidents of the offence are alleged to have taken place.²⁰¹ That is, sexual offences alleged to have been committed before the course of conduct charge was introduced can now be charged as a course of conduct offence (if they otherwise satisfy the requirements for the course of conduct charge).

The Victorian DPP’s policy for using course of conduct charges expresses a preference for charging the substantive charge rather than a course of conduct charge.²⁰² The policy provides criteria for determining whether to use the course of conduct charge, including:

- whether the charge adequately reflects the criminality of the offending involved
- whether there is a reasonable explanation as to why the state of the evidence and/or the allegations of the victim are sparse or lacking in detail as to dates or exact circumstances.

The policy provides that a course of conduct charge is not to be used simply to overcome the evidentiary deficiencies of a superficial investigation and that a course of conduct charge should not be used merely as an alternative method of prosecuting what would otherwise be a series of substantive charges.²⁰³

There are detailed jury directions that require the trial judge to explain the elements of the charge to the jury.²⁰⁴

The course of conduct charge applies to multiple incidents of the same offence, and sentencing a course of conduct offence may be more straightforward than sentencing a persistent child sexual abuse offence. The court must impose a sentence that reflects the totality of the offending that constitutes the course of conduct charge but must not impose a sentence that exceeds the maximum penalty prescribed for the single offence.²⁰⁵ Since the sentence is required to reflect the totality of the conduct, it is expected that the court sentencing a course of conduct offence will apply a sentence higher than the penalties imposed for individual offences.²⁰⁶

The Victorian course of conduct charge explicitly amends the common law to permit the complainant to give evidence of what the accused ‘would do’ (that is, what would typically or routinely occur).²⁰⁷

The Victorian Department of Justice noted that course of conduct charges have inherent limitations and will not be suitable for all cases of repeated child sexual abuse.²⁰⁸ For example, although the charge could be founded on only two incidents, where the prosecution can only lead evidence of a small number of incidents over an extended period it may be difficult to establish the continuing or regular nature of the conduct. Also, the multiple incidents must all be examples of the same type of offending. If the alleged conduct is of different kinds of sexual offending – for example, some penetrative and some not penetrative – these incidents cannot be bundled into one course of conduct charge.²⁰⁹

The number of incidents of an offence, and the offence type, should help to determine whether a course of conduct charge is available. For instance, it may be unlikely that a course of conduct will be found where there are only two or three incidents over a one-year period, because a ‘course of conduct’ involves continuing or regular conduct. Here the complainant may be able to specifically identify each incident, and a persistent child sexual abuse charge may be more appropriate.²¹⁰ This may also be the case where an accused is alleged to have committed different sexual offences (such as sexual assault and indecent assault) against a complainant rather than a ‘course of conduct’ of one offence. In such cases, separate individual offences or the persistent child sexual abuse offence might be more appropriate.

11.5.3 Use of the Victorian course of conduct charge

The Victorian Court of Appeal recently considered the course of conduct charge in relation to the offence of obtaining a financial advantage by deception. In *Poursanidis v The Queen*²¹¹ (*Poursanidis*), the accused pleaded guilty to a single course of conduct charge which related to 541 separate acts of dishonesty. The court dismissed the accused's appeal against sentence. Justice Weinberg, with Priest JA agreeing, stated: 'The charge to which the appellant pleaded guilty was drafted upon a "course of conduct" basis. This represents a new, and somewhat novel, basis upon which a sentence can be imposed'.²¹²

Justice Weinberg referred to the provisions for sentencing for a course of conduct charge and stated:

These provisions may well give rise to particular difficulties where an accused is charged with a 'course of conduct' offence, and pleads not guilty. There is no need, for present purposes, to enlarge upon that point.²¹³

Justice Weinberg rejected the Crown's submission that it would be reasonable to impose a higher sentence than would otherwise be appropriate because of the number of individual offences under the course of conduct charge. He held that orthodox sentencing principles should apply to course of conduct charges and that the maximum sentence for the (single) offence should still be treated as a 'yardstick'.²¹⁴

We are aware of two matters prosecuted under the Victorian course of conduct provision in relation to child sexual abuse. One matter, which we understand was not published, resulted in a directed acquittal.

In the other prosecution, *DPP v Ellis*,²¹⁵ the accused pleaded guilty to one charge of sexual penetration of a 16- or 17-year-old child who was under his care, supervision or authority contrary to section 48(1) of the *Crimes Act 1958* (Vic). The offence was charged as a 'course of conduct' charge between the dates of 25 October 2015 and 23 November 2015.²¹⁶

The offender was a year 11 teacher at a suburban public high school and the victim was one of his year 11 students. She was 16 years and nine months old at the time of the offending. Her father was suffering from a terminal illness, and she relied on the offender, confiding in him in relation to what was happening with her father. They exchanged numerous electronic and phone messages between May and November 2015. An emotional relationship developed.²¹⁷

In sentencing the offender, the judge summarised the offending as follows:

In the one-month period between 25 October 2015 and 23 November 2015 you arranged dinner dates at various locations around Southbank and the Melbourne CBD areas, and you would also arrange rooms at various high-end Melbourne hotels where you would engage in sexual intercourse with the victim. You would also arrange to pick her up and

park your car in secluded car parks. You would then engage in sexual intercourse in your car. There are 12 particularised incidents which make up the 'course of conduct' single charge which you have pleaded guilty to. The details of these occasions are contained in the agreed prosecution summary. The sexual intercourse was usually preceded by digital penetration (which is uncharged), before penile/vaginal penetration. You used a condom although you did not ejaculate on any of these occasions.

On the final occasion you were in your car at the Melbourne Airport with the victim early in the morning where you had sex. You were spoken to by members of the Australian Federal Police. Both you and the victim denied that she was aged 16 and that you were her teacher. The AFP referred the matter to the Victoria Police.

You were interviewed by police on 23 November 2015. During the interview you made full admissions. You took responsibility for the sex taking place. You admitted to knowing that you should not have entered into anything in the first place and that you should not have let it get to that stage. You admitted to developing strong feelings for the victim. You stated that it was your fault and that you had 'crossed the line'.²¹⁸

The judge described a number of features of the offending which made it a serious example of the offence as follows:

- it involved a high level of breach of trust
- as the victim's teacher, the offender occupied a significant position of authority and trust in the community with respect to his students
- the offender knew the victim was relying heavily on him for welfare support and was emotionally fragile and especially vulnerable
- there was a significant age difference of more than 20 years
- the offender knew that he was acting in breach of trust, violating his professional teacher–pupil boundaries and engaging in wrongful and criminal conduct
- although the offending was for a relatively modest period of time, it was sustained and the emotional and physical contact before the period of offending contextualises the nature and extent of the wrongdoing
- the offending involved 12 separate and distinct occasions of sexual penetration
- the offending involved a high degree of planning with the dinner and hotel bookings, and the offender purchased jewellery for the victim to further his relationship with her.²¹⁹

The judge discussed a number of mitigating factors.

In relation to the offence being charged as a course of conduct, the judge quoted the Victorian Court of Appeal's decision in *Poursanidis* in stating:

Pursuant to s 5(2F) of the Sentencing Act, the court must impose a sentence that reflects the totality of the offending that constitutes the course of conduct, and must not impose a sentence that exceeds the maximum penalty prescribed for the offence if charged as a single offence (here it being 10 years' imprisonment). The principles of sentencing for a 'course of conduct' offence are similar to those involved in sentencing for 'rolled up counts'. Orthodox sentencing principles apply, so that the maximum sentence 'remains a 'yardstick', by which the gravity of the offending is to be assessed, even though the offence itself is charged in 'course of conduct' terms.'²²⁰ [References omitted.]

The judge stated that, while specific deterrence of the offender had only a limited role to play, the sentence 'must be significant enough to deter others – particularly teachers – from engaging in similar offending'.²²¹ The offender was sentenced to three years and nine months imprisonment, with a non-parole period of 22 months. Had he not pleaded guilty, the judge would have sentenced him to five years and three months imprisonment, with a non-parole period of three years and six months.²²² The offender will also be required to report as a registered sex offender for a period of 15 years.²²³

In its submission in response to the Consultation Paper, the Victorian Government referred to another child sexual abuse matter being charged using the course of conduct provisions. It referred to conduct described as follows, drawing from the Summary of Prosecution Opening in a case which had not then been completed:

over almost a two year period, the accused was alleged to have committed an indecent act (fondling a child's penis when washing him) 'every time', 'like every weekend' he stayed with the accused and 'just any time he would shower me'.²²⁴

In his submission in response to the Consultation Paper, the Victorian DPP stated that:

In the year 2015–16, 62 'course of conduct' charges against 34 accused were approved. Not all of these matters have been dealt with yet; a number have been stayed; a number were dealt with in the summary stream; a number were subject to verdicts of not guilty; and a number were referred for advice only. As at June 2016 there were four convictions (three pleas – two indictable and one summary – and one trial) relating to child sex offences.²²⁵

11.6 What we were told in submissions and Case Study 46

11.6.1 Survivor advocacy and support groups

In their submissions in response to the Consultation Paper, a number of survivor advocacy and support groups commented on the difficulties for survivors in providing sufficient details of their abuse, particularly given how long it takes for many survivors to be able to disclose and

report their abuse. Some survivor advocacy and support groups expressed strong support for the Queensland persistent child sexual abuse offence. A number of representatives of survivor advocacy and support groups also commented on these issues in their evidence in the public hearing in Case Study 46.

In its submission in response to the Consultation Paper, Micah Projects reported on a forum it held with survivors. It expressed strong support for reform, submitting:

The feedback on this question was unanimous that reform should happen with national consistency. Participants in the forum were clear in their view that the focus on one single incident should be removed because it is unworkable and ‘thwarts the pursuit of justice’ where multiple incidents have ‘*melded together in the victims mind*’. Evidence of the ‘*behavioral and physical impacts need to be held to be valid evidence in abuse cases*’. By its very nature sexual abuse is secretive and there are no witnesses. Opinion was unanimous about reform needed in the area of repeated abuse and the need for timeliness when awaiting trials as this goes to the core of testing memory and the identification of particularities in relation to child sexual abuse.

People in the group, when considering repeated abuse, focused on trauma-induced symptoms, most particularly dissociative disorders such as desensitization, amnesias, and what might be called fugue states as a result of repetitive child abuse. This is an area where research continues to demonstrate that people who have undergone such extreme, lengthy child abuse suffer from an inability to isolate particularities of circumstances.²²⁶

Ms Karyn Walsh, representing Micah Projects, told the public hearing in Case Study 46:

it’s not just about the incident, the time, the date and the place. We know that why people can’t remember is because of the trauma itself that was generated; the abuse itself. It’s not able to be cut down into those categories ... the context is really important, telling your whole story; understanding whether the offender has acted out of the scope of their role, what was the nature of their relationship; their relationship with the other adults in the person’s life – those things are all much more important than what someone was wearing.²²⁷

In relation to the Queensland offence, Micah Projects expressed support for the offence but submitted that, because it still requires two distinct occasions of abuse, it can result in a complainant not proceeding because of their ‘composite memories’ or general assertions of occasions of abuse.²²⁸

Protect All Children Today (PACT) expressed strong support for the Queensland offence.²²⁹ Ms Joanne Bryant, representing PACT, told the public hearing:

Children often don't have the capacity to particularise set dates and things. They can usually generalise about the time of year and things like that when an offence occurs. So, yes, I think if there's enough evidence that an offence is occurring, then that should be sufficient to continue a prosecution of the matter.²³⁰

Dr Wayne Chamley, representing Broken Rites, was asked about the example of the prosecution of Brother Rafferty and the evidence of FAB and Mr Lungo, and whether in his experience it was common for survivors to have difficulty differentiating particular events over a course of abuse. Dr Chamley told the public hearing:

It's impossible for them. Time after time after time. It is impossible. We spend hours with them trying to get their story and then see if we can validate it with access to government files if they were in institutions or whatever. It's totally impossible for them, because they've lost so much of their ability to form memory. They begin to get it back, but they're way behind and it takes years. I don't think the police and the legal profession and the judges have understood this enough, that this phenomenon happens.²³¹

In his submission in response to the Consultation Paper, Mr Peter Gogarty expressed support for an offence that focuses on the unlawful sexual relationship.²³² In relation to his own experience of trying to particularise the abuse he suffered, Mr Gogarty told the public hearing:

I remember very, very clearly being with my abuser at a little country church in the Upper Hunter Valley and what occurred there, but I could not tell you – other than that I'm sure it was a Sunday because he was there to say mass, I couldn't tell you what I was wearing, what sort of car he drove, what church it was. All I remember is a little brick church and horror.²³³

Ms Caroline Carroll OAM, representing the Alliance for Forgotten Australians, told the public hearing in relation to those who grew up in institutional care:

We hear it often, that people cannot remember. They can't often remember what home they were in, let alone, you know, the time of day or the place or the name of the person who abused them. You weren't – like I say, it was a surreal environment. You know, you just survived, and the less notice that you could have brought upon yourself, the better you were. So blocking things out and just being a nobody was the normal sort of existence. So remembering dates – and there was hardly, like someone said before, a music lesson. We didn't have music lessons, you know, so everything was pretty much the same every day. So trying to define the day that this abuse happened would be very difficult for many of our people.²³⁴

The Centre Against Sexual Violence Queensland submitted:

There are many difficulties for survivors being able to provide information about individual occasions of abuse. Survivors of sexual abuse use coping strategies including denying, minimising, memory repression and dissociation to help themselves survive through traumatic situations (The Blue Knot Foundation, 2016). These strategies inhibit the survivor's ability to recall specific events, dates and times of the sexual abuse. Further to this, there is often a significant delay in the reporting of child sexual abuse offenses which can also adversely impact on the survivor's ability to recall specifics of the sexual assault/s.²³⁵

In its submission in response to the Consultation Paper, the In Good Faith Foundation (IGFF) expressed support for having both the Queensland offence and the Victorian course of conduct charge and for having the laws apply retrospectively.²³⁶ It stated:

A number of IGFF clients have experienced serious serial sexual assault as children that has been both sustained and injurious. The nature of such abuse and the associated trauma very often means that very often our clients are unable to distinguish individual/isolated instances of abuse and provide a single timeline of abuses. In such circumstances, the requirement of proof of a minimum number of unlawful sexual acts is often prohibitive to prosecution.²³⁷

Ms Clare Leaney, representing IGFF, told the public hearing:

it is very often impossible for a person to distinguish between incidents of abuse, particularly when the abuse occurs over multiple years and has similar identifying characteristics, and also taking into account the trauma that is involved with these experiences. It's really hard for a person to sit down and give a clear and coherent time line. It would be great if every client we sat down with had a diary and they had written down and recorded everything, but realistically that doesn't happen. So we need to take that into consideration.²³⁸

In its submission in response to the Consultation Paper, the Ballarat Centre Against Sexual Assault (CASA) Men's Support Group expressed support for reform of persistent child sexual abuse offences. It submitted:

It is almost impossible for survivors to remember all occasions of abuse, as part of coping is to block a lot of the memories away, and trauma responses impede people trying to recall every detail without becoming overwhelmed. ... It is unreasonable to expect that trauma survivors can accurately recall specifics of such overwhelming experiences, especially if they occur during childhood. It is problematic that the reporting process currently requires these details.²³⁹

Ms Shireen Gunn, representing the Ballarat CASA Men’s Support Group, told the public hearing in relation to the need for legislative reform to address the situation where a witness cannot remember specific details:

the group saw that as a really important issue that they would like to comment on, because they think that it’s unreasonable to expect them to remember specific instances, key things that happened during abuse that occurred many years ago when they were children, and we’re talking about experiencing an event that is traumatic, that is overwhelming and can often be repeated, but for those occasions, many of those survivors were just looking to survive. They weren’t taking in the particulars of what was happening, where the room was, what they were doing; they were just looking to survive that particular event.²⁴⁰

Ms Gunn expressed support for an offence that focused on the relationship viewed as a whole.²⁴¹

In its submission in response to the Consultation Paper, Care Leavers Australasia Network (CLAN) expressed support for a more effective offence. However, CLAN noted its limitations and expressed support for retrospectivity. It submitted:

Children often have trouble recalling dates, names and places simply due to their age and brain capability. However, when a child is being abused and is traumatised there are a number of both psychological and physical responses which occur in a child’s body that makes it even more difficult to recall specific information that they are unaware of the importance. There needs to be sufficient education of those who make the law, those who work within, and those in the community who serve on juries so as to understand the complexity of this as an issue. Whilst the persistent child sexual abuse offence makes it easier for those who were abused numerous times over a long period of time it doesn’t help to establish one or two instances of the crime if the child has difficulties remembering. We do believe that the rules of evidence and other legislation need to recognise these difficulties and that there needs to be more education for all those working within the legal system including juries who are on a child abuse case.²⁴²

Professor Judy Cashmore AO, who, together with Mr Craig Hughes-Cashmore, spoke to the joint submission of Survivors & Mates Support Network (SAMSN) and Sydney Law School in response to the Consultation Paper, told the public hearing:

what victim/complainants are asking for, whether they are children or adults, is a fairer and equal playing field. I think that people understand that there needs to be a balance between the rights of the accused and the rights of those who are coming forward to give evidence.

The issue is that those who are the complainants often feel as though, as Craig [Hughes-Cashmore] said, they don’t have the script. They don’t have the knowledge. They don’t know the rules of the game. They are in a non-familiar environment. They are at a power

imbalance. They don't understand the language. And on top of all that, they are incredibly stressed by having to talk about those very sensitive events in a lot of detail, that they often don't understand the reason for in terms of the particularisation that is required.

What really hit me this morning [in relation to the prosecution of Brother Rafferty] was hearing about a judge who accepted that somebody had been abused on a regular basis by a sexual predator, who was then acquitted. I can well understand that it is incomprehensible to the layman as to why that would occur, and particularly to that victim.²⁴³

Professor Cashmore told the public hearing that it is very difficult for people to particularise because when there are repeated events, your memory goes into a schema. When the stress and trauma of the abuse is laid on top of that, it is asking too much to expect people to particularise what they were wearing, the time of day or exactly where they were.²⁴⁴

Professor Cashmore suggested that the complainant might be able to particularise the first and last occasions that they remember, giving details of what happened and where they were and if there was an event in their life to which they can tie the occasion of abuse, such as a birthday.²⁴⁵

Mr Michael O'Connell APM, the South Australian Commissioner for Victims Rights, submitted:

The Queensland offence that focuses on the maintenance of an unlawful sexual relationship rather than particular unlawful sexual acts warrants further consideration. Likewise, I acknowledge the modification in South Australia and Tasmania law that 'allows the offence in those jurisdictions to apply to unlawful sexual acts that were committed before the offence', which means 'the offence can be used in historical cases'.

Mindful of such law and the South Australia Supreme Court decision quoted by the Royal Commission, as well as anecdote such as informal comment by police officers and victim-advocates, I agree with the Royal Commissioners that 'there needs to be an offence in each jurisdiction that will enable repeated but largely indistinguishable occasions of child sexual abuse to be charged effectively'. On the question of the 'form' I add only that the offence should in content and operation be consistent throughout Australia. Whether a victim – survivor has access to justice should not be constrained by geo-politico borders.²⁴⁶

Mr John Hinchey, the Australian Capital Territory Victims of Crime Commissioner, expressed support for adopting the Queensland offence in other jurisdictions and for it to operate retrospectively.²⁴⁷

In relation to the Victorian course of conduct charge, the National Association of Services Against Sexual Violence (NASASV) submitted that there seems still to be a preference for charging offences that are able to be clearly particularised and that, if the course of conduct charge is used, offenders are not being held accountable for the full extent of their offending.²⁴⁸

Mr Norm Tink, representing NASASV, told the public hearing in response to a question about NASASV's submission that the course of conduct charge may not fully reflect the extent of an offender's conduct 'especially in those historical child sexual offences where you had multiple offences over long periods of time'.²⁴⁹

We also received a number of confidential submissions in response to the Consultation Paper from survivors who gave accounts of the difficulties they experienced in trying to particularise abuse which occurred on many occasions.

One particularly compelling account came from a survivor who experienced some three years of regular, often daily, penetrative sexual assaults. He calculated that he was raped by the offender more than 1,000 times. He could not differentiate any of these rapes from each other, although he was able to identify a number of different physical locations where they occurred. Following earlier convictions in relation to other complainants, the offender agreed to plead guilty to two counts in relation to this survivor, but they were for less serious offences.

This survivor submitted that it should be possible to charge an offender in a way that allows for conflated memories of offences to be admissible and for representative charges to be brought based on the location and nature of the offences even if they cannot be differentiated by particular occasions of offending. He also submitted that offences should reflect advances in brain science and should take into account what can be expected of witnesses based on the impacts of trauma and memory and the nature of traumatic memory.

Another particularly compelling account came from a survivor of child sexual abuse by a senior teacher at her public primary school. She was unable to disclose her abuse for more than 30 years. When she was able to disclose, the offender was charged and other charges were laid in relation to other complainants. The offender pleaded guilty and was sentenced.

This survivor submitted that persistent abuse becomes a continuum, and the series of events blur into each other. Sometimes an assault will stand out because of some little detail, but she was unable to separate each event; therefore, many crimes were not the subject of charges. She told us she knows that she spent many afternoons after school in the classroom or storeroom at the school, but she could not say what happened on each occasion as opposed to giving a general overview of the things that did happen.

11.6.2 Governments

In its submission, the New South Wales Government stated that the persistent child sexual abuse offence in section 66EA of the *Crimes Act 1900* (NSW) is rarely used and has only been charged on 42 occasions between April 2006 and March 2016. The New South Wales Government stated:

As part of the NSW Child Sexual Offences Review, consideration is being given to how the offence of persistent child sexual abuse can be improved, whether it should operate retrospectively and if a course of conduct offence should be introduced in NSW.²⁵⁰

In its submission, the Victorian Government referred to difficulties of prosecuting persistent sexual abuse within the traditional paradigm of a single offence applying to a single clearly identified allegation.²⁵¹ It stated that the requirement for particulars is applied much more strictly in Australia than in New Zealand or England and Wales.²⁵²

Mr Greg Byrne, Special Counsel, Criminal Law Review in the Victorian Department of Justice and Regulation, representing the Victorian Government, told the public hearing about the experience with the Victorian persistent child sexual abuse offence in section 47A of the *Crimes Act 1958* (Vic) as follows:

It has proved quite difficult. There were attempts to try to even identify some events by saying, well, if there have been numerous events, well at least if the jury accepts that, then by inference they could conclude that there was a first event and a last event, as a way of identifying at least two events, but that has been held to be impermissible. So it proved very difficult, and I understand you'll hear evidence from the Victorian DPP, but my understanding is that it's very rarely ever used in relation to a trial and it's mainly used for plea agreements.²⁵³

Mr Byrne outlined how the course of conduct charge is intended to work.²⁵⁴ In relation to the need to identify particular occasions, Mr Byrne told the public hearing:

it's not necessary to prove any particular number of incidents and, indeed, what must be proved is the course of conduct, the systematic or repeated nature of the offending.

It also indicates that it's not necessary to prove that there were distinctive features to differentiate one alleged incident from another, and, indeed, the lack of distinctive features is part of what often will support a course of conduct.²⁵⁵

The Victorian Government drew the following distinctions between the Queensland offence and the Victorian course of conduct charge as follows:

the Queensland relationship offence and the Victorian course of conduct charge focus on different aspects of the problem of persistent sexual abuse. The Queensland relationship offence most effectively addresses the problem where there are at least two identifiable (or distinguishable) acts, even if there are many other indistinguishable acts. What is necessary is that the prosecution be able to prove a sufficient number of identifiable acts from which a jury may conclude that there was a relationship of the relevant kind.

The Victorian course of conduct charge does not require there to be a number of identifiable acts. Indeed, the lack of distinguishing features between different acts may be evidence of the repeated and systematic abuse that is alleged. The different focus of the Queensland relationship offence and the Victorian course of conduct charge means that they may each be better at dealing with ‘a number of offences on different occasions’ and ‘a number of offences on different occasions over a significant period of time’ respectively.²⁵⁶

The Victorian Government suggested that the most effective response might involve having both the Queensland offence and the Victorian course of conduct charge. It stated:

Victoria prohibits the use of the Victorian course of conduct charge and a persistent sexual abuse charge in the one indictment. While problems would arise from using both mechanisms in the one trial that does not mean that both mechanisms cannot be available to be used. If both mechanisms were available, the prosecution would then need to choose the most appropriate approach in each case. This would be consistent with the aim of identifying the problem and the context in which it occurs and then developing legislative solutions to address that problem. The prosecution could choose which mechanism to use on a case-by-case basis having regard to the nature of the evidence in the case. If this approach were adopted, consideration would need to be given to whether any other potential unfairness arises from the availability or use of both options.²⁵⁷ [Reference omitted.]

In relation to the retrospective application of the course of conduct charge, the Victorian Government submitted:

The course of conduct does not create retrospective criminal liability – it does not criminalise anything that was not already an offence against the law. However, it operates retroactively in that if the alleged offence was an offence known to the law at the time that it is alleged to have been committed, a course of conduct charge may instead be used. That is, if a single offence may be charged, the 2014 Act enables a course of conduct charge to be used for the same offence.²⁵⁸

In its submission in response to the Consultation Paper, the Tasmanian Government noted the difficulties that can arise in relation to sufficiently particularising individual counts in cases of prolonged child sexual abuse. It stated:

the inability to identify individual incidents or particulars may also negatively impact the way in which a jury views the evidence of a complainant, that is that a jury may view the evidence as vague and unpersuasive.

As the Royal Commission notes Tasmania's persistent child abuse offence, maintaining a sexual relationship with a young person contrary to section 125A of the Tasmanian Criminal Code, operates retrospectively in Tasmania. Accordingly, a number of historical child sexual abuse cases have been successfully prosecuted under that section in Tasmania.²⁵⁹

In its submission to the Consultation Paper, ACT Policing noted the difficulties for police in particularising offences. It stated:

Currently accurate particularisation of historic child abuse offences can be very difficult because of the victim's recollection of offences. Victims often inform investigators that offending happened all the time or about 20 times. In these circumstances it is extremely difficult to particularise offences so that it accurately reflects offending behaviour. A process which allows for a pattern of continued offending over a period of time to be considered when prosecuting historic child abuse offences would assist in these circumstances.²⁶⁰

11.6.3 Directors of Public Prosecutions

In its submission in response to the Consultation Paper, the New South Wales ODPP stressed the inadequacies of the offence in section 66EA of the *Crimes Act 1900* (NSW). It stated:

Today, in our view, the most imperative issue to be addressed in terms of child abuse offences in NSW is the inadequacy of section 66EA. We believe that the provision should be recast in a form that makes it an offence in its own right, rather than a procedural provision (*R v Fitzgerald* (2004) 59 NSWLR 493, *R v Manners* [2004] NSWCCA 181).

The gravamen of the offence should be that the child was not safe from a sexual predator who took advantage of the child's vulnerability and violated a position of trust over an extended period.²⁶¹

The New South Wales ODPP stated that in 2008 it advised the then New South Wales Attorney General that section 66EA was 'profoundly underutilised' and suggested that the Queensland form of offence be adopted. The New South Wales ODPP stated that this is still its position.²⁶²

The New South Wales ODPP also commented more generally on memory, referring to *The guidelines of memory and the law*, published by the British Psychological Society in 2008.²⁶³ The New South Wales ODPP submitted that:

the formulation of criminal offences and evidentiary rules that rely on fragile memory should be considered in light of contemporary psychological research. Such research provides the foundations for the need for an offence of persistent sexual abuse and the way it should be framed.²⁶⁴

The New South Wales ODPP also referred to the potential impact of repeated questioning on memory and stated:

It is likely that the impact of an investigator exhorting the witness to isolate specific events and particularise them may result in unintended error by the witness. This almost certainly would have an impact, albeit unmeasured, on a prosecution.²⁶⁵

The New South Wales ODPP submitted that there should still be a need for some particularity as follows:

It is our submission that in order to adequately prove the offence of persistent sexual abuse, there is a need for some particularity for two or three offences. In our experience it is usually possible for a victim to provide details of the first and last abuse event. This would strike the appropriate balance between assisting the victim to give evidence, avoiding conflation and not placing an unacceptable burden on the accused to defend the allegation.²⁶⁶

The New South Wales ODPP expressed strong support for recasting section 66EA and for the recast offence to operate retrospectively, at least to 1998, when the section 66EA offence was introduced.²⁶⁷

The New South Wales DPP, Mr Lloyd Babb SC, told the public hearing:

The New South Wales section [66EA] does not solve the problem; it hasn't removed the need for particularisation to any great extent. I think it is desirable that we look for legislative change in New South Wales and then the question becomes where. I've had a look at both models [the Queensland maintaining a sexual relationship offence and the Victorian course of conduct charge]. I'm quite attracted to the Queensland model. I thought that the requirement for more than one offence and that – it lessened the particularity but required some particularisation for an accused person. That is the real challenge in this area, is having an offence that doesn't work an injustice because you don't have some clarity as to what allegation you are meeting. And so I'm more attracted to the Queensland provision, personally.²⁶⁸

In relation to the Victorian course of conduct offence, the New South Wales ODPP suggested that it does not appear to have any particular advantage over an offence of persistent child sexual abuse. It suggested that, because the course of conduct charge can only apply to one type of offence, it is unlikely to cover the course of offending, particularly where long-term sexual abuse escalates over time. However, it suggested that a course of conduct offence would be useful for other types of criminal offences.²⁶⁹

In his submission in response to the Consultation Paper, the Victorian DPP, Mr John Champion SC, outlined the history and use of the Victorian persistent child sexual abuse offence.²⁷⁰ Mr Champion stated that:

At certain points in time, the VPPS [Victorian Public Prosecution Service] has had a practice of largely avoiding s 47A charges in contested trials, as the issues of proof had become insurmountable. In practice, s 47A charges were often used only upon negotiated pleas of guilty and less commonly for contested trials.²⁷¹

Mr Champion stated that, in the 2012 Department of Justice led review of sexual offences, consideration was given to whether to amend section 47A or to consider an alternative means of charging for such cases. Section 47A was retained, but the course of conduct method of charging was also enacted. Mr Champion noted that a peripheral advantage of the course of conduct charge that is not available with section 47A is that it may be used fully retrospectively.²⁷²

In relation to the relative merits of section 47A and a course of conduct charge, Mr Champion submitted:

It is my view that the relative merits of the s 47A and 'course of conduct' provisions are such that, in many cases, adopting the latter is the only viable method of prosecuting contested cases where there are repeated but largely indistinguishable occasions of child sexual abuse.²⁷³

In relation to the use of the course of conduct charge, Mr Champion submitted:

Charges pleaded as a course of conduct for a sexual offence can be filed only with the consent of the DPP or a Crown Prosecutor with the appropriate delegation. In the year 2015–16, 62 'course of conduct' charges against 34 accused were approved. Not all of these matters have been dealt with yet; a number have been stayed; a number were dealt with in the summary stream; a number were subject to verdicts of not guilty; and a number were referred for advice only. As at June 2016 there were four convictions (three pleas – two indictable and one summary – and one trial) relating to child sex offences.²⁷⁴

Mr Champion commented on the decision in the prosecution of Brother Rafferty. He told the public hearing:

I read the decision in *Rafferty* and especially the closing remarks of the judge in that case, where he said that he was well satisfied that the accused did sexually abuse the complainant at school but said, then, that he could not be satisfied of the particular incidents that were said to found the particular charges and that he could not be satisfied of those incidents beyond reasonable doubt. I looked at that and I thought that if we laid that in Victoria we would have laid it as a course of conduct, quite happily, in my opinion.²⁷⁵

In the Consultation Paper, we asked for submissions as to whether the approach reflected in Victoria's course of conduct charge could be improved upon. Mr Champion submitted that he cannot yet offer any specific suggestion for further improvement and will be unlikely to be able to do so until a number of course of conduct matters have been the subject of Court of Appeal judgments.²⁷⁶

The Queensland DPP, Mr Michael Byrne QC, outlined the history and operation of the offence in section 229B of the *Criminal Code* (Qld) in his evidence in the public hearing in Case Study 46.²⁷⁷

In terms of particularisation, Mr Byrne said:

The important provision in terms of the particularisation issue is subsection (2), which refers to a relationship involving more than one unlawful sexual act over any period. The provision has been interpreted, without complaint, as requiring, however, a focus on the establishment of a relationship – a sexual relationship, I should say – so that another relationship which is sometimes interspersed with sporadic sexual conduct may not gain that quality of being a sexual relationship.

Issues of the repetitiveness, the frequency, the nature of the conduct and the period of time over which it occurs are all relevant in reaching that conclusion.

But it is important, to my mind, to recognise that all that is required in terms of subsection (2) is more than one unlawful sexual act. ...

As a matter of practice, where a complainant enters the witness box and testifies broadly to this effect, 'Person X sexually offended against me in manners A, B and C; I do not recall any specific incident, except I know that it happened in this particular calendar year, it happened at least once or twice a week, but I can't give any more detail than that', we are still able to prosecute under 229B.²⁷⁸

In relation to charging specific offences and the relationship offence, Mr Byrne said:

As a matter of practice we will often charge a 229B offence as the first count on the indictment, as we call them in Queensland, and there may be other specific offences then listed also on the indictment, which again is allowed for by the section itself. But we do not necessarily need to do so.²⁷⁹

In relation to the success of the section 229B offence in Queensland, Mr Byrne agreed that it has worked well in practice considering the conviction rate but said:

it's also important to note that it's not a 100 per cent conviction rate, so it's not as if it's a charge that cannot be defended. I don't suggest it's easy to defend, but from my perspective it has worked well but also provides a balance.²⁸⁰

The Acting DPP for Western Australia, Ms Amanda Forrester SC, outlined the operation of the persistent sexual conduct offence under section 321A of the *Criminal Code* (WA) in her evidence in the public hearing.²⁸¹

In relation to the use of the offence in Western Australia, Ms Forrester told the public hearing:

we don't use it very often. It's a provision that, on indictment, can only be signed by the director or deputy director. Our experience with the judiciary is that they tend to be fairly critical when the prosecution presents an indictment alleging an offence under this section.

That's not to say we don't use it because the judiciary are critical of it; it's our right to present such an indictment. But it's natural that when a member of the bench is critical, in front of a jury, of your use of the provision, you rethink how best to present your case. On many, many occasions, we are able to properly present an indictment that has enough specific counts on it that the difference at the end of the day would not be great.

It does put greater pressure on a complainant, and we work off their statement. So if they haven't been able to particularise conduct and we get them in and talk to them and they still can't, we're much more likely to use this provision, but we tend to use it as a last resort.²⁸²

Ms Forrester expressed support for making the offence retrospective. She told the public hearing:

Our biggest problem is that it's particularly those very historical ones that we can't charge this catch-all offence in relation to, and yet that's where it would be most useful.²⁸³

When asked about the concerns expressed in some submissions in response to the Consultation Paper that retrospectivity may expose the accused to higher maximum penalties, Ms Forrester told the public hearing:

I think that could be got around sensibly. Merely because the maximum penalty is there doesn't mean that there's not a limitation in an appropriate circumstance to take that into account. I read the submission that you're talking about and I do recognise that that could create an unfairness, but I do think it could be got around.²⁸⁴

Ms Forrester agreed with Counsel Assisting's suggestion that one way in which it could be addressed would be by applying the provision retrospectively but subject to the statutory maximum penalty that applied for the underlying unlawfulness of the conduct at the time.²⁸⁵

The South Australian DPP, Mr Adam Kimber SC, told the public hearing that he thought the South Australian offence was being dealt with well and appropriately until the decision in *Johnson* in November 2015.²⁸⁶ Mr Kimber said that, following the decision in *Johnson*, he has recommended to the South Australian Attorney-General that the Queensland provision be adopted and he was also pursuing an appeal in the case of *Hamra*, which was heard by a judge alone, before a bench of five judges in the Court of Appeal so that it could reconsider the

decision in *Johnson*. As at the time of the public hearing in Case Study 46, the Court of Appeal had not delivered its decision in *Hamra*.²⁸⁷ However, the decision was delivered in December 2016 and is discussed in section 11.4.2.

Mr Kimber told the public hearing that, if the Court of Appeal in *Hamra* returns to the interpretation of the South Australian offence that applied before *Johnson*, there will still be a difference between the South Australian and Queensland offences in that the South Australian offence requires the jury to unanimously find the same occasions of abuse proved.²⁸⁸

In his submission in response to the Consultation Paper, the Tasmanian DPP, Mr Daryl Coates SC, submitted that his office uses the offence under section 125A of the *Criminal Code (Tas)* extensively.²⁸⁹ He stated that it has only been on rare occasions that they have not been able to particularise three separate occasions of abuse.²⁹⁰

Mr Coates told the public hearing that it would be a very rare case in which a complainant was unable to talk about three occasions of abuse, usually the first and last occasions and then one other occasion that was slightly different from the other occasions of abuse.²⁹¹

Mr Coates expressed some concern about the impact that removing any requirement to identify individual assaults might have on interviewing complainants and in the jury's assessment of the complainant's evidence. He stated:

I am concerned about any provisions where no individual assaults have to be identified because this could possibly result in police or prosecutors when interviewing complainants not actually getting details of specific occasions which could in turn lead to credibility problems with the complainant, in that their evidence may appear vague and non-specific. Where specific incidents are led it provides the jury with the capacity to judge the witness's credit and reliability and for the accused to test the charges. If evidence were only to be required of general sexual abuse, given the onus of proof, I think this would lead to a rise in acquittals.²⁹²

However, Mr Coates expressed support for an amendment to overcome the direction in *KBT v The Queen* that requires all members of the jury be satisfied beyond reasonable doubt of the same three unlawful sexual acts.²⁹³

In relation to retrospectivity, Mr Coates stated:

the offence of maintaining a sexual relationship with a young person is retrospective in Tasmania. I know of no occasion where it has been suggested that the provision has caused any injustice. Bearing in mind, that in order to prove the offence one has to prove that the unlawful sexual acts would have been unlawful at the time.²⁹⁴

The DPP for the Australian Capital Territory, Mr Jonathan White SC, told the public hearing:

the problem here is that there is a lawyerly desire for certainty which runs up against reality in the way that children in particular recall sexual offending. So we often will have children saying, 'It then happened every weekend', or 'most weekends', or 'whenever I was in X', and that's really not sufficient particularity for the sort of old-fashioned charge that we have. But that's the reality of the way children seem to recall sexual offending.²⁹⁵

In his submission in response to the Consultation Paper, Mr White submitted that the offence in section 56 of the *Crimes Act 1900* (ACT) is little used and that the effect of the High Court's decision in *KBT* is that there is no advantage in using the provision over charging specific incidents.²⁹⁶ He stated:

if the complainant cannot recall specific incidents but is able to give an account of repeated sexual abuse (and this is not unusual and consistent with how trauma impacts on memory) s 56 does not assist in any way.²⁹⁷

Mr White stated that, where the complainant recalls the first and last incident and knows the abuse happened repeatedly between the two occasions without recalling the details, the prosecutor will need to seek to have evidence of the uncharged acts admitted as relationship or tendency evidence. He submitted that:

The exercise involves trying to fit a square peg, being the reality of child sexual abuse, into a round hole, being concepts of criminal liability and evidence law that have developed prior to our now far more comprehensive understanding of how child sexual abuse is perpetrated. When applications are made to lead evidence of uncharged acts there is no guarantee this evidence will be admitted.²⁹⁸

Mr White expressed his support for an offence based on the Queensland model and submitted that focusing on the unlawful sexual relationship rather than specific incidents 'recognises how child sexual abuse occurs, and how victims of child sexual abuse respond to trauma'.²⁹⁹

Mr White told the public hearing that his office is 'attracted to the Queensland provision, but the Victorian provision also would be a great advance on what we have'.³⁰⁰

11.6.4 Private Bar, legal bodies and representative groups

In its submission in response to the Consultation Paper, the Law Council of Australia addressed the issue of the retrospective operation of persistent child sexual abuse offences. It noted that the offences in South Australia and Tasmania do not criminalise conduct that was not a crime at the time it was engaged in, so a person's legal obligations are not changed by virtue of the offences.³⁰¹

However, the Law Council of Australia expressed a concern that, because of the higher maximum penalty for the offence in South Australia, the consequences of conviction under the offence may cause unfairness. It submitted:

However, despite the content of the offence not giving rise to injustice or unfairness, the Law Council notes that the maximum penalty under the South Australian provision is life imprisonment. Accordingly, there is a disproportionate and very real shift in the consequences that flow from a conviction under this provision—as opposed to a historical provision under which a person would otherwise be charged—and it is here that the unfairness may arise. ... It is unclear why, for example, a person recently prosecuted and convicted of two separate offences of indecent assault against an eleven year old that occurred in 1991 should be subject to a maximum penalty of 10 years imprisonment for each offence while, if that person was recently prosecuted and convicted under the retrospective provision for exactly the same conduct, life imprisonment is the maximum penalty. In the Law Council's view, an offender should be sentenced on the basis of the penalties as they stood at the time of the commission of the offence. The retrospective South Australian provision does not allow for this.³⁰²

Mr Arthur Moses SC, representing the Law Council of Australia, told the public hearing:

the concern is one of, as it were, parity or equality as to why a person who has been recently prosecuted and convicted of two separate offences of indecent assault against a child that occurred in 1991 should be subject to a maximum penalty of 10 years imprisonment for each offence, while, if that person was recently prosecuted and convicted under the retrospective provision for exactly the same conduct, life imprisonment is the maximum penalty.³⁰³

The Law Council of Australia submitted that the better approach is the Victorian course of conduct charge, which it describes as a retrospective 'procedural' amendment as opposed to a substantive criminal offence that operates retrospectively.³⁰⁴ Mr Moses told the public hearing that the Victorian course of conduct charge is preferred because it does not retrospectively introduce a new maximum penalty.³⁰⁵

In the Consultation Paper, we asked whether the requirement for particulars could be further restricted without causing unfairness to the accused. The Law Council of Australia submitted that 'restricting the requirement for particulars must be approached with great care and caution'.³⁰⁶ It noted that the approach in Queensland still requires proper particularisation of the *actus reus*. In Queensland, that is the 'unlawful sexual relationship' and not the constituent acts that are relied on to prove the relationship. It stated:

It is suggested that the scope of the Queensland provision ought to be the outer limit when it comes to restricting particulars: any further restriction and injustice may result. The *actus reus* of the offence must always be adequately particularised, whatever the

status of any series of acts that may constitute it. Further, the abolition of the requirement for particulars, while theoretically open, should never be taken up. Limitation of the requirement for particulars may be appropriate in some limited circumstances but doing away with particulars entirely would result in grave unfairness.³⁰⁷

Mr Moses told the public hearing:

We're not suggesting this is not an area that needs to be examined and potential need for reform. It's just the concern to ensure that in the way in which the charges are formulated and particularised, there is some element of procedural fairness that will still be accorded to the accused. What this Royal Commission has exposed is that there are certainly deficiencies within the criminal justice system that do need to be revisited, and I don't think anybody could suggest to the contrary.³⁰⁸

Mr Stephen Odgers SC, who gave evidence concurrently with Mr Moses, agreed generally with Mr Moses. He told the public hearing that he did not consider the Queensland offence to be 'inherently unjust', although he noted that he did not have experience of how it operated in practice.³⁰⁹ He told the public hearing:

The particularisation is still required in relation to that offence [the Queensland offence], but because it is defined in that way, you are more likely to achieve a just outcome and reconcile the competing interests. ...

I accept that the parliament can legitimately criminalise a relationship rather than specific conduct.³¹⁰

In its submission in response to the Consultation Paper, Legal Aid NSW stated its opposition to any substantive reform to section 66EA of the *Crimes Act 1900* (NSW), including in relation to retrospectivity and any weakening of the current requirement for particulars.³¹¹ It submitted:

The NSW offence reflects the model recommended by the Model Criminal Code Committee in 2009. The fact that section 66EA is rarely prosecuted does not, on its own, justify substantive amendment to the provision.³¹²

It stated that, in its experience, the reason the offence is rarely prosecuted is often unrelated to particularisation and is often because of the late involvement of Crown prosecutors in reviewing the indictment.³¹³ Legal Aid NSW also expressed concern that an unlawful sexual relationship offence such as the Queensland offence would criminalise an 'unequivocally consensual relationship between an 18 year old and a 15 year old, including sexting'.³¹⁴

Legal Aid NSW also expressed strong opposition to any amendment to make the offence retrospective because it would have the effect of applying a higher maximum penalty than the offences which comprise the individual acts. It submitted:

The change proposed is more than procedural, as the substantive effect would be to attach a maximum penalty of 25 years in place of individual offences carrying far lesser penalties. This result would offend basic principles of fairness and longstanding principles concerning retrospectivity in the criminal law.³¹⁵

Ms Sharyn Hall, a barrister representing Legal Aid NSW, told the public hearing:

Legal Aid NSW recognises that there is some room for reform, and reform that addresses the maintenance of a relationship that is obviously a sexual relationship with a child. Legal Aid NSW takes the position that that aspect of the Queensland legislation that really does deal with continuing course of conduct is something that recommends itself, although Legal Aid takes the view that the Victorian legislation is, in many respects, preferable, particularly given that that particular legislation is retrospective but has a particular section that deals with the issue of sentencing.

The concern that Legal Aid has is that a charge that is retrospective should appropriately take that into account in the issue of sentence.

So Legal Aid does recognise, perhaps slightly differently to what's in the submissions, that there is some room for reform in terms of addressing a continuing course of conduct.³¹⁶

In relation to the concerns about higher maximum penalties, Ms Hall told the public hearing:

The concern that Legal Aid has with, for example, the Queensland legislation is, as you've already identified, that it is a very high maximum penalty that applies, and if the acts that are being dealt with are both retrospective but also, for example, indecent assaults, Legal Aid NSW would have a concern that the maximum penalty for an indecent assault or an aggravated indecent assault under section 61M(2) [of the *Crimes Act 1900* (NSW)] is 10 years, albeit it has a standard non-parole period of 8, which is significant and they are obviously guides.

But if that was the act that was being dealt with pursuant to something in the nature of the Queensland legislation, Legal Aid NSW would be concerned about the significant variance between those two maximum penalties.³¹⁷

In relation to sentencing under section 66EA, Legal Aid NSW expressed support for recommendation 4 made by the NSW Sentencing Council in its report, *Penalties relating to sexual assault offences in New South Wales*.³¹⁸

The NSW Sentencing Council considered the issue of sentencing for an offence under section 66EA and discussed the concern that the courts have sentenced under it on a similar basis to how they would have sentenced for the individual offences, 'overlooking the aggravating fact that the offender has engaged in a persistent pattern of abuse, which would merit additional punishment'.³¹⁹

The NSW Sentencing Council stated that the New South Wales DPP had submitted that:

the section should be recast so as to make it clear that the offence of engaging in a course of sexually abusive conduct is a separate offence, the gravamen of which is the persistence of the criminal conduct, which would be more serious than the total of its constituent assaults.³²⁰

In recommendation 4, the NSW Sentencing Council suggested that consideration be given to:

Providing a note to, or amending s66EA Crimes Act 1900 (NSW) in order that it be made clear that a separate offence has been created by this section, the gravamen of which is the fact that the accused has engaged in a course of persistent sexual abuse of a child, and that the appropriate sentence to be imposed is one that is proportionate to the seriousness of the offence.³²¹

The NSW Sentencing Council suggested that this could be achieved by including the persistent child sexual offence in the Table of Standard Non-Parole Period matters.³²²

In its submission in response to the Consultation Paper, Victoria Legal Aid stated that:

[Victoria Legal Aid] acknowledges the difficulty faced by many complainants who are unable to provide sufficient detail of their historical sexual assault allegations. Historical sexual offences are universally challenging for complainants, prosecution and accused as the passage of time inevitably leads to diminished recollection and limits the availability of witnesses and forensic evidence.³²³

It submitted that this difficulty is reflected in the Victorian course of conduct charge.³²⁴

In relation to the question whether the requirement for particulars could be further restricted without causing unfairness to the accused, Victoria Legal Aid submitted that:

further restricting the requirement for the complainant to provide some particulars creates a very real risk that people will be wrongly convicted of serious offences on evidence that is impossible to meaningfully test or challenge. In an environment in which both the complainant and the accused are disadvantaged by the passing of time, it is important that appropriate balance is achieved so as not to undermine an accused's presumption of innocence, especially given the serious consequences that follow a conviction.³²⁵

Victoria Legal Aid expressed its opposition to a further restriction on the requirement for particulars in the Victorian course of conduct provision and stated:

Whilst an overwhelming majority of sexual offence complaints are genuine, there are a small number of cases where allegations will be made that are incorrect, false or exaggerated. Requiring reasonable particulars that are able to be tested in the courts is one way to guard against the possibility of improper convictions, as it allows an accused to produce exculpatory evidence (for example, alibi evidence).³²⁶ [Reference omitted.]

Ms Helen Fatouros, representing Victoria Legal Aid, told the public hearing:

I think where you draw the line in terms of the degree of particulars can vary depending on policy settings and the construction of particular offences and indictments, and I think it is a balancing exercise.

One of the challenges with the course of conduct offences, which don't just apply to sexual offences but to other types of offences as well, and the persistent sexual abuse offences and, prior to that, the maintain sexual relationship offence, is around the ability, particularly in historical cases or where the passage of time impacts memory of all involved in the case – it can become very difficult to even be in a position with an accused person to identify whether there is a defence, because there's just not enough detail, if you like, in the particulars of the offending.

I think in the large majority of cases – and when I was a prosecutor in my former role, there are a large number of historical cases where there's a range, if you like, where there are very, very few particulars and in the narrative form victims talk about it 'happening all the time', all the way through to far more detailed accounts, which you can use various markers or proxies to try to nail down some particulars that enable more certainty and enable more fairness for an accused person to meet the accusations or the allegations.

So I think historical cases are particularly vexing and complicated for all involved and we risk falling below a threshold, if you like, where there's safety in convictions if we go too far down the track of removing the need for some particularisation. But I think we've come a long way, at least over the last decade, and certainly in Victoria, in recognising the nature of sexual assault and recognising the need to change outdated offences and outdated approaches to the way we establish cases of this sort.³²⁷

11.7 Memory Research

We outlined the findings of the Memory Research generally in Chapter 4. We also discussed issues in relation to memory for repeated or recurring events in section 4.3.4.

The Memory Research suggests that it should be expected that complainants will face difficulties in providing particulars of child sexual abuse.

As we discussed in section 4.3.3, a person will only encode information that is noticed or attended to during an event.³²⁸ Further, people experience a rapid decline in memory for the event so that many aspects of the event that were attended to during encoding will be forgotten soon after the event if they are not consolidated into long-term memory.³²⁹ A victim will not be able to retrieve from memory details that they did not encode during the abuse or that they have not consolidated into long-term memory.

Age and children's development may also affect the particulars that can be given. It is likely to be particularly difficult for children to provide temporal details of when the abuse occurred,³³⁰ although the Memory Research also makes clear that people generally tend to be especially poor at reconstructing the time frame of an event.³³¹

At our public roundtable on complainants' memory of child sexual abuse and the law, which was held on 31 March 2017 in conjunction with finalising the Memory Research, Dr Penny van Bergen, a senior lecturer in educational psychology at Macquarie University, told the roundtable that it is important to know that children are not necessarily able to think in terms of temporal details so that scantness of temporal detail is not wrongly taken to be a sign that the memory is inaccurate.³³² Dr van Bergen said:

I think the risk would be for someone that didn't know that work [that is, research] to think that if you are unable to temporally date something or say exactly when it occurred, that must mean that it's not a good memory, but the research would suggest that that inability is actually related to conceptual development rather than the quality of the memory itself. So children may emerge first with times of the day that they can relate, in terms of context to things like around breakfast time or when they go to sport, rather than specific time periods that adults would use. That ability develops later.³³³

As we discussed in section 4.3.4, the memory of child sexual abuse that can be retrieved in order to report to police and to give evidence as a complainant will also be affected by factors such as:

- whether the abuse was experienced subjectively as traumatic at the time of the abuse
- whether the victim or survivor is affected by a mental disorder – such as post-traumatic stress disorder
- whether the victim or survivor is affected by stress or trauma at the time of reporting
- how the victim or survivor is questioned about the abuse.

The research on memory for repeated or recurring events is particularly important in considering persistent child sexual abuse offences and course of conduct charging. While the Memory Research suggests that victims and survivors are likely to have good recall of the core features of the abuse – what always or usually happened – they are likely to have more difficulty recalling the details that changed or distinguishing between different events.

As we discussed in section 4.3.4, in relation to memory for recurring events generally – and not just for child sexual abuse – the Memory Research reported:

For repeated or familiar events, people generally develop a schema or ‘script’ for the core or gist features of that type of experience in their long-term memory. These memory templates spare a person from detailed encoding of redundant information.³³⁴

The Memory Research identified that, for recurring events:

- once a schema exists, the specific details of every instance of a recurring event may not be encoded or consolidated and thus cannot be recalled
- people tend to report the gist of what happened in similar and recurring events but do not clearly remember details particular to one of the events
- people’s memory for the gist of an event tends to be accurate and long-lasting, but all memories fade over time
- even reliable memory reports of core features of the recurring events will often be accompanied by minor inconsistencies related to the core features of the event.³³⁵

Studies with children who were exposed to repeated events have identified that even children as young as three to five years of age were able to provide accurate descriptions of the invariant features of the repeated events – that is, the features that occurred on each occasion.³³⁶

The Memory Research reported that:

As these types of features [the invariant features] produce stable memory traces, they are typically strengthened and less susceptible to suggestion and decay, compared to the features of one-off incidents. The invariant features become part of an individual’s knowledge repertoire, script or schema or gist.³³⁷ [References omitted.]

Studies have shown that, while children report accurately most of the invariant features that occurred in all events, they also commonly incorrectly attributed variable features to a particular event.³³⁸ However, in relation to reporting details that did not occur in the events at all, they made fewer errors than children in the study who experienced only a single event.³³⁹

The Memory Research concluded in relation to these studies:

Overall, details about recurring events will often be remembered, but may be unrelated to particular moments in time, while recall of specific details about a particular recurring event in a series may not be possible or may be prone to error.³⁴⁰

In relation to research examining children’s memories for repeated events, Dr Stefanie Sharman, senior lecturer in the School of Psychology at Deakin University, told the roundtable:

What we know from this research is that children are able to remember details from these particular events, but they often have trouble determining which particular event those memories are from. So they have difficulties with the temporal sense of where that information came from.

If they experience more than, say, four events, they experience a number of events, even if we ask them to report on the frequency of those events, they often have difficulty. They can say they have done it once, that's really easy, but if they have done it more than once, then they often have trouble estimating how many times they participated in those events. Usually they'll say they have done it a number of times, but they can't actually tell you specifically what number that was.³⁴¹

Professor Martine Powell from the School of Psychology at Deakin University told the roundtable:

With a repeated event, memory for detail that occurred consistently in the same way, there are very few errors, and that's because there's no real need to make a source judgment [that is, identify which particular event the detail relates to] because it's reflecting more a general knowledge of what usually occurred. Also, there are other reasons why these memories are more stable.

A few of the things that affect the likelihood of error is that the more times you experience an event and the more times those experiences change from time to time, the harder it is to remember what happened at a particular time.³⁴²

Some studies also suggest that, while older children may be better able to distinguish between repeated events, after a period of delay, even of several weeks, they may be no better than younger children at distinguishing between repeated events.³⁴³

Different studies have investigated children's and adults' capacity to provide temporal information about a series of recurring events and to estimate the frequency and duration of recurring events.³⁴⁴

One of the options for particularising repeated child sexual abuse or a course of conduct charge may be to focus on the first or last occasion of abuse. In relation to memory for the first and last events in a series of recurring events, the Memory Research reported that studies suggest that:

Researchers have found that adults' memory for repeated events can be represented with a U shape. Adults have good memories of the first event (referred to as 'the primacy effect') and the most recent event (referred to as 'the recency effect') in a series of repeated events, although the latter is more susceptible to memory loss than the former.³⁴⁵

Research is more limited in relation to children's memory for first and last events.³⁴⁶

A particular issue with recurring events may arise in relation to the inclusion of details that did not occur on a particular occasion. Professor Powell told the roundtable:

Identifying the time and the contextual details around that [repeated events] is very different from remembering one episode of an event. In that, in a narrative form, you are going to have some aspects where there are going to be gaps and you are going to fill in those gaps. Adults do this as well.

What they do, when they fill in the gaps, most people don't make an error of commission [sic – commission], which is something that never occurred. They fill in the gap, even if they are conscious of this or not, with a detail that was likely to have occurred. So it may have occurred, if it's an error, it's something that occurred in close proximity, or it was something that occurred frequently, or it was something that could logically have occurred.

If it's proven that that didn't occur in a particular time, people often make the assumption that everything else must have been wrong, that [sic – but] this is just a normal memory process. It's very rare, we are seeing in research, for a detail to be provided that didn't happen at all. When you have a repeated event, you have a fairly good idea of the sorts of things that have happened and the content details can be quite stable, even though you might insert the wrong detail from another time into that occurrence.³⁴⁷

The Memory Research and discussions at our public roundtable confirm the importance of there being an offence that can be prosecuted without requiring particularisation that is inconsistent with the ways in which complainants are likely to be able to remember the child sexual abuse they suffered, particularly where there were repeated occasions of abuse.

11.8 Discussion and conclusions

As noted in section 11.2, the example of the prosecution of Brother Rafferty, who was acquitted in circumstances where the judge said that he was 'well satisfied that the accused did sexually abuse the complainant at school', is particularly relevant to the consideration of the need for particulars and the extent to which a persistent child sexual abuse offence might address the difficulties many complainants will have in giving details about abuse that is alleged to have occurred many years earlier.

More fundamentally, the prosecution of Brother Rafferty raises the issue of whether a criminal justice response can be said to be reasonably available to condemn and punish child sexual abuse if an accused is acquitted in circumstances where the judge was 'well satisfied' that the accused sexually abused the complainant.

We are satisfied that, without undermining a fair trial for the accused, there must be offences in each jurisdiction that allow for prosecutions – and convictions where the evidence warrants convictions – that:

- do not require particularisation in a manner inconsistent with the ways in which complainants remember the child sexual abuse they suffered
- allow for the effective charging and successful prosecution of repeated but largely indistinguishable occasions of child sexual abuse.

The question then is what form of offence would be most effective.

In the Consultation Paper, we stated that the Queensland offence appears to be the most effective of the current forms of persistent child sexual abuse offences. It identifies the core of the offence as the maintaining of the relationship rather than the two or more individual unlawful acts. Although each juror must be satisfied that two or more individual unlawful acts have been proved beyond reasonable doubt, the Queensland offence also removes the requirement that they be satisfied of *the same* two or more acts.

A number of decisions of the Queensland Court of Criminal Appeal suggest that a jury conviction for the persistent child sexual abuse offence may be safe even where the jury has not convicted for any individual offences also charged – for example, because the jury can be taken to have accepted as proved beyond reasonable doubt the complainant’s evidence of uncharged acts.³⁴⁸ This may be most likely where the accused had made general admissions of wrongdoing to police or the complainant but has not made specific admissions about the particular individual offences particularised as part of a persistent child sexual abuse charge or charged as individual offences.

However, we suggested in the Consultation Paper that, because the Queensland offence still requires at least two distinct occasions of abuse to be identified, it may not overcome difficulties of the kind identified in *Johnson*³⁴⁹ – that is, where a complainant cannot identify or distinguish any particular occasion of repeated abuse.

We also discussed circumstances in which victims or survivors may give evidence in ways that make charging under the Queensland offence difficult. We heard a number of examples in our case studies where prosecutions did not proceed because of ‘composite memories’ or ‘general assertions’ of occasions of abuse and where the victims or survivors are unable to describe or distinguish a particular occasion of abuse. For example:

- In Case Study 38, a New South Wales Crown prosecutor gave evidence about the accounts that two young children gave of alleged abuse. Although the children were able to describe the acts of abuse and the location in the childcare centre where they occurred, they were unable to distinguish one occasion from another.³⁵⁰ The Crown prosecutor gave evidence that:

when one looked at what the children said, they described what happened to them and where they were, but they went on to say it happened all the time. It was something that happened regularly.³⁵¹

He also said that:

the difficulty can be that when the child is cross-examined, as they must be, when questioned about the particular incident, they would not be able to provide those details. So they would be in their mind thinking of all of the different occasions pushed together and not able to pull out particular things that might assist in satisfying the jury of a particular event.³⁵²

- In Case Study 26 on St Joseph’s Orphanage, Neerkol, a consultant Crown prosecutor and in-house counsel for the Queensland ODPP gave evidence about the difficulties of linking children’s evidence of the alleged acts of abuse to a particular occasion or external event. He said:

even though children can give convincing evidence as to what has occurred, where there has been a number of acts and a relationship between the complainant and the accused, it’s difficult to distinguish, for the purposes of particulars. To run a prosecution, there has to be some form of objective external facts, events or circumstances.³⁵³

He said, ‘The difficulty is where the child is unable to distinguish details of one act from many others’³⁵⁴ and that ‘generally, complainants have little difficulty in identifying what the acts were; it’s more linking it to a particular occasion or external event’.³⁵⁵

If the sexual abuse was of the same kind – for example, penetrative sexual assault or indecent assault – course of conduct charging may better address the difficulties where abuse has been repeated so often and in such similar circumstances as to make the identification of individual occasions impossible for the complainant.

However, as we noted in the Consultation Paper, the Victorian course of conduct charge is largely untested, and it is unclear how it will operate in practice. The decision in *DPP v Ellis*³⁵⁶ does not provide significant guidance as it was a sentencing decision following a guilty plea.

In *KRM v The Queen*, in relation to the Victorian persistent child sexual abuse offence, McHugh J stated:

Subject to the operation of Ch III of the Constitution, the legislature of the State of Victoria may modify – even abolish – the need for particulars of criminal charges. But an intention to do so should be imputed to the legislature only when it has enacted words that make its intention unmistakably clear. Courts should not lightly infer that a legislature has intended to abolish or modify fundamental principles of the common law such as the principle that an accused person must have a fair opportunity to defend a criminal charge.³⁵⁷

An accused is entitled to have a fair trial and to know the case against him or her. However, the criminal law should not impose requirements that operate to effectively prevent the prosecution of some of the most serious cases of child sexual abuse – creating the ‘perverse paradox’ that Sulan and Stanley JJ of the South Australian Court of Criminal Appeal identified.³⁵⁸

Although the South Australian Court of Criminal Appeal’s decision in *R v Hamra*³⁵⁹ suggests that the concerns of Sulan and Stanley JJ might be overstated to the extent they relate to any requirement that the complainant delineate distinct occasions of abuse, their concerns appear to remain pressing because of the requirement for extended jury unanimity – that is, the requirement that the jury identify and agree on the same occasions of sexual abuse.

In the Consultation Paper, we stated that we were interested to hear whether the approaches reflected in the current Queensland offence and the current Victorian course of conduct charge could be improved upon and whether the requirement for particulars could be further restricted without causing unfairness to the accused.

We did not hear any real opposition to the approach of the Queensland offence.

We consider that the Queensland offence, in making the actus reus the relationship rather than the individual occasions of abuse, provides the best opportunity to charge repeated or ongoing child sexual abuse in a manner that is more consistent with the sort of evidence a complainant is more likely to be able to give.

Many children who are subjected to repeated occasions of child sexual abuse in similar circumstances are unlikely to be able to distinguish the particular occasions of abuse from each other. Many children may have composite memories of repeated occasions of abuse and may recall events and give evidence in that form. Even as adults, survivors may be in no better position to distinguish particular occasions of abuse from each other than they were as children. These circumstances are features of this type of abuse rather than any indication that the account that the victim or survivor has given is untrue or unreliable.

We consider that the Queensland offence best allows for these sorts of memories of abuse and the type of evidence that is likely to be able to be given as a result of remembering abuse in this way.

Following the South Australian Court of Criminal Appeal’s decision in *R v Hamra*,³⁶⁰ it might be thought that the South Australian offence is essentially as effective as the Queensland offence in returning to its *pre-Johnson* interpretation. However, we do not consider that it is likely to be as effective as the Queensland offence because of its requirement for extended jury unanimity. The Queensland offence expressly removes the requirement for the jury to agree on the same occasions of abuse – in Queensland, the jury is required only to agree that the accused maintained the unlawful sexual relationship.

However, we consider that the Queensland offence can be improved upon by giving it retrospective operation.

As we stated in the Consultation Paper, there may be significant benefits in enabling persistent child sexual abuse offences to operate retrospectively so that they can apply to conduct that occurred before the commencement of the offence. Of course, legislation creating offences is generally presumed to operate prospectively only because it would be manifestly unjust to later punish conduct that was not unlawful at the time it was committed.³⁶¹ However, the presumption is rebuttable.³⁶² Also, in giving persistent child sexual abuse offences retrospective operation, the offences would apply to conduct that was unlawful at the time it was committed and the only change would be to the way in which it can be charged.

This is likely to be important given what we know about delays in reporting child sexual abuse, including institutional child sexual abuse.³⁶³ Indeed, given the particularly lengthy delays in reporting abuse by a person in authority,³⁶⁴ it may be of most importance for institutional child sexual abuse that the offences operate retrospectively.

We are not aware of any argument or concern that the retrospective operation of the offences in South Australia or Tasmania has caused unfairness to any accused person or has led to any injustice.

However, concerns were raised in some submissions in response to the Consultation Paper and in evidence in Case Study 46 that, given that persistent child sexual abuse offences tend to have high penalties – the maximum penalty in Queensland is life imprisonment – their retrospective operation may have the effect of exposing the offender to a much higher maximum penalty than applied to the individual acts of abuse at the time they were committed.

We consider this concern to be a fair one. However, we are satisfied that it can be addressed by requiring the sentencing court to have regard to the maximum penalties that applied to the individual acts of abuse at the time they were committed if the offence is being used retrospectively. In Chapter 34, we make recommendations about sentencing for historical offences. In line with what we recommend there, we do not consider it necessary for the sentencing court to have regard to any factors that applied at the time of the offending other than the maximum penalty that then applied.

We also note that persistent child sexual abuse offences have operated in many jurisdictions for some years now – all jurisdictions introduced offences between 1989 and 1999 – and often with higher maximum penalties than would have applied to individual offences committed while those persistent child sexual abuse offences applied (prospectively, not retrospectively) even if the maximum penalties for the persistent child sexual abuse offences were not as high as those applying today.

Where the new offence is charged retrospectively but for a period of alleged conduct during the (prospective) operation of the earlier persistent child sexual abuse offences, we consider that regard should be had to the maximum penalty for the earlier persistent child sexual abuse and not for the

individual offences. We consider that it is only where the new offence is charged retrospectively for a period of alleged conduct before the earlier persistent child sexual abuse offences occurred that regard should be had to the lower maximum penalty for the individual offences.

The higher maximum penalties should apply to conduct committed at the time those persistent child sexual abuse offences applied rather than looking to the lower maximum penalties applying to the individual offences. This is because it is the earlier form of the persistent child sexual abuse offence, rather than the individual offence, that should determine the lower maximum penalty.

In relation to the Victorian course of conduct charge, it seems to us that a significant limitation is that each course of conduct charge can only cover offending under the same provision – that is, a charge could cover penetrative sexual assault but not occasions of indecent assault or acts of indecency or grooming and vice versa.

On the other hand, we appreciate the Victorian Government's submission in response to the Consultation Paper to the effect that the Queensland offence and the Victorian course of conduct charge focus on different aspects of the problem of persistent child sexual abuse and how complainants remember and give evidence.³⁶⁵

Another difficulty with the course of conduct offence may be sentencing and the maximum penalty. The Victorian Court of Appeal's decision in *Poursanidis* was to the effect that a higher sentence will not be imposed because of the number of individual offences under the course of conduct charge and that orthodox sentencing principles apply to course of conduct charges, with the maximum sentence for the single offence serving as a 'yardstick'.³⁶⁶

If the maximum penalty for the offence the subject of the course of conduct charge is materially lower than the maximum penalty for the persistent child sexual abuse offence then the different form of charging may lead to different penalties. Of course, if a course of conduct charge is the more effective charge because of what the complainant can remember and give evidence of, the lower penalty may not be a decisive factor in how to charge.

The Victorian Government suggested that it might be most effective to have both the Queensland offence and the Victorian course of conduct charge so that the prosecution could choose which one to use on a case-by-case basis and having regard to the evidence that was available in the case.

We see no difficulty with this approach.

Equally, we see no difficulty with the two or more unlawful sexual acts each being particularised as courses of conduct for the purposes of the Queensland offence. That is, two unlawful sexual acts required for the Queensland offence could be particularised as:

- penile/vaginal sexual penetration under the relevant specific offence provision occurring approximately weekly over a period of 12 months between specified dates
- oral sexual penetration under the relevant specific offence provision occurring approximately weekly over a period of 12 months between specified dates.

Such particulars could be supplemented by first and last occasions if the complainant remembers them. We do not see a difficulty in the jury being satisfied that the accused maintained an unlawful sexual relationship if they are satisfied of some or all of the alleged occasions of abuse. If the jury is satisfied of the oral penetration but not the penile/vaginal penetration, it could still be satisfied of the relationship if it is satisfied that the oral penetration occurred more than once.

Apart from the absence of retrospectivity, the only concern we have with the current Queensland offence is its name: ‘maintaining an unlawful sexual relationship’. The language of ‘relationship’ does not sit easily with the exploitation involved in child sexual abuse offending. However, it may help to emphasise that the actus reus of the Queensland offence – and what the jury needs to be satisfied of – is the existence of the relationship and not particular underlying acts. Tasmania, the Australian Capital Territory and the Northern Territory also use ‘relationship’ in the name of their offences. Although we are uncomfortable with the language of ‘relationship’, we are content to adopt it in the interests of achieving the most effective form of offence.

We appreciate that ‘relationship’ may also act as a limitation – as, for example, in the Queensland case where the court held that seven instances of improper touching inside and outside of clothes over five years did not amount to ‘maintaining a relationship’.³⁶⁷ Perhaps offending that is alleged to have occurred this infrequently (barely more than once a year) would need to be charged as individual offences unless there was a more intensive period of offending that could be charged as maintaining a relationship, with additional isolated occasions of offending charged as individual offences.

We obtained the assistance of the New South Wales Parliamentary Counsel’s Office to draft an offence provision based on the Queensland offence but:

- making provision for retrospective application
- requiring regard to be had to relevant lower statutory maximum penalties if the offence is charged with retrospective application.

The draft provision is set out in full in Appendix H.

Clause 3 of the draft provision creates the offence as follows:

- (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.

The offence is given retrospective application in subclause (7), and the requirement to have regard to relevant lower statutory maximum penalties if the offence is charged with retrospective application is addressed in subclause (8).

Clause 2 of the draft provision includes definitions of ‘child’ (which extends to children aged 16 and 17 where they are under the ‘special care’ of an adult), ‘sexual offence’ and ‘predecessor offence’. These definitions are drafted in general terms, and states and territories would need to consider how best to define them to capture the relevant offences applying in the particular jurisdiction.

Clause 4 of the draft provision addresses the circumstances in which a person may be charged with the unlawful sexual relationship offence and other sexual offences. It allows a person to be charged on the same indictment with both the offence of maintaining an unlawful sexual relationship with a child and one or more sexual offences against the same child during the period of the alleged unlawful sexual relationship, as may currently occur in relation to the Queensland offence. However, it addresses the risk of ‘double jeopardy’ by otherwise not allowing a person to be convicted of:

- an unlawful sexual relationship offence if they have already been convicted or acquitted of one of the unlawful sexual acts that are alleged to constitute the unlawful sexual relationship
- a sexual offence in relation to a child if they have already been convicted or acquitted of an unlawful sexual relationship offence in relation to the child for a period which includes the occasion on which the sexual offence is alleged to have been committed
- an unlawful sexual relationship offence in relation to a child if they have already been convicted or acquitted of a predecessor offence – an earlier version of a persistent child sexual abuse offence – in relation to the child for the same period or if any part of the period overlaps.

We raised our concerns about the name of the Queensland offence with the New South Wales Parliamentary Counsel’s Office. The drafter suggested a possible alternative of ‘having a sexually abusive relationship with a child’. For the purposes of the draft provisions, we preferred to retain the language used in the Queensland offence, primarily because it has been the subject of consideration by the Queensland Court of Criminal Appeal on a number of occasions and, as discussed in section 11.4.2, the High Court has twice refused special leave to appeal in relation to convictions for the Queensland offence.

We set out above our reasons for recommending that the offence be given retrospective application. If our recommendations are adopted, it may be important for state and territory governments to explain the reasons for retrospective application when the amending legislation is introduced. In particular, it should be made clear that the offence applies only to conduct that was unlawful at the time it was committed, and the maintaining an unlawful sexual relationship offence only affects the way in which it can be charged.

We also consider that states and territories should make provision for course of conduct charging in relation to child sexual abuse offences if they consider such charging might assist in cases that may be unable to be charged under the maintaining an unlawful sexual relationship offence.

Recommendations

21. Each state and territory government should introduce legislation to amend its persistent child sexual abuse offence so that:
 - a. the actus reus is the maintaining of an unlawful sexual relationship
 - b. an unlawful sexual relationship is established by more than one unlawful sexual act
 - c. the trier of fact must be satisfied beyond reasonable doubt that the unlawful sexual relationship existed but, where the trier of fact is a jury, jurors need not be satisfied of the same unlawful sexual acts
 - d. the offence applies retrospectively but only to sexual acts that were unlawful at the time they were committed
 - e. on sentencing, regard is to be had to relevant lower statutory maximum penalties if the offence is charged with retrospective application.
22. The draft provision in Appendix H provides for the recommended reform. Legislation to the effect of the draft provision should be introduced.
23. State and territory governments (other than Victoria) should consider introducing legislation to establish legislative authority for course of conduct charges in relation to child sexual abuse offences if legislative authority may assist in using course of conduct charges.
24. State and territory governments should consider providing for any of the two or more unlawful sexual acts that are particularised for the maintaining an unlawful sexual relationship offence to be particularised as courses of conduct.

12 Grooming offences

12.1 Introduction

‘Grooming’ refers to a preparatory stage of child sexual abuse, where an adult gains the trust of a child (and, perhaps, other people of influence in the child’s life) in order to take sexual advantage of the child. Grooming has been defined by an international working group as the ‘short name for solicitation of children for sexual purposes’ which ‘refers to the process of establishing/building a relationship with a child ... to facilitate ... sexual contact with that person’.³⁶⁸

Many survivors have told us of their experiences of being groomed for sexual abuse. In many cases, this occurred in a period well before grooming was recognised as a criminal offence.

In a number of our public hearings, we have heard evidence of grooming behaviour by alleged perpetrators and convicted offenders. For example:

- In Case Study 6 on a primary school and the Toowoomba Catholic Education Office, we heard evidence that a teacher groomed young students by handing out lollies in the playground and putting a chocolate bar on the desk of a year 7 girl.³⁶⁹
- In Case Study 12 on an independent school in Perth, we heard evidence that a teacher was seen putting his arm around favourite students and giving them lollies after they had completed jobs for him. The teacher gave gifts and extra attention to new students.³⁷⁰
- In Case Study 32 on Geelong Grammar School, we heard evidence that a chaplain formed a trusting father–son bond with his victim. The chaplain was kind and supportive and spent some time building a relationship of trust before making sexual advances towards the victim.³⁷¹

We have also heard evidence of parents being groomed in order to facilitate the perpetrators’ access to their children without raising the parents’ suspicions.

For example, in Case Study 38 on criminal justice issues, Mr Sascha Chandler gave evidence that, while he was a student at Barker College, the lieutenant of the cadet unit at the school began to single Mr Chandler out and enmesh himself in Mr Chandler’s family life to the point where he was coming to dinner with Mr Chandler’s family at least twice a week while sexually assaulting him on a weekly basis.³⁷²

The report *A statistical analysis of sentencing for child sexual abuse in institutional contexts* (Sentencing Data Study) analysed sentencing remarks in 283 matters involving institutional child sexual abuse. In 149 matters, it was unclear from the sentencing remarks whether grooming had occurred. However, the sentencing remarks in almost one-third of the 283 sentenced matters of institutional child sexual abuse indicated that the abuse involved some form of grooming (although the term ‘grooming’ was not necessarily used).³⁷³ In the matters where grooming conduct could be identified in the sentencing remarks, 66 per cent of matters involved giving alcohol or showing pornography to the child. In 22 per cent of matters, the offender had ingratiated himself or herself with the victim’s family.

Identifying and responding to grooming behaviours is a significant focus of the Royal Commission's policy work beyond criminal justice issues. Grooming will be addressed in a number of areas of our work, including child safe organisations and institutions' responses to complaints.

As we stated in the Consultation Paper, the key criminal justice issue in relation to grooming is determining the appropriate scope of grooming offences.

Grooming presents a challenge for the criminal law because – at least in its broader forms – it is particularly difficult to identify if it does not lead to contact offending.

What makes otherwise benign conduct 'grooming' is that the adult forms an intent for his or her conduct to facilitate sexual relations with a child. Before a substantive unlawful sexual act occurs, and without the benefit of hindsight, it can be difficult to identify and distinguish grooming from other conduct that is common – and, in many cases, desirable – in healthy adult-child mentoring relationships.

As the research report *Hear no evil, see no evil: Understanding failure to identify and report child sexual abuse in institutional context*, published by the Royal Commission in 2015, stated:

With grooming behaviour in particular, its purpose may not be clear not just to the observer but even to the victim. For example, in Case Study One, Larkins was seen giving out sweets to children at a local swimming pool and encouraging them to join the Scouts. This was reported at the time as suspicious but can also be seen as a well-meaning, if misplaced, marketing strategy – as was noted at the time.³⁷⁴

In the Consultation Paper we sought submissions on the broader grooming offences, including whether the approaches reflected in the current broad Victorian and Queensland offences can be improved upon and whether grooming of persons other than the child should be included in the offence.

Some submissions in response to the Consultation Paper addressed the issue of grooming offences, and some witnesses who gave evidence in Case Study 46 also commented on grooming offences.

12.2 Current grooming offences

12.2.1 Introduction

All Australian jurisdictions have offences in relation to grooming.

In each case, culpability arises from the perpetrator's intention to manipulate and take sexual advantage of the child. Culpability does not require the grooming to be 'successful' in the sense that grooming can be charged even if the perpetrator does not proceed to commit a substantive child sexual offence against the child. As the Victorian Law Reform Commission stated:

Whether or not the sexual act actually takes place should not affect the criminal nature of the act. An adult who invites a child to take part in an act of sexual penetration but does not actually follow through with the act should be regarded as culpable in the same way as a person whose 'grooming' behaviour succeeds in inducing the child to take part in an act of sexual penetration. Both of these adults intend to influence the mind of the child to cause him or her to take part in a sexual act.³⁷⁵

The current grooming offences broadly take three different forms:

- **Online and electronic grooming offences:** These offences focus on conduct involving online or other electronic communication.
- **A specific conduct grooming offence:** This offence, in New South Wales only, focuses on specific conduct such as sharing indecent images or supplying the victim with drugs or alcohol.
- **Broad grooming offences:** These offences criminalise *any* conduct that aims to groom a child for later sexual activity.

12.2.2 Online and electronic grooming offences

Commonwealth offences relating to 'using a carriage service' for various acts of grooming are particularly important in online and electronic grooming offences.

In addition:

- Western Australia³⁷⁶ and the Australian Capital Territory³⁷⁷ have grooming provisions that apply only to conduct that occurs electronically
- Queensland has a specific telecommunication provision as well as a broader grooming provision³⁷⁸
- Victoria and the Northern Territory also have provisions that may apply to online conduct.³⁷⁹

Jurisdictions that have broader grooming provisions tell us that they have arrangements in place with the Commonwealth to prosecute grooming where the entire conduct occurs online under Commonwealth provisions and to use state legislation where the offender attempts to meet with the child in person following grooming.

Commonwealth

Commonwealth legislation creates a number of offences relating to ‘using a carriage service’ for child pornography material, child abuse material, and grooming and procuring persons under the age of 16 to engage in, or submit to, sexual activity.³⁸⁰

Commonwealth offences attempt to capture various stages of grooming and include the early contact stage, sending indecent material and the procurement of sexual activity.

The Commonwealth Attorney-General’s Department states that ‘the Commonwealth grooming and procuring offences complement State and Territory grooming and procuring offences by targeting predatory behaviour that occurs through a carriage service’.³⁸¹

The grooming provision in section 474.27 of the *Criminal Code Act 1995* (Cth) schedule 1 (*Criminal Code* (Cth)) commenced in 2005 and applies to a broad range of online conduct.³⁸² The maximum penalty ranges from 12 to 15 years imprisonment.

Initially, the offence applied only if the communication in question included material that was indecent. This requirement was removed in 2010. The Attorney-General’s Department stated:

The practice of grooming encompasses a wide range of activity designed to build a relationship with the child for the purposes of later sexually exploiting that child. The content of communications between an offender and a child may not always be indecent, and in any case may not start out as indecent. As illustrated in *Meehan*, the offender started the grooming process through platonic and innocent exchanges ...

Even by removing the requirement that the communications include material is indecent, a person cannot be prosecuted for a grooming offence unless the communication was made with the *intention* of making it easier to procure the recipient to engage in or submit to sexual activity. The prosecution must show that the communications were of a nature that would suggest the offender wanted to engage in sexual activity with the child. Genuinely innocent communications between an adult and a child would not be captured by the amended grooming offence.³⁸³ [Emphasis original.]

A person may be found guilty of these offences even if it was not possible for sexual activity to have taken place.³⁸⁴

States and territories may have arrangements with the Commonwealth to prosecute grooming where the entire conduct occurs online under Commonwealth provisions and to use state or territory offences where the offender attempts to meet with the child in person following online grooming. As with state and territory offences, Commonwealth offences may be prosecuted even where the recipient of an online communication is a fictitious person represented to the sender as a real person (as may occur in relation to police ‘stings’).³⁸⁵

Victoria

In 2006, Victoria amended its offences relating to soliciting and procuring children for sexual activity to extend their application to cover grooming conduct engaged in online and by electronic means.³⁸⁶ There does not appear to have been any judicial consideration of the amended provisions. It may be that they are rarely used for online grooming because Commonwealth offences are used instead.

Victoria's new offences of encouraging a child to engage in or be involved in sexual activity and its substituted grooming offence continue to extend to electronic communications: sections 49K(3) and 49M(7). We discuss these offences further in section 12.2.4.

Queensland

In 2003,³⁸⁷ Queensland introduced a specific offence for using the internet to procure a child under 16 years to engage in a sexual act.³⁸⁸ An aggravated offence, where the child is under 12 years old or the adult intends to meet or has met with the child, was introduced in 2013.³⁸⁹

The Queensland Crime and Corruption Commission has stated that:

Police will generally only charge a person with this offence where the person is detected before they have a chance to commit further, more serious offences. If a child is in fact procured to engage in a sexual act, the offender will be charged with the appropriate substantive offence.³⁹⁰

Most cases in which this offence is charged appear to involve an adult offender who was a stranger to the child. In many cases, the 'child' does not exist and charges were laid following a police 'sting'.

Queensland also has a broad grooming offence, discussed below, and some online grooming conduct may be prosecuted under the broader offence.

Western Australia

In 2006, Western Australia introduced an offence to criminalise the use of electronic communication to procure children or expose children to indecent material.³⁹¹ It was based on the Queensland offence.³⁹² The maximum sentence for the online offence is between five and 10 years.

Australian Capital Territory

In 2001, the Australian Capital Territory introduced an offence to criminalise the procurement of a person under 16 years old to commit, take part in or watch an act of a sexual nature through electronic means.³⁹³ The maximum penalty for a first offence is seven years imprisonment, with a maximum penalty for a second or subsequent offence of 10 years imprisonment.

12.2.3 Specific conduct grooming offence

In 2007 and 2008, New South Wales introduced an offence which criminalises the following three types of behaviour preparatory to child sexual abuse:

- procurement of a child for sexual activity³⁹⁴
- grooming a child³⁹⁵
- meeting after grooming.³⁹⁶

Procurement for sexual activity and meeting a child after grooming each carry a maximum sentence of 15 years imprisonment (for the aggravated offence), and grooming a child carries a maximum of 12 years imprisonment. The standard non-parole period for the grooming offence is five years, or six years if the child is under 14 years of age.³⁹⁷

In relation to grooming, section 66EB(3) provides:

Grooming children

An adult person:

- (a) who engages in any conduct that exposes a child to indecent material or provides a child with an intoxicating substance, and
- (b) who does so with the intention of making it easier to procure the child for unlawful sexual activity with that or any other person,

is guilty of an offence.

In the second reading speech to the 2007 amending Bill, the then Attorney-General and Minister for Justice said:

The offences of procuring and grooming have been drafted as separate offences in this bill, which is appropriate given that grooming is a preparatory offence and procuring involves more substantial acts. The offences are directed against people who are actively engaging with children in ways that make the children more likely to participate in sexual activity. Grooming can include a wide range of behaviour including conduct that encourages a child to believe they have romantic feelings for the adult or desensitising the child to the

thought of engaging in sexual activity with the adult. Procuring a person to engage in sexual activity includes encouraging, enticing, recruiting or inducing – whether by threat, promises or otherwise – in relation to that activity. For example, procuring offences would apply when a person offered money to a child to engage in sexual acts or promised them gifts or some other form of benefit. The Government is committed to ensuring that such activities are outlawed and offenders punished in line with community expectations.³⁹⁸

Under the New South Wales provision, grooming is defined as conduct which exposes a child to indecent material or provides illicit substances to a child with the intention of making it easier to procure sexual activity with the child. This conduct may be most likely to occur towards the end of the grooming phase.

The limited application of the provision has led to criticism that its operation will not meet the key policy objectives of prevention and deterrence of grooming in its entirety.³⁹⁹ The Victorian Parliament Family and Community Development Committee report *Betrayal of trust: Inquiry into the handling of child abuse by religious and other non-government organisations* (Betrayal of Trust report) commented on the limitations of the provision and noted that grooming can encompass a wide range of behaviour that aims to facilitate the sexual exploitation of the child.⁴⁰⁰

12.2.4 Broad grooming offences

Grooming offences that apply to any conduct aimed at facilitating child sexual abuse exist in Victoria,⁴⁰¹ Queensland,⁴⁰² South Australia⁴⁰³ and Tasmania.⁴⁰⁴

Although these provisions are not restricted to online activity, in practice they are used mainly to prosecute online grooming.

Victoria

Broad grooming offence

Before 2014, the conduct that amounted to grooming operated as an aggravating factor in matters of child sexual assault that was taken into account by the sentencing court.⁴⁰⁵ Where the grooming conduct occurred online, Commonwealth offences were used.⁴⁰⁶

In 2013, the Betrayal of Trust report found that dealing with grooming in this way did not accurately represent the criminality of the conduct, and it recommended that a substantive offence of grooming be created.⁴⁰⁷ In addition, the report found that targeting and grooming family members or carers in order to facilitate access to the child should also be criminalised.⁴⁰⁸

In 2014, Victoria introduced a broad grooming offence based on the recommendations of the Betrayal of Trust report.⁴⁰⁹

Section 49B(2) of the *Crimes Act 1958* (Vic) provided:

A person of or over the age of 18 years must not communicate, by words or conduct, with a child under the age of 16 years or a person under whose care, supervision or authority the child is (whether or not a response is made to the communication) with the intention of facilitating the child's engagement in or involvement in a sexual offence with that person or another person who is of or over the age of 18 years.

The offence under section 49B has been restated in section 49M of the *Crimes Act 1958* (Vic), which was enacted in the *Crimes Amendment (Sexual Offences) Act 2016* (Vic). That Act was intended to modernise and simplify many of Victoria's sexual offences, including sexual offences against children.⁴¹⁰

The *Crimes Amendment (Sexual Offences) Act 2016* (Vic) commences on 1 July 2017 unless it commences earlier by proclamation: section 2. On commencement, the offence in section 49B of the *Crimes Act 1958* (Vic) will be replaced by a new offence in section 49M.

In its submission in response to the Consultation Paper, the Victorian Government stated that the new offence in section 49M 'largely replicates' the offence in section 49B but with improvements in structure.⁴¹¹

Section 49M(1) provides as follows:

A person (A) commits an offence if –

- (a) A is 18 years of age or more; and
- (b) A communicates, by words or conduct (whether or not a response is made to the communication), with –
 - (i) another person (B) who is a child under the age of 16 years; or
 - (ii) another person (C) under whose care, supervision or authority B is; and
- (c) A intends that the communication facilitate B engaging or being involved in the commission of a sexual offence by A or by another person who is 18 years of age or more.

'Communication' is defined to include an electronic communication within the meaning of the *Electronic Transactions (Victoria) Act 2000* (Vic): section 49M(7).

The offence – under section 49B and section 49M – catches the grooming of:

- the child
- a person who has care or supervision of, or authority over, the child.

A person with care or supervision of, or authority over, the child includes a parent, step-parent, teacher, legal guardian, religious leader, employer, youth worker, sporting coach, foster parent or corrections officer.⁴¹²

It applies to words or conduct, and it includes electronic communication.⁴¹³ Not all elements of the offence need to occur in Victoria.

The maximum sentence is 10 years imprisonment.

As to proving the offence, in the second reading speech in relation to the offence in section 49B, the then Attorney-General described the conclusion in the Betrayal of Trust report as follows:

the critical feature of grooming is not the conduct itself, but the intention that accompanies it, and that apparently innocuous conduct needs to be viewed in the context of a pattern of behaviour, with the accompanying intention usually needing to be inferred from all of the circumstances.⁴¹⁴

It was expected that, in the absence of a substantive child sexual abuse offence, intent could be inferred from evidence such as emails, text messages, other forms of message, diary entries, chat room entries and so forth.⁴¹⁵

Encouraging sexual activity offence

In its submission in response to the Consultation Paper, the Victorian Government submitted that the new offences of encouraging sexual activity, which replace the offences of procuring sexual penetration of a child, target sexualised grooming behaviour.

In his second reading speech introducing the Crimes Amendment (Sexual Offences) Bill 2016, the Victorian Attorney-General explained this offence as follows:

Existing sexual offences against children do not cover all preparatory sexual conduct. To address this gap in the law, the bill will introduce a new offence of encouraging a child to engage in sexual activity. This offence will apply where an adult seeks or gets sexual arousal or gratification from encouraging a child to engage in sexual activity. This offence is broader than the offence of grooming, as it will apply where the encouraged sexual activity does not constitute a criminal offence. This new offence ensures Victoria has a full set of offences that criminalise a broad range of preparatory sexual offending against children.⁴¹⁶

Section 49K(1) provides as follows:

A person (A) commits an offence if –

- (a) A is 18 years of age or more; and
- (b) A encourages another person (B) to engage in, or be involved in, an activity; and

- (c) the activity is sexual; and
- (d) B is a child under the age of 16 years; and
- (e) A seeks or gets sexual arousal or sexual gratification from –
 - (i) the encouragement; or
 - (ii) the sexual activity that is encouraged.

There is a similar offence in section 49L covering children aged 16 or 17 and under care, supervision or authority.

The Victorian Government described the purpose of the changes in these offences as follows:

The new offences replace the phrase ‘solicits or procures’ with the term ‘encourage’. This broad term more clearly describes the type of conduct covered by the offence, where solicits or procures is more closely connected with achieving the resulting sexual conduct. Consistent with existing section 58(1), encouragement with no resulting sexual conduct will be an offence, and the offence also applies regardless of whether the accused intends for the sexual activity to occur.

The new offences are also broader than the existing grooming offence as they relate to encouragement of ‘sexual activity’ which is defined broadly. An interpretative provision in new section 35D provides that an activity may be sexual due to –

- a. the area of the body that is involved in the activity, including (but not limited to) the genital or anal region, the buttocks, or, in the case of a female or a person who identifies as a female, the breasts; or
- b. the fact that the person engaging in the activity seeks or gets sexual arousal or sexual gratification from the activity; or
- c. any other aspect of the activity, including the circumstances in which it is engaged in.

The encouraging offences target sexualised grooming behaviour but the behaviour does not need to be associated with, or followed by, sexual activity, touching or penetration offences with the offender. For some, this behaviour may represent the totality of their offending, for others it is a preliminary process to sexualise the child and leads to more serious sexual offending against children.

The encouraging offences only apply to the conduct of adults. This recognises that the broad coverage of the offence may otherwise criminalise the acceptable sexual exploration of teenagers.

The fault element that the accused ‘seeks or gets sexual arousal or sexual gratification’ from the encouragement or the sexual activity encouraged narrows the breadth of the offence, and ensures it does not unduly criminalise the discussion of sexual activity with children – for example, a parent asking a child to wash their genital area.⁴¹⁷

Queensland

In 2013, Queensland introduced a broad grooming offence which criminalises any conduct towards a person under (or believed to be under) the age of 16 years which is intended to facilitate the procurement of the child to engage in a sexual act or the exposure to indecent material.⁴¹⁸

The maximum penalty is five years imprisonment, or 10 years where the child is, or is believed to be, under 12 years old.

The provision was introduced with the objective to ‘potentially allow police to intervene before a sexual act or sex related activity takes place’.⁴¹⁹

Section 218B(1) provides:

Any adult who engages in any conduct in relation to a person under the age of 16 years, or a person the adult believes is under the age of 16 years, with intent to –

- (a) facilitate the procurement of the person to engage in a sexual act, either in Queensland or elsewhere; or
- (b) expose, without legitimate reason, the person to any indecent matter, either in Queensland or elsewhere;

commits a crime.

The offence is intended to be broad enough to cover circumstances where an adult seeks to build a relationship of trust with a child and that adult intends to sexualise that relationship at some point in time.⁴²⁰

Although the Queensland offence is similar to the Victorian offence, it does not cover conduct directed at parents, carers or others with care or supervision of the child.

South Australia

In 2005, South Australia introduced a provision criminalising the making of a communication for a ‘prurient purpose and with the intention of making a child under the prescribed age [17 years] in relation to that person amenable to a sexual activity’.⁴²¹

The South Australian offence may have a narrower operation than the Victorian and Queensland offences: the South Australian offence applies to 'communication', whereas the Victorian and Queensland offences apply to 'conduct'.

Tasmania

In 2005, Tasmania introduced a provision criminalising the making of a communication with intent to procure a young person under the age of 17 years (or a person the accused believes is under 17 years) to engage in an unlawful sexual act.⁴²² It also makes it a crime to communicate with intent to expose, without legitimate reason, a young person under the age of 17 years (or a person the accused believes is under 17) to indecent material.

In the second reading speech, the then Minister for Justice and Industrial Relations said:

The primary purpose of section 125D is to target those who seek to groom and procure children for sexual purposes through Internet chat rooms or via e-mail. The provision is broad enough, however, to include communications made by any means, including by ordinary mail and other forms of electronic communication, such as SMS messages.

'Grooming' is the term used for the process that paedophiles use to prepare children for future abuse. For example, paedophiles may show pornographic or indecent material to children in order to promote discussion of sexual matters and thereby persuade them that such activity is normal.⁴²³

As with the South Australian offence, the Tasmanian offence applies to 'communication' and not to 'conduct'. However, in his submission in response to the Consultation Paper, the Tasmanian Director of Public Prosecutions (DPP) stated that 'communication' is defined to include communication 'by any means', which would include conduct.⁴²⁴

12.2 5 Use of grooming offences

The offence of grooming is most commonly charged in relation to online and electronic communications.

Where grooming has contributed to a substantive child sexual abuse offence, grooming conduct may be taken into account on sentencing without a specific grooming offence being charged. In these circumstances, a broader range of grooming behaviour can be recognised.

We have some data on the use of the grooming provisions in New South Wales, Victoria and Queensland. Many online offences, including police 'stings', are likely to have been charged as Commonwealth offences.

New South Wales

The Judicial Information Research System database indicates that convictions where grooming is the primary offence are rare, with a total of only 16 proven matters between 2011 and 2015 in the summary jurisdiction and between 2008 and 2015 in the indictable jurisdiction combined.⁴²⁵

In the summary jurisdiction, for the four years from July 2011 to June 2015:

- there were 13 convictions, including nine guilty pleas
- 10 offenders received prison sentences, with a median total sentence of eight months
- two offenders received suspended sentences and one received a supervised bond
- eight offenders had no prior convictions.

In the indictable jurisdiction, for the seven years from April 2008 to March 2015:

- there were three convictions, including two guilty pleas
- two offenders received prison sentences, with a median total sentence of three years and nine months
- one offender received a suspended sentence
- all three offenders had no prior convictions.

Victoria

The Victorian broad grooming offence is relatively new. We have obtained some information under notice from Victoria Police about the use of the new offence. However, many of the matters in which the offence has been charged or considered for charging are still under investigation or not yet finalised before the courts.

In 2016, we obtained from Victoria Police information about the circumstances in which the grooming offence had then been charged. In most of these matters, the grooming conduct could have been charged under narrower grooming offences, including Commonwealth offences. Most matters involved grooming using social media, although several matters involved grooming conduct outside of the online environment.

Updated data from Victoria shows that the grooming offence has now been charged in a number of additional matters. We have not reviewed the circumstances in which the grooming offence has been charged in these matters.

Queensland

The Queensland DPP has provided us with the data on convicted matters under the broad grooming offence for the years 2014 to 2016.⁴²⁶ The data are shown in Table 12.1.

Table 12.1: Convictions under section 218B of the Criminal Code (Qld) 2014–2016

| Year | Guilty – jury verdict | Guilty – plea of guilty | Nolle prosequi | Discharged – plea to alternative charge | Total |
|--------------|-----------------------|-------------------------|----------------|---|------------|
| 2014 | 0 | 9 | 3 | 0 | 12 |
| 2015 | 2 | 39 | 6 | 1 | 48 |
| 2016 | 0 | 58 | 0 | 0 | 58 |
| Total | 2 | 106 | 9 | 1 | 118 |

The high proportion of guilty pleas (90 per cent) may indicate that many of the matters involve grooming via telecommunications, which tends to produce strong evidence for the prosecution.

12.3 What we were told in submissions and Case Study 46

12.3.1 Survivor advocacy and support groups

In its submission in response to the Consultation Paper, People with Disability Australia (PWDA) expressed support for a grooming offence that catches grooming of people other than the child. It submitted that many perpetrators in disability services will groom people other than the victim themselves within the institution and beyond it, including families.⁴²⁷ It stated:

For families of children with disability, this can be particularly difficult because

- a) they may build substantial social and support networks through a disability service provider or special school;
- b) they are frequently so isolated and at times lacking in support that perpetrators may find it simpler to build pathways to accessing children; and
- c) perpetrators who work with children with disability are frequently understood by the broader community to be especially moral, upstanding members of the community because of their work with children with disability, making it even more difficult for families and the community more broadly to recognise grooming.⁴²⁸

PWDA expressed support for a community-based, prevention-focused response to grooming. In relation to the offence, it submitted that it helped to ‘name the broader wrongs done to a family and community, and to enhance awareness of what such criminal behaviour looks like’.⁴²⁹

However, PWDA also submitted that grooming charges should apply only where it is clear that child sexual abuse was the intent of the behaviour. It submitted:

Some adults with disability may have had limited education regarding social mores, community expectations and so on. They may also be treated with more suspicion by a community, and it is important that they do not get criminalised for innocent behaviour.⁴³⁰

In its submission in response to the Consultation Paper, Care Leavers Australasia Network (CLAN) expressed its strong support for broad grooming offences which extend beyond the grooming of the child. It stated:

CLAN strongly believes that ALL states need to adopt broader grooming offences which extend beyond the grooming of the child to the grooming of family members which we know has played a huge role in subsequent sexual abuse. Whilst we understand the difficulties in prosecuting broader grooming offences if no sexual abuse has taken place, having these offences there enables police, and the DPP's office to take sexual predators out of the community before they do progress to the act of sexual abuse. All those who deal with children including parents and families should be aware of the signs and dangers associated with grooming in order to protect children.⁴³¹
[Emphasis original.]

CLAN submitted that:

It is not in the best interests of the child to NOT have grooming offences available merely because these are more difficult to prosecute and this should always be the first and foremost consideration.⁴³² [Emphasis original.]

In its submission in response to the Consultation Paper, the In Good Faith Foundation (IGFF) expressed support for the Victorian grooming offence, pointing to its inclusion of both communication and conduct. IGFF stated:

IGFF is aware of circumstances where grooming has occurred in a schooling environment but the sexual assault was not committed until after the victim/survivor was eighteen years of age. It is proposed that this broad definition of grooming would cover such incidences.⁴³³

IGFF submitted that institutions should be assisted to educate staff and volunteers about indicators of grooming behaviour to prevent future child sexual abuse and that this should be extended to the parent or caregiver communities associated with the institutions. IGFF submitted that there should be a standardised education and accreditation program available for institutions.⁴³⁴

In his submission in response to the Consultation Paper, Mr Peter Gogarty expressed support for grooming offences to extend to the grooming of family members.⁴³⁵ In his evidence in the public hearing in Case Study 46, Mr Gogarty said:

In terms of families, particularly in the Catholic Church, which is where I have most knowledge and experience, I think grooming of the families by paedophile priests, paedophile Marist Brothers and so on was an essential part of how they got to do what they did.

There was a huge trust amongst Catholic families, particularly parents, that for a child to be with a priest was for them to be with somebody who was closer to God. I know in my own personal circumstances, my parents would let me do things with my abuser, let me go places with him, that they would never have considered with anybody else.⁴³⁶

12.3.2 Institutions

In the Consultation Paper, we expressed interest in hearing whether institutions and other interested parties considered that a broader grooming offence would be of assistance or would carry risks. We stated:

Particularly in relation to institutional child sexual abuse, we are interested to hear whether institutions or other interested parties see any benefit in a broader grooming offence – for example, whether it might assist institutions to:

- educate staff and volunteers about the signs and dangers of grooming
- encourage staff and volunteers to comply with the code of conduct
- encourage staff and volunteers to report any noncompliance with the code of conduct.

Equally, we are interested to hear whether any institutions or other interested parties see any risks in a broader grooming offence compared with the narrower grooming offences – for example, whether a broader grooming offence might discourage (non-offending) staff and volunteers from engaging in healthy and appropriate behaviour with children in their care.⁴³⁷

In its submission in response to the Consultation Paper, the Association of Heads of Independent Schools of Australia (AHISA) addressed this issue. It stated:

While AHISA agrees such an offence may have these outcomes, there is also a risk that criminal offences for grooming – whether broader or narrow in scope – will inhibit reporting. We have noted above that human uncertainty is a deterrent to reporting; knowing that reporting a suspicion of grooming behaviour may lead to prosecution can put staff of schools in a position where they feel they are acting as judge and jury and possibly accusing the innocent. It may mean a delay in reporting until suspicions or beliefs can be firmed.⁴³⁸

Ms Beth Blackwood, representing AHISA, gave evidence in the public hearing in Case Study 46. Ms Blackwood told the public hearing:

I think a staff member reporting on a suspicion of another staff member is an incredibly difficult thing to do, particularly when staff rooms are based on collegiality and collaboration, and there is an element of you don't do in our Australian culture. So there is, I think, that element of uncertainty. If there is an element of uncertainty sometimes a staff member might give the benefit of the doubt to a fellow member of staff.

I think the key to it is obviously education and professional development, and I think this is a relatively new field for staff in schools around grooming – what is grooming and how do you identify grooming behaviour. So it's relatively new for staff. So there is that challenge. There also is that challenge of how do you educate young people around grooming behaviour and what is appropriate and what is inappropriate behaviour as well. It is a significant challenge.⁴³⁹

AHISA expressed its support for pursuing grooming offences but stated that 'the possibility of a negative impact from a grooming offence points to the importance of education for staff in schools and other institutions if such offences are to fully realise their intent'.⁴⁴⁰

AHISA made a number of suggestions to provide the greatest encouragement to both recognition and reporting of grooming behaviours in schools, including codes of conduct, professional education, a school culture that supports child safe practices, best practice in relevant record keeping, educational materials for school staff and parents, and relevant age appropriate education for students.⁴⁴¹

12.3.3 Governments

In its submission in response to the Consultation Paper, the New South Wales Government described the offence in section 66EB of the *Crimes Act 1900* (NSW). It provided the following information in relation to the use of the offence:

BOCSAR [New South Wales Bureau of Crime Statistics and Research] data indicates that charges for grooming were laid on 129 occasions between April 2006 and March 2016. While there has been an increase in the use of that charge in the last five years, during that time the accused was also charged with another sexual offence under a different section of the *Crimes Act 1900* (NSW) in over 80% of matters. This is consistent with the notion that grooming behaviour may only come to light once a substantive offence is committed.⁴⁴²

It reported that the New South Wales Child Sexual Offences Review is examining whether the offence of grooming can be improved.⁴⁴³

In its submission in response to the Consultation Paper, the Victorian Government outlined Victoria's grooming offence in section 49B of the *Crimes Act 1958* (Vic). In relation to the use of section 49B, it stated:

Since commencement [on 9 April 2014], 100 counts of the offence have been recorded by Victoria Police and 41 counts have resulted in an arrest. A further 18 counts have resulted in the application of a summons, and 6 counts have resulted in an intent to issue a summons. Overall, 65% of the recorded counts have resulted in a positive police outcome.⁴⁴⁴

It also outlined how the offence is to be amended once the *Crimes Amendment (Sexual Offences) Act 2016* (Vic) commences, replacing section 49B with the new offence in section 49M and creating new offences of encouraging sexual activity in sections 49K and 49L.⁴⁴⁵ We described the new Victorian offences in section 12.2.4.

Mr Greg Byrne, Special Counsel, Criminal Law Review in the Victorian Department of Justice and Regulation, represented the Victorian Government in the public hearing in Case Study 46. He gave the following evidence as to why Victoria adopted a broader grooming offence rather than an offence focused on particular means of communication:

Certainly from the Betrayal of Trust Report from the Victorian parliament that was handed down in 2014, they recommended that there be a broad offence of grooming that applied, as I've indicated, both to the grooming of a child or of a person with the care, supervision or authority, and that it apply to any type of communication, regardless of the means that were used for the communication.

I think, in a sense, that's because the important thing is the fact of the communication rather than the means that were used to undertake that communication.⁴⁴⁶

In its submission in response to the Consultation Paper, the Queensland Family & Child Commission discussed the broader grooming offences in Queensland and Victoria and stated:

These measures – extending the definition of grooming to include conduct beyond communication, and providing for an offence of grooming adults who have responsibility for a child – are also supported by a growing body of evidence in the academic literature on child sexual abuse, which analyse the broader methods used by abusers to gain access to and the trust of children.⁴⁴⁷ [References omitted.]

Ms Andrea Lauchs, Assistant Commissioner of the Queensland Family & Child Commission, told the public hearing that the commission would like further consideration to be given to extending the Queensland offence to include conduct beyond communication. She said:

We've done a lot of work in the children's commission to date around online child sexual exploitation and that being a particular area of interest for us, and we believe with the advancing of technology as it is, then the grooming offences in their current form need to be expanded to allow all instances of grooming, whether that be online, face to face, through conduct and communication, to be considered.⁴⁴⁸

12.3.4 Directors of Public Prosecutions

In its submission in response to the Consultation Paper, the New South Wales Office of the Director of Public Prosecutions stated:

The main issue about a 'grooming' offence appears to be whether it should be cast broadly or narrowly. NSW has a narrow offence reliant on the proof of illicit activity, such as sharing indecent images or the supply of drugs or alcohol. It relies on activities which are relatively easy to prove and because these activities may be more readily detected before the behaviour escalates, it has some advantages over a broad offence.⁴⁴⁹

In his submission in response to the Consultation Paper, the Victorian DPP, Mr John Champion SC, stated that his office had now had two years' experience in the operation of the new grooming offence. He provided information showing that 19 offences had been prosecuted under section 49B in 2015–16.⁴⁵⁰ He submitted:

It is my view that thus far, the Grooming offence is operating reasonably well, and it will not be possible to suggest any specific elemental or other improvements until the offence has been critically assessed in a number of Court of Appeal judgments.⁴⁵¹

In his submission in response to the Consultation Paper, the Tasmanian DPP, Mr Daryl Coates SC, stated that, contrary to what was stated in the Consultation Paper, the Tasmanian provision is broad; although it requires 'communication', that term is defined to include communication 'by any means', which would include conduct.⁴⁵² He submitted:

In my view, the words 'facilitate the procurement of a person to engage in a sexual act' as contained in the Queensland provision or 'communicate by words or conduct' as contained in the Victorian provision is covered in the sections of the Tasmanian Criminal Code mentioned above [ss 125C, 125D and 299].⁴⁵³

In his submission in response to the Consultation Paper, the DPP for the Australian Capital Territory, Mr Jonathan White SC, stated that there is no provision in the Australian Capital Territory that deals with grooming conduct generally, beyond electronic grooming. He submitted that he 'would welcome legislation along the lines of the Queensland provision, s 218B, which covers all forms of conduct'.⁴⁵⁴

12.3.5 Legal bodies and representative groups

In its submission in response to the Consultation Paper, the Law Council of Australia stated that it sees no difficulties as a matter of principle with the current Victorian or Queensland approaches to grooming offences.⁴⁵⁵

It suggested that the Queensland offence is broader than the Victorian offence because:

- the Queensland offence covers ‘any conduct’ while the Victorian offence covers ‘communication by words or conduct’
- the mens rea for the Queensland offence – ‘with intent to facilitate the procurement of the person to engage in a sexual act’ – is wider in scope than the mens rea for the Victorian offence – ‘with the intent of facilitating the child’s engagement in or involvement in a sexual offence with that person or another adult’.⁴⁵⁶

In relation to the application of grooming offences to persons other than the child, the Law Council of Australia submitted that it had no issue in principle with the Victorian provision. It also submitted that intention must always remain the mental element for grooming offences and that recklessness would be too low a bar.⁴⁵⁷

In its submission in response to the Consultation Paper, Legal Aid NSW submitted that it is not opposed to further consideration of the Victorian grooming offence or alternatives including whether grooming should be an express aggravating factor on sentence for child sexual abuse offences. However, Legal Aid NSW expressed concern that:

Any educative benefit in a broader grooming offence may be outweighed by the real risk that a broader offence would capture entirely innocent conduct encompassing everyday acts of kindness and sociability, ultimately discouraging individuals from becoming involved as volunteers in any child-related setting, such as the school canteen.⁴⁵⁸

Legal Aid NSW submitted that this is particularly concerning because the standard non-parole period scheme has been applied to all grooming offences in New South Wales if the offences were committed on or after 29 June 2015.⁴⁵⁹ It also submitted that extending the forms of contact beyond exposure to indecent material or the use of intoxicating substances may not change the rate of prosecutions for grooming because of difficulties of proof.⁴⁶⁰

Legal Aid NSW submitted that institutional codes of conduct may be a preferable means of addressing grooming behaviour and stated that such codes should be made public and provided to parents and guardians.⁴⁶¹

12.4 Discussion and conclusions

We recognise that grooming behaviour can occur in many contexts and it may not be overtly sexual or have any appearance of impropriety.

What makes apparently innocent behaviour become grooming behaviour is the intention of the person engaging in the behaviour. The difficulty for the criminal law is identifying the person's unlawful intention in the context of apparently innocent behaviour.

Online communication with sexualised content, or the provision of sexually explicit material, tends to be easier to charge and prosecute as grooming because there is a record of the online communication or explicit material and there is unlikely to be an innocent explanation for it.

Other behaviour is more difficult to prosecute, at least in the absence of a substantive child sexual abuse offence being committed following grooming. It is much more difficult to distinguish between innocent and unlawful behaviour where the behaviour is not explicitly sexualised.

For example, having dinner with the child's family could be seen as grooming behaviour with the benefit of hindsight after contact offences have occurred. However, before any contact offences have occurred, dining with the child's family with the unlawful intention of facilitating sexual offending with the child might be difficult to distinguish from dining with no unlawful intention.

There may be categories of conduct that can be seen as particularly risky or dangerous and that an institution should prohibit its staff or volunteers from engaging in through the institution's code of conduct. For example, the NSW Ombudsman has identified the following conduct in adult-child relations under the reportable conduct scheme (effectively, in an institutional context) as potentially constituting grooming:

- An adult persuades a child that they have a special relationship by spending 'special time' with the child; giving the child unwarranted gifts; showing special favour to the child; and allowing the child to overstep the rules.
- The adult tests boundaries by, for example, undressing in front of the child; encouraging physical contact; talking about sex; and 'accidentally' touching.
- The relationship extends beyond work.
- The adult has personal communications, such as emails, calls, texts, and on social media that explore sexual or intimate feelings with a child.⁴⁶²

The NSW Ombudsman also suggests that a request by an adult that a child keep a relationship secret generally makes it more likely that grooming is occurring.⁴⁶³

However, identifying risky behaviour and prohibiting it in advance under a code of conduct is likely to be considerably easier and more effective than trying to prevent this behaviour through the use of a criminal offence.

The use of the criminal offence must turn on the state of mind of the accused and not merely on the potential riskiness of the behaviour. Unless the prosecution can prove that the accused had the unlawful state of mind, the offence will be very difficult to prove. Broader grooming offences are likely to be very difficult to prove in cases other than the narrower online or specific grooming offences – unless contact offending has occurred.

In the Consultation Paper, we stated that there may be an issue of principle as to whether the criminal law should recognise the full breadth of grooming behaviour and denounce it as wrong through a broad grooming offence or whether the criminal law should focus on narrower offences that are more likely to be able to be prosecuted.

Based on what we have heard throughout our consultations, including in submissions in response to the Consultation Paper and in evidence in Case Study 46, we have concluded that there are at least educative benefits in the broader grooming offence, even if it is more often prosecuted in the narrower circumstances of online and other electronic grooming, including police ‘stings’.

We agree with those submissions that noted the importance of education and training for institutional staff, providing information to parents and guardians, and age-appropriate education for children. Our policy work in relation to identifying and responding to grooming behaviours outside of our work on criminal justice issues will be important in this regard.

In recommending a broader grooming offence, we do not anticipate that it will be charged frequently outside of the circumstances to which the narrower offences would apply, particularly online and electronic grooming offences.

However, in so many of the cases we have examined, we have seen the breadth of grooming behaviour and the range of people at which grooming behaviour has been directed. We have also seen the damage grooming behaviour has done, including in relation to establishing circumstances where the victim will not disclose the abuse even once contact abuse occurs and circumstances where parents or carers might be unlikely to believe a disclosure because they too have been groomed to trust and respect the perpetrator.

We consider that a broader grooming offence could help to emphasise the wrongfulness of grooming behaviour, which should perform an educative function for institutions, their staff, parents, children and the broader community. A broader grooming offence also provides the criminal law context for institutional codes of conduct. These codes would prohibit conduct that is risky, in the sense that it creates the opportunity for abuse, rather than taking the narrower criminal law focus on intention.

We do not consider that there is any material risk that grooming offences will be charged in circumstances involving entirely innocent conduct, and it will be important that institutions educate their staff and volunteers to understand the necessary differences between the approach in the code of conduct and the approach of the criminal law.

We also consider that there is merit in adopting a broader grooming offence that includes persons other than the child, as the Victorian offence does. Again, we do not anticipate that the offence of grooming persons other than the child would be charged often, and particularly not in the absence of contact offences. However, extending the grooming offence in this way would recognise the damage grooming behaviour can do to those around a child.

We have heard from a number of parents of victims and survivors who have expressed great distress at having been groomed by a perpetrator so that they came to trust that person and encouraged their child to spend time with a person who they later discovered had abused the child. We particularly note the submission of PWDA that many perpetrators in disability services will groom people other than the victim within the institution and beyond it, including families.⁴⁶⁴

In the Consultation Paper, we expressed interest in hearing any views on the preferred form of a broader grooming offence, noting that the Victorian and Queensland offences appear to provide the best starting points.

We note the Law Council of Australia's suggestions in its submission in response to the Consultation Paper that the Queensland offence may be broader in some respects than the Victorian offence,⁴⁶⁵ other than in relation to the application to persons other than the child.

We do not consider it necessary to recommend any particular form of grooming offence. However, we consider that other jurisdictions could usefully draw on the Victorian approach generally, and particularly in relation to including the grooming of persons other than the child, and on the Queensland approach. We also note that other jurisdictions may wish to consider the new Victorian offences of encouraging sexual activity, which may target even broader grooming behaviour.

Recommendations

25. To the extent they do not already have a broad grooming offence, each state and territory government should introduce legislation to amend its criminal legislation to adopt a broad grooming offence that captures any communication or conduct with a child undertaken with the intention of grooming the child to be involved in a sexual offence.
26. Each state and territory government (other than Victoria) should introduce legislation to extend its broad grooming offence to the grooming of persons other than the child.

13 Position of authority offences

13.1 Introduction

Institutional child sexual abuse often involves perpetrators who are in a position of authority in relation to their victim or victims. For example, foster parents who abuse their foster children, teachers who abuse their students and priests who abuse children in their congregations are in positions of authority in relation to their victims.

These relationships are variously described, including as positions of trust or authority or persons having care, supervision or authority in relation to the victim. They typically extend beyond an institutional context to include parental relationships such as step-parents, and they may apply to biological parents.

Of course, not all institutional child sexual abuse involves perpetrators who are in a position of authority in relation to their victim or victims. Sometimes, the institutional context might have provided the opportunity for the perpetrator to meet the victim without the perpetrator having authority in relation to the victim. Similarly, child-on-child sexual abuse may not involve any position of authority. For example, a school student who abuses another student at the same school may not be in any position of authority in relation to the victim.

However, abuse by persons in positions of authority over their victims is a particularly common scenario in institutional child sexual abuse. Research suggests that it is also a particularly damaging form of abuse and is subject to particularly lengthy delays in reporting.⁴⁶⁶

In the Consultation Paper, we sought submissions from interested parties about any gaps in the recognition of relationships of authority as aggravating factors in child sexual abuse offences.

We also sought submissions as to whether it would be preferable for all jurisdictions to adopt person in authority offences applying to children up until the age of 18 years. That is, unlike the Queensland and Tasmanian approach of allowing the relationship of authority to be a factor that can vitiate consent, consent should be irrelevant in relationships involving a relationship of authority.

We suggested that, where a child of 16 or 17 years has sexual contact with a person who is in a position of authority in relation to the child, it might be preferable for the presence or absence of consent – apparent or actual – to have no role in determining whether an offence has been committed. Of course, all circumstances relevant to the particular offending could be taken into account in sentencing.

This approach would involve the criminal law effectively denying children who are over the age of consent the ability to consent to sexual contact with persons who are in a position of authority over the child, or at least not recognising the effectiveness of that consent.

We acknowledged that views might differ as to whether this is an appropriate protection for vulnerable young people who may be at particular risk of exploitation by those in authority over them or whether it is an unnecessary restriction on young people, who should be regarded as being able to make their own decisions about sexual contact once they reach the age of consent.

Some submissions in response to the Consultation Paper commented on position of authority offences.

13.2 Current offences

Many current child sexual abuse offences recognise the particular seriousness of abuse by a person in a position of authority in two ways:

- by including position of authority as an ‘aggravating’ factor that is recognised as making the commission of an offence worse and that attracts a higher maximum penalty
- by creating offences in relation to older children who are above the age of consent such that, even if they ‘consent’, sexual contact by a person in authority in relation to the child will be an offence.

Child sexual abuse offences generally apply to sexual contact with children who are under the age at which they are recognised as being able to consent to sexual contact.

The age of consent for sexual intercourse in Australian jurisdictions is as follows:

- in the Commonwealth, New South Wales, Victoria, Western Australia, the Australian Capital Territory and the Northern Territory – 16 years of age
- in Queensland:
 - 18 years of age for anal sex
 - 16 years of age for all other sexual acts
- in South Australia and Tasmania – 17 years of age.⁴⁶⁷

Some child sexual abuse offences are ‘aggravated’ offences in that they attract higher maximum penalties if the victim was under the authority of the offender either generally or at the time of the offence. For example, the following offences are aggravated:

- **New South Wales:** aggravated act of indecency, section 61O(1); aggravated sexual intercourse – child between 10 and 16, section 66C(2) and s 66C(4) – aggravating factors are victim being under the authority of the offender, either generally or at the time of the offence, or victim has a serious physical disability or cognitive impairment
- **Victoria:** sexual penetration of a child under the age of 16, section 47(1) – aggravating factors include the victim being between 12 and 16 years old and under the care, supervision or authority of the offender

- **Queensland:** carnal knowledge with or of children under 16, section 215(3) – aggravating factors are offender is the child’s guardian or for the time being has the child under the offender’s care; child has an impairment of the mind
- **Western Australia:** sexual penetration of or indecent dealing against a child over 13 and under 16, section 321(2) and 321(4) – aggravating factor is victim is under the care, supervision or authority of the offender
- **Northern Territory:** sexual intercourse or gross indecency involving a child under 16 years, section 127(1) – aggravating factors include victim is under the care of the offender, either generally or at the time of the offence; child has a serious physical or intellectual disability; offender took advantage of the child being under the influence of alcohol or a drug.

In 2016, Tasmania amended its *Sentencing Act 1997* to provide a sentence aggravation provision in relation to a number of sexual offences. The victim being under the care supervision or authority of the offender is listed as an aggravating circumstance under section 11A(1)(a).⁴⁶⁸

In some child sexual abuse offences, the age of consent is effectively higher if the victim was under the authority of the offender. This means that, even if the victim ‘consents’ to the sexual activity, the offender commits an offence because the victim was under the offender’s authority. Most states and territories have adopted this approach as follows:

- **New South Wales:** In 2003, a number of offences were introduced to criminalise sexual contact between an adult and a child of 16 or 17 years of age who is under their ‘special care’. ‘Special care’ is defined to arise if the offender is the victim’s step-parent, guardian or foster parent; schoolteacher; custodial officer; or health professional. It also arises if the offender has an established personal relationship with the victim in connection with the provision of religious, sporting, musical or other instruction to the victim.⁴⁶⁹
- **Victoria:** In 1991, offences were introduced to criminalise sexual contact between a child over the age of consent (covering children 16 or 17 years of age) and a person in a position of authority or care. ‘A position of authority’ was defined in 2006 to include teachers; foster parents; legal guardians; ministers of religion; employers; youth workers; sports coaches; counsellors; health professionals; police; and employees of remand and similar centres.⁴⁷⁰

The definition of the circumstances in which a child is under the care, supervision or authority of a person is re-enacted in section 37 of the *Crimes Amendment (Sexual Offences) Act 2016*, which provides for the offences of sexual assault of a child aged 16 or 17 under care, supervision or authority: s 49E; sexual activity in the presence of a child aged 16 or 17 under care, supervision or authority: s 49G; causing a child aged 16 or 17 under care, supervision or authority to be present during sexual activity: s 49I; encouraging a child aged 16 or 17 under care, supervision or authority to engage in, or be involved in, sexual activity: s 49L.

- **Western Australia:** Western Australia has longstanding offences criminalising the sexual abuse of children (under 17 years of age) by persons in a position of authority or care. In 1992, Western Australia introduced new offences criminalising sexual acts between 16- or 17-year-old children and persons who have the care, supervision or authority of the child. A relationship involving ‘care, supervision or authority’ is not defined.⁴⁷¹
- **South Australia:** South Australia has longstanding offences criminalising sexual contact between children (under 18 years of age) and persons in positions of authority. In 2008, South Australia significantly expanded the categories of persons in positions of authority to include teachers; foster parents, step-parents or guardians; religious officials or spiritual leaders; medical practitioners, psychologists or social workers; persons employed or providing services in a correctional institution or a training centre; and employers.⁴⁷²
- **Australian Capital Territory:** In 2013, the Australian Capital Territory introduced two new offences criminalising sexual contact or acts of indecency with a young person who is 16 or 17 years of age and under ‘special care’. ‘Special care’ is defined to include relationships such as those with teachers; step-parents, foster carers or legal guardians; people providing religious instruction to the young person; employers; sports coaches; counsellors; health professionals; and custodial officers.⁴⁷³
- **Northern Territory:** In 2003, the Northern Territory introduced a new offence of sexual intercourse or gross indecency involving a child of 16 or 17 years of age under ‘special care’. ‘Special care’ is defined to include similar categories to New South Wales, although it also includes a person who has established a personal relationship with the victim in connection with supervision, such as supervision in the course of employment or training.⁴⁷⁴

However, Queensland and Tasmania have taken a different approach as follows:

- **Queensland:** Queensland has not introduced specific provisions extending offences in relation to positions of trust or authority. In 1989, Queensland introduced aggravated provisions for a number of offences so that offenders are liable to longer imprisonment if they are a ‘person who has care of a child’. This includes a parent, foster parent, step-parent, guardian or other adult in charge of the child, whether or not they have lawful custody of the child. However, Queensland also amended the definition of ‘consent’ so that consent may be vitiated in circumstances where it was obtained by exercising authority.⁴⁷⁵
- **Tasmania:** Tasmania has not introduced offences in relation to persons in a position of authority or trust. However, in 1987 Tasmania amended the definition of ‘consent’ to include a series of circumstances where the consent of the victim will be vitiated. These include where the victim is ‘overborne by the nature or position of another person’, which may be interpreted to include persons in a position of authority, care or trust.⁴⁷⁶

13.3 What we were told in submissions

In their submissions in response to the Consultation Paper, some interested parties commented on the position of authority offences.

Care Leavers Australasia Network (CLAN) submitted that it believes:

that there is a necessity for 'Person of authority' and concealment offences. ... psychological damage is something that needs to be considered, and when a person of authority who is entrusted with the welfare or best interests of a child, abuses that child the psychological damage can be irreparable. This is considered an aggravating factor for a reason and as such it should rightfully be given its own offence.

Those who work in positions of authority with children need to be held to a higher standard as they are members of society who have been entrusted to care for the welfare of children, when this is broken it is difficult to ever go back. Also, those who are employed in these roles need to understand their obligations and their duties and why it is such. If they cannot understand this, then they should not be employed in these roles to begin with.⁴⁷⁷

The New South Wales Office of the DPP submitted that the latest amendments to section 73 of the *Crimes Act 1900* (NSW) have now addressed gaps in the abuse of trust offences, such that the abuse of 16 or 17 year olds in a relationship involving 'special care' where the perpetrator is the de facto partner of a parent, guardian or foster parent of the victim are now captured. However, they also submitted that there is a disconnection between the terminology and definitions used in the section 73 abuse of trust offence compared to the other 'in authority' offences in the *Crimes Act 1900* (NSW).⁴⁷⁸

The Victorian Director of Public Prosecutions (DPP), Mr John Champion SC, submitted that:

It is my view that this element [position of authority] operates reasonably well, subject only to the expected issue arising in some appeal matters in which the degree of care, supervision or authority has been examined. Although one option would be to attempt to schedule all relationships which would satisfy this element, it is my view that a less prescriptive and more flexible approach is to be preferred, especially as this element is uncontested in most relevant matters.⁴⁷⁹

The Tasmanian DPP, Mr Daryl Coates SC, submitted:

When considering in the Tasmanian context whether there should be aggravating offences for offenders who are in a position of authority, it should be recognised that, apart from murder, all offences under the Criminal Code have a maximum penalty of 21 years' imprisonment (s 389(3) of the Criminal Code). In Tasmania there are no differentiating sentences for aggravating offences. Matters of aggravation are generally taken into account

in the overall sentence. Thus, if a person was in a position of authority that is regarded as an aggravating circumstance for offences involving children where consent is not an element of the offence. This has recently been codified in Parliament by the passing of the *Sentencing Amendment (Sexual Offences) Bill 2016*.⁴⁸⁰

In relation to the use of the provision to vitiate consent where a complainant is overborne by the nature or position of another person, Mr Coates submitted:

[It] has been used to charge and convict accused persons of the more serious crime of rape, rather than simply unlawful sexual intercourse with a person under the age of 17 years where, for example, the accused is a parent, employer or carer, and there is evidence that their position overbore the consent of the complainant.⁴⁸¹

Mr Coates did not support any aggravated 'position of authority' offence, submitting:

Given these provisions and the fact that, in any event, the position of the person is treated as an aggravating factor in the sentencing process, I am of the view that we do not need a separate aggravating offence for a person when they are in a position of authority. Making such a provision an element of the offence would only add to the complexity of a case to the jury without providing any tangible benefit.⁴⁸²

The Law Council of Australia submitted that it 'is not aware of any gaps in relation to relationships of authority as aggravating factors in child sexual abuse offences'.⁴⁸³

The Law Society of New South Wales submitted that the inconsistencies between jurisdictions as to what constitutes being under authority have caused difficulties in the protection of children, citing *Queensland College of Teachers v Morrow*.⁴⁸⁴

It also submitted that the differences *within* jurisdictions mean that:

Depending on the jurisdiction and which offence is charged, consent could be negated by the *existence* of a relationship involving a position of authority; the *exercise* of the position of authority; or the *abuse* of the position of authority.⁴⁸⁵ [Reference omitted. Emphasis original.]

It referred to the following cases as illustrating the differences between these three categories: *R v Howes*;⁴⁸⁶ *Lydgate (a pseudonym) v The Queen*;⁴⁸⁷ and *R v King*.⁴⁸⁸

We outline the four cases cited by the Law Society of New South Wales in section 13.4.

The Law Society of New South Wales stated that New South Wales provides for the negation of consent by the *abuse* of a position of authority, or by the *existence* of a position of authority,⁴⁸⁹ and for an aggravation of offences if there is *abuse* of authority or if the victim was *under* the authority of the offender.⁴⁹⁰

The Law Society of New South Wales submitted that:

there should be consistency across the jurisdictions. We recommend that negation of consent and aggravation should be via *abuse* of a position of authority, rather than the mere existence of a position of authority. We consider that the meaning of ‘abuse’ of a position of authority should be determined by the courts.⁴⁹¹ [Emphasis original.]

In relation to whether categories of positions of authority should be defined, the Law Society of New South Wales submitted that:

[We consider] that an exhaustive list of positions of authority provides certainty, and is even more important if position of authority offences that only require proof of the existence of a position of authority are retained.⁴⁹²

It expressed support for the list of ‘special care’ relationships under section 73 of the *Crimes Act 1900* (NSW) to be adopted as a model for all jurisdictions.⁴⁹³ However, it also submitted that one element of the list is too broad. It stated:

The Law Society also submits that s 73(3)(c) of the *Crimes Act 1900* (NSW), which provides that a special care relationship exists where ‘the offender has an established personal relationship with the victim in connection with the provision of religious, sporting, musical or other instruction to the victim’, may be drafted too broadly. We consider that the phrase ‘in connection with’ may mean that the special care relationship extends beyond the instructor to anyone who is ‘connected with’ the provision of instruction. For example, a 17-year-old sports mentor or captain of the team who has consensual sex with a 17-year-old team mate may be committing an offence under s 73.⁴⁹⁴

It submitted that the definition in section 73(3)(c) should be narrowed or a similar-age consent defence should be available.⁴⁹⁵

Legal Aid NSW submitted that it does not consider that there are any gaps in the list of categories of relationships in New South Wales.⁴⁹⁶ It made a similar submission to that made by the Law Society of New South Wales in relation to section 73(3)(c) of the *Crimes Act 1900* (NSW) potentially being too broad.⁴⁹⁷

A confidential submission made in response to the Consultation Paper:

- expressed support for more closely defining ‘position of authority’ as an aggravating factor under section 66C of the *Crimes Act 1900* (NSW), perhaps by way of a non-exhaustive list, so that it is not always a matter for the jury
- suggested clarifying that the conduct of the person in authority includes ‘out of hours’ conduct – for example, conduct by a teacher out of school hours
- suggested including ‘breach of trust’ as an aggravating factor in the formulation of the offence rather than it being solely a sentencing principle.

13.4 Cited cases

The Law Society of New South Wales cited the case of *Queensland College of Teachers v Morrow*⁴⁹⁸ in submitting that the inconsistencies between jurisdictions as to what constitutes being under authority have caused difficulties in the protection of children.⁴⁹⁹

It also cited the cases of *R v Howes*,⁵⁰⁰ *Lydgate (a pseudonym) v The Queen*⁵⁰¹ and *R v King*⁵⁰² as illustrating the difference between circumstances where consent can be negated by the *existence* of a relationship involving a position of authority; the *exercise* of the position of authority; or the *abuse* of the position of authority.⁵⁰³

We outline these four cases below.

13.4.1 Queensland College of Teachers v Morrow (2011)

In *Queensland College of Teachers v Morrow*,⁵⁰⁴ the Queensland College of Teachers (QCT) sought leave to withdraw disciplinary proceedings against a teacher, Stephen Peter Morrow, in the Queensland Civil and Administrative Tribunal (the Tribunal) on the basis that Mr Morrow was now an 'excluded person' under the *Education (Queensland College of Teachers) Act 2005* (the Act) and was no longer entitled to apply for teacher registration or permission to teach under the Act.

The history of the matter was stated by the Tribunal as follows:

Mr Morrow obtained registration as a teacher in Queensland in September 2004.

In November 2006, Mr Morrow was charged by the Victorian Police Service with six counts of offences relating to sexual penetration of a child aged 16 or 17 years under his care, supervision or authority.

Within days, his teacher registration was suspended under the Act. He ceased being registered on 13 April 2007.

In April 2008, Mr Morrow was convicted of nine counts of the charge and sentenced to a term of imprisonment.

In 2010, the Victorian Court of Appeal quashed the convictions and listed the matter for retrial. The retrial was listed in October 2010, and Mr Morrow pleaded guilty to five counts of sexual penetration of a 16 or 17 year old child under his care, supervision or authority under section 48 of the *Crimes Act 1958* (Vic). Mr Morrow was sentenced to an effective sentence of three years imprisonment, although some fifteen months of the term was suspended.⁵⁰⁵

Morrow was the teacher of the victim. The Victorian offence (then under section 48 of the *Crimes Act 1958* (Vic)) made consent irrelevant except in very limited circumstances.

The Crown case in the prosecution of Morrow was set out by Redlich JA in the Victorian Court of Appeal as follows:

The Crown case was that the offences occurred during the complainant's VCE studies. The applicant was her physics teacher. In 1998, the complainant, then in Year 11, would ask for assistance with her studies from the applicant. On occasions, the applicant would drive the complainant home from school. A personal relationship began to develop and both kissed for the first time in 1998, some time around the Year 11 formal.

In 1999 the complainant commenced Year 12. The applicant continued to drive her home from school on occasions. In May of that year, the applicant drove the complainant to a car park at the Fairfield Boathouse. The applicant and the complainant had intercourse in the backseat of the car (Count 1).

After school, about two times a week, the applicant would drive the complainant to either the area near the Fairfield boathouse or St Kilda beach. The complainant said that the intercourse would occur in the back seat of the car and that typically, prior to intercourse she would give oral sex to the applicant (Counts 2 and 3).

Counts 4 and 5 concerned on [sic] an encounter at a Hotel in Northcote. (The applicant was acquitted of count 5). Counts 6 and 7 were said to concern 'occasions' where the complainant was driven after school to either St Kilda or Fairfield. In relation to both sets of counts, oral penetration was said to precede penile penetration by the applicant.

Neither the applicant nor the complainant used contraception. The complainant fell pregnant. The applicant testified that the applicant was the father of the unborn child. On 30 September 1999 she attended the East Melbourne fertility clinic and terminated the pregnancy. The complainant said the applicant attended with her and paid in cash for the termination. On a day or two before the termination, the complainant said she and the applicant visited a Hotel around the Springvale Road area (Counts 8 and 9). (The applicant was acquitted of Count 8 – oral penetration).

From this time the applicant and the complainant continued to have intercourse, but the complainant was trying to 'back down' from the relationship. The complainant gave evidence about an occasion in the middle of October 1999, where the applicant drove her to a service lane and they had intercourse there (Counts 10 and 11). The applicant said the last time they had intercourse was in December 1999.

On 10 August 2006, at the instigation of police, the complainant telephoned the applicant and the conversation between them was recorded. This conversation contained no clear admissions, although the applicant seemed to acknowledge a sexual relationship of some kind with the complainant. In his record of interview, the applicant denied having a sexual relationship with the complainant and denied seeing her after she finished Year 12. The applicant was later presented with the fact and substance of the taped conversation. The applicant gave evidence at trial. He said that there was one occasion on which he had intercourse with the complainant. That was in January 2000, after she had finished her studies in Year 12. The complainant denied any contact with the applicant during the year after she completed Year 12.⁵⁰⁶

The Victorian Court of Appeal allowed Morrow's appeal against conviction due to a number of errors in the directions given by the trial judge, including as to forensic disadvantage and breach of the rule in *Browne v Dunn*.⁵⁰⁷ It also found that the verdicts were unsafe and unsatisfactory due to latent duplicity arising from a lack of particularisation as to which of the series of acts of which the complainant gave evidence were relied on for some of the counts.⁵⁰⁸

In his subsequent retrial on some counts, as the Tribunal stated, Morrow pleaded guilty to five counts of sexual penetration of a 16- or 17-year-old child under his care, supervision or authority under section 48 of the *Crimes Act 1958* (Vic).⁵⁰⁹

In Queensland, under the *Commission for Children and Young People and Child Guardian Act 2000* (Qld), an offence under a law of another jurisdiction will be a disqualifying offence if it would have constituted a relevant offence if committed in Queensland.

The problem here was that Queensland had no equivalent offence. The only relevant offence was rape, which is a disqualifying offence if it is committed against a child under the age of 18 years. However, the charge of rape would require proof of the absence of consent.

Under section 348(2) of the *Criminal Code* (Qld), consent will be vitiated if obtained by the 'exercise of authority'. The Tribunal stated that the phrase 'exercise of authority' does not appear to have been considered judicially since it was inserted in the *Criminal Code* in 2000. However, they stated:

A teacher does not by virtue of being a teacher, exercise authority over a person, although a relationship of authority exists. Whether or not Mr Morrow would be considered to have exercised authority over the student concerned, thereby vitiating any consent she gave, is unknown. It was not relevant to the charges brought against him in Victoria. Accordingly, it is not known whether Mr Morrow's actions would have constituted the Queensland offence of rape.⁵¹⁰ [Emphasis added.]

The Tribunal did not accept that Morrow was an excluded person within the definition of the Act and so refused leave for the QCT to withdraw the disciplinary proceedings. It directed that the disciplinary proceeding be listed for hearing.⁵¹¹

When the matter was then listed for hearing of the disciplinary referral on the papers, QCT made a further application to withdraw the disciplinary proceedings, again arguing that Morrow is an 'excluded person' under the Act but advancing a different reason for this status.⁵¹² This time, QCT argued that he was a 'relevant excluded person' because he is subject to offender reporting obligations under the *Child Protection (Offender Reporting) Act 2004* (Qld) (the CPOR Act). The CPOR Act includes persons who are 'corresponding reportable offenders' in other jurisdictions, including under the *Sex Offenders Registration Act 2004* (Vic).

Under the *Sex Offenders Registration Act 2004* (Vic), Morrow was required to report for life. The Tribunal found:

As a result, he is a corresponding reportable offender in Queensland under section 7, and also a reportable offender under section 5 of the CPOR Act. By virtue of section 39 of the CPOR Act, he must report in compliance with the recognised foreign reporting period, namely for life.

While he is subject to those offender reporting obligations, he is both a relevant excluded person and an excluded person under the Act. As a consequence, he is ineligible to apply for teacher registration in Queensland. It appears that he will remain ineligible to do so for life.

Mr Morrow raises the possibility that he may seek suspension of the reporting obligations. Both the CPOR Act and the *Sex Offenders Registration Act 2004* (Vic) provide for the Supreme Court in the relevant jurisdiction to suspend reporting obligations, in essence, after 15 years of reporting. Whether or not he ultimately proceeds to do so, and if he does make application, whether he succeeds cannot be known at this stage. Even if he did apply and succeed at some point, and then sought teacher registration, which he suggests he will not do, registration is not an automatic process.

Disciplinary proceedings are protective, not punitive in nature. The tribunal is satisfied that the public interest is protected as a consequence of Mr Morrow's status as an excluded person. In all of the circumstances, it is appropriate for leave to be granted to QCT to withdraw the disciplinary referral relating to Mr Morrow.⁵¹³ [References omitted.]

Ultimately, then, it was the reporting requirements that flow from being a registered sex offender that made Morrow an 'excluded person' and ineligible to be a teacher in Queensland, not his convictions in Victoria for sexually abusing his student.

13.4.2 R v Howes (2000)

In *R v Howes*,⁵¹⁴ the accused, a teacher, was charged with 22 counts relating to three complainants, but the presentment was severed and three separate trials were ordered. In the second trial, he was acquitted on a count of rape of his student but was convicted on the alternative count of sexual penetration with a 17-year-old under his care, supervision or authority under section 48 of the *Crimes Act 1958* (Vic). The Victorian Court of Appeal upheld the conviction.

An issue on the appeal was whether a pupil could cease to be under the teacher's care, supervision or authority if they had arranged to meet off school premises and outside of school hours when the sexual penetration occurred.

In year 11, the complainant had been in the accused's maths and chemistry classes. She gave evidence of his conduct towards her that could be characterised as grooming (such as discussing sex and his relationship with his wife). She gave evidence that he offered to meet her at a university to show her around. He then took her back to his flat, gave her alcohol, insisted they play strip poker and then had penile vaginal intercourse with her. In summary in cross-examination, she said that:

the meeting at the university was a private one unconnected with the teacher and student relationship. She did not regard herself as being under his supervision when she went to the flat. She believed there was not the relationship of teacher and student in the sense of her being on some excursion under the applicant's supervision or authority.⁵¹⁵

The accused gave evidence denying any sexual encounter and saying that at no time had he said or done anything inappropriate.⁵¹⁶

Justice Brooking discussed how the words 'care, supervision or authority' should be interpreted, including by reference to the purpose of the offences, and how juries could be assisted in understanding them.⁵¹⁷

He concluded that:

In my opinion, if a jury is satisfied that a standing relationship of care, supervision or authority was established between two persons, and that it still existed as a standing relationship on the day on which penetration took place, the jury may convict notwithstanding that the occasion on which penetration took place was not connected with and did not arise out of the relationship and the parties were not acting in any sense in the capacities which gave rise to the relationship.⁵¹⁸

Justice Winneke, President of the Court of Appeal, stated:

In my view, the words [under the care, supervision or authority] are apt to describe circumstances which are wider than those which demonstrate that the child complainant is, at the time of sexual penetration, actually or temporally under the care, supervision or authority of the accused (for example, baby-sitters or child-carers). The offence created by the section is also aimed at those who, by virtue of an established and on-going relationship involving care, supervision or authority, are in a position to exploit or take advantage of the influence which grows out of that relationship. The words of the section cannot sensibly mean that, in a case such as the present, a child pupil ceases to be under the care, supervision or authority of his or her teacher when a teaching period concludes, or when school ceases for the day, or even when the school goes into temporary recess. It certainly cannot mean, in my view, that the relevant relationship ceases to exist because the parties agree during school session, to meet at a place remote from the school. That this was the intention of the Parliament in creating the offence becomes clear from the speech of the Minister when introducing, in 1980, the Bill which first created the concept of 'care, supervision or authority' as an element of sexual offences. He said:

'The Government is of the view that all young persons in this age category, whether boys or girls, should be protected from exploitation by all persons in positions of responsibility, that is, teachers, scout leaders, youth leaders, babysitters and such like.'⁵¹⁹ [References omitted.]

He also stated:

It remains, of course, a question of fact and degree in a particular case, whether the complainant, at the time of penetration, is under the care, supervision or authority of the accused. But where, in cases such as the present, that relationship is an on-going one, the question is not to be answered by narrowly construing the circumstances in which sexual penetration occurred; but rather by considering whether the special position of responsibility arising from the relationship of teacher and pupil continues to subsist between the parties at the time of such penetration. The relevant question is whether a relationship of the stated kind exists at the time of penetration, and not necessarily whether the accused is actually exercising or exploiting his position of advantage at that time. The responsibility arising from that relationship cannot be turned 'on and off' at the whim of the parties. Rather it will subsist so long as there exists a teacher/pupil relationship which gives rise to a capacity in the teacher to exploit or take advantage of the influence which the words creating the offence imply that he or she has over the pupil and so long as there exists the need, which the offence also implies, to protect the child from such capacity for exploitation; and this is so notwithstanding that the pupil may regard himself or herself as sexually mature. The purpose of s.43 [sic – s.48] is to impose restraint on the accused, not the victim. It is for this reason that the question whether, at the relevant time, the complainant was under the care, supervision or authority of the applicant, is not to be answered by evidence on the part of the complainant that she did not regard herself as being under the authority of the applicant at that time, or by her evidence that she was not compelled to go into the premises where penetration occurred.⁵²⁰

In relation to the purpose of the offence and what should be said to juries, Brooking JA stated:

What more should be said to juries? It is appropriate to tell them to consider the three words [care, supervision, authority] in the context in which they appear, that of creating a sexual offence. They may be told that what is often called the age of consent for acts of sexual penetration is fixed by the law at sixteen as a general rule but that Parliament has chosen to give special protection by raising the age of consent by two years for the protection of sixteen and seventeen-year-old children against what Parliament has called, in a general statement of its purposes, 'exploitation by persons in positions of care, supervision and authority'. ... Juries may be told that the obvious purpose underlying the section is to protect sixteen and seventeen-year-olds from being taken advantage of by persons who are in a position to influence them. They may be told that the section is concerned to protect young people, and often, protect them from themselves ...⁵²¹

13.4.3 Lydgate (a pseudonym) v The Queen (2014)

In *Lydgate (a pseudonym) v The Queen*,⁵²² the accused was charged with one count of sexual penetration of a child under his care, supervision or authority under section 48 and five counts of committing an indecent act with or in the presence of a child under his care, supervision or authority under section 49 of the *Crimes Act 1958* (Vic).

The trial judge reserved a number of questions for determination by the Court of Appeal.

The accused had been the principal of the victim's school, but the sexual acts occurred after he had resigned as principal. The issue was whether the victim remained under his 'care, supervision or authority' and whether evidence of the former relationship of principal and student was relevant and admissible to prove that, at the time of the sexual activity, the victim was under his care, supervision or authority.

Justice Beach summarised the undisputed core facts as follows:

- (a) the complainant was 17 years of age at all relevant times;
- (b) during 2012, the complainant was a year 11 student at a school at which the accused was employed as the principal;
- (c) although the accused was not a classroom teacher of the complainant, the complainant was under his care, supervision or authority while he was the principal and she was a student;
- (d) an inappropriate relationship, excluding sexual activity, developed between the complainant and the accused during the accused's employment as principal;
- (e) in December 2012, the accused was suspended from his employment;

- (f) following that suspension, the accused continued to communicate with the complainant via text messages on a mobile telephone, and the communications became sexual in nature;
- (g) in January 2013, the accused resigned his position as principal; and
- (h) between 9 February and 2 May 2013 (the dates on the indictment), the accused engaged in a sexual relationship with the complainant.⁵²³

Justice Beach, with Maxwell P agreeing,⁵²⁴ held that the reserved questions should be answered to the effect that admissibility of evidence of the former relationship (principal and student) to prove care, supervision or authority depends on the test of relevance. He stated:

The mere proof that an accused was in a position to exploit or take advantage of an influence that might have grown out of a former relationship could not, without more, establish that the complainant was under the accused's care, supervision or authority after the former relationship ended.⁵²⁵

Further, the former relationship is more likely to be relevant if there is temporal proximity between the former relationship and the sexual activity.⁵²⁶

Justice Tate proposed that the first reserved question should be answered differently. She stated:

The prosecution cannot rely solely on a former standing relationship to prove that a complainant was under the care, supervision or authority of an accused at the time of the offending. ...

However, the existence of a former standing relationship will always be relevant to the question of whether an ad hoc relationship of care, supervision or authority exists at the time of the offending, within the meaning of s 55 of the *Evidence Act 2008* (Vic). This is so because the existence of a former standing relationship will always raise an assessment of the probability that an ad hoc relationship was later established, when compared to circumstances where there had been no former standing relationship. That is, the existence of a former standing relationship means that the later establishment of an ad hoc relationship is more probable, at least to some degree, than it would have been if there had been no earlier standing relationship.

The critical issue is not one of relevance but of admissibility and of probative value.

Depending on the evidence of the nature of the relationship during the time of the offending, a former standing relationship may be admissible to prove that a complainant was under the care, supervision or authority of an accused at that time. If a judge on a voir dire concludes, on the basis of independent evidence about the circumstances between an accused and a child after the standing relationship has come to an end, that the circumstances are capable at law of establishing that the child is, at the time of the

offending, under the care, supervision or authority of the accused, then the prosecution should be entitled at trial to rely on evidence of the former standing relationship to prove that when the sexual activity took place the child was under the care, supervision or authority of the accused, for example, by exploiting the influence that grew out of the former standing relationship. To admit evidence of the former standing relationship without applying a threshold test on a voir dire as a safeguard would be to extend the offences under s 48 and s 49 of the Act beyond their statutory boundaries.⁵²⁷

‘Lydgate’ was back before the Victorian Court of Appeal in 2016,⁵²⁸ appealing against his conviction for three counts of committing an indecent act with a child aged 17 who was under his care, supervision or authority. The jury had acquitted him of the other 14 counts in relation to sexual activity with the same complainant.

Lydgate sought leave to appeal on the ground that the verdicts on the three counts of which he was convicted were unsafe and unsatisfactory because the finding that the child was under his care, supervision or authority at the time of those offences was inconsistent with the verdicts of not guilty on the remaining 14 counts.

The court gave further detail of the conduct, as follows:

The applicant was the principal of the school attended by the complainant in 2012. In that year the complainant was in year 11 and, at the relevant time, was 17 years of age. In about November, the applicant and the complainant began exchanging text messages and having phone calls which were personal and unrelated to school matters. The complainant did not discourage this contact and she participated in it. But she also informed a teacher at the school, who had the role of mentor with her, of at least some of what was passing between them. As a result, on 8 December 2012 the school council suspended the applicant while the matter was investigated.

The applicant and the complainant continued their contact, notwithstanding a meeting between the complainant’s mother, the complainant and the applicant at a coffee shop later in December 2012 when the complainant’s mother asked them both to cease all contact. The interchange between the two of them became increasingly intimate over the summer school holiday period, although no physical sexual contact occurred during that time. For much of that time the complainant was in India with her family and a friend.

On 22 January 2013 the applicant resigned his position as principal of the school. The complainant learnt that the applicant would not be continuing as principal whilst she was still in India.

The complainant returned to Australia on 27 January 2013. By this time both her parents and her mentor at the school were actively trying to prevent contact between her and the applicant. Despite the difficulties put in their way, the contact by text, emails and phone calls continued.

The first physical sexual contact between the applicant and the complainant occurred on 9 February 2013 at a cinema. This was referred to as the 'cinema' incident. It was the subject of the three charges on which the applicant was convicted. The only matter in issue at the trial on these charges was whether at that time the complainant was under the applicant's care, supervision or authority.

After the cinema incident the complainant attempted to break off contact with the applicant. For a period of some weeks she did not contact him herself and she rebuffed his attempts to contact her. She sent him a long text message terminating the relationship, which was referred to during the trial as the 'goodbye' text.

According to the complainant's evidence, contact with the applicant resumed after she mistakenly sent a text message intended for someone else to the applicant on 17 March 2013.

Thereafter, a series of sexual encounters occurred at various locations, the first of which was on 22 March 2013. These encounters were the subject of the 14 charges on which the applicant was acquitted. Again, the only issue at the trial in relation to those charges was whether at the time of the sexual encounters the complainant was under the applicant's care, supervision or authority.⁵²⁹

Justices Redlich and Whelan held that the guilty verdicts were open on the evidence and could be reconciled with the not guilty verdicts on the other counts in manner that was 'both logical and reasonable'. They dismissed the appeal.⁵³⁰

Justice Priest, in dissent, held that the convictions were inconsistent with the acquittals and would have allowed the appeal. In his view, the evidence was not capable of establishing that the complainant was under Lydgate's care, supervision or authority when sexual activity took place.⁵³¹

13.4.4 *R v King* (2013)

In *R v King*,⁵³² the accused was charged with eight counts of child sexual abuse offences against five complainants. The court (Higgins CJ, Katzmann J and Nield AJ) summarised the offences as follows:

Ian Harold King is charged with three counts of engaging in sexual intercourse without consent and five counts of committing acts of indecency without consent, in each case knowing or being recklessly indifferent as to whether the complainants consented. The conduct in question allegedly occurred at different times over a nine-year period between 1 April 1989 and 1 July 1998 and involves five complainants. The complainants were then young men in their mid to late teens, enthusiastic cricketers keen to improve their skills. The accused was a man in his forties, a cricket coach and a former player of some

repute. The Crown case is that at all relevant times the accused was the complainants' cricket coach and mentor and that he used that position to facilitate sexual contact with the complainants and to procure their consent to the activities the subject of the charges.⁵³³

The Crown sought to rely on both tendency and coincidence evidence. We discuss tendency and coincidence evidence in Part VI.

The trial judge ordered separate trials and the Crown sought leave to appeal against that decision.

The accused did not dispute the sexual acts but disputed that they were non-consensual. The Crown case was that, if the complainants did consent, consent was negated by then section 92P(1)(h) of the *Crimes Act 1900* (ACT) (now section 67(1)(h)). That provided for negating consent caused 'by the abuse by the other person of his position of authority over, or professional or other trust in relation to, the person'.

The substantive issue was whether the trial judge erred in interpreting whether the accused committed an 'abuse' of his position of authority or trust because:

there was no allegation that he [the accused] did 'some act connected with his position calculated to deprive the apparent consent of the complainants of any reality', such as by offering to ensure their selection or by threatening to block their selection in return for sexual favours.

The Crown contends that the trial judge erred by imposing 'a superadded requirement' that the accused 'did some act connected with his position calculated to deprive the apparent consent of the complainants of any reality'. The Crown submits that in order to negate consent it merely had to prove that the accused was in a position of authority over, or trust in relation to, the complainants and that the complainants' consent was obtained through abuse of that position. The Crown submits that the trial judge's imposition of the 'superadded requirement' resulted in the order for separate trials so that that order was infected by error.⁵³⁴

The Crown's tendency notice listed the following tendencies that it alleged the accused had:

- to use his role as a cricket coach to develop a close relationship with young males by positioning himself as a mentor
- to use this close relationship to groom the young males
- to use his role as a cricket coach to introduce sexual topics into conversations with young males
- to buy gifts for young males as a means of grooming them to engage in sexual activity
- to attempt to normalise sexual contact with young males in order to develop sexual contact
- to use pornography to normalise sexual contact with young males

- to relate sexual performance to cricket performance
- to perform sexual acts on young males
- to be attracted to young males to whom he acted as a cricket coach
- to use his position of trust to facilitate sexual contact with young males he coached.⁵³⁵

The Australian Capital Territory Court of Appeal held that:

The relevant question under s 92P(1)(h) was not whether the facts set out in the tendency notice could lead to a finding that ‘the accused did an act connected with his position of authority or trust calculated to deprive the apparent consent of the complainants of any reality’. The relevant question was whether the facts set out in the notice could lead to a finding that the accused abused his position by engaging in sexual acts with the complainants. To ‘abuse’ a position means no more than to misuse it, in other words, to use it for an improper purpose. His Honour’s conclusion that something more is required is incorrect.⁵³⁶

The Court of Appeal continued:

After his Honour’s judgment was published, this Court published its judgment in *Gillard v The Queen* [2013] ACTCA 17 (‘Gillard’). In that case his Honour’s interpretation of the meaning of abuse in the context of para (h) was emphatically rejected. ... The Court held at [93]:

We accept that a threat or a bribe relevant to the relationship concerned would be likely to constitute an abuse of authority or trust placed in an accused. We also consider that an explicit reminder to a complainant about the nature of that relationship would be likely to support a claim that an apparent consent to sexual activity was obtained through an abuse of the position of authority or trust. However, we are not satisfied that s 67(1)(h) requires anything in the nature of an explicit invoking of the relationship in order that an abuse for the purposes of that provision can be made out. We see no reason why the abuse may not be implied in the exchanges between the parties, or simply implicit in the relationship, especially where it has been the basis for prior sexual activity of a similar kind. It will depend in each case on the particular facts and the circumstances in which the act is committed. Whether an accused was in a position of authority or trust, and whether any particular ‘consent’ was obtained through an abuse of that position, are questions of fact that are properly left to a jury.⁵³⁷

As to the admissibility of the tendency evidence, the court stated:

When the correct test is applied, it can be seen that the evidence was relevant. The Crown seeks to establish a pattern or a modus operandi of the accused using his position as a coach and/or mentor as a means of facilitating sexual contact with adolescent males. ... In relation to any one of the charges, it is open to a jury to conclude that the accused abused his position of authority or trust as a cricket coach and/or mentor by using

the position as a means to ingratiate himself with young men for the purpose of gratifying his sexual appetite. Logically, if he behaved in such a way for the alleged purpose in relation to one complainant, it is likely that, if he behaved in the same way or ‘a strikingly similar way’ (to use the old terminology) in similar circumstances in relation to another, that he did so for the same purpose. Thus, evidence in one case that he behaved in the ways set out in the tendency notice could rationally affect the assessment of the probability that he did so in the other cases.⁵³⁸

The court also set aside the trial judge’s decision to refuse to allow the Crown to lead coincidence evidence.⁵³⁹ The matter was remitted to the trial judge, who was left to determine whether the tendency and coincidence evidence had significant probative value, sufficient to substantially outweigh any prejudicial effect on the accused.⁵⁴⁰

13.5 Discussion and conclusions

Submissions in response to the Consultation Paper did not identify any gaps in the recognition of relationships of authority as aggravating factors in child sexual abuse offences.

In relation to our request for submissions as to whether it would be preferable for all jurisdictions to adopt person in authority offences applying to children up until the age of 18 years rather than allowing authority to vitiate consent to sexual activity, the Tasmanian DPP submitted that, in Tasmania, the provision to vitiate consent had been used successfully and that, effectively, no change was required.

The cases cited by the Law Society of New South Wales, which we discussed in section 13.4, cause us some concern. The Law Society of New South Wales submitted that the test should be ‘abuse’ of a position of authority and not merely ‘existence’ of a position of authority, but we do not agree.

As Brooking JA said of the Victorian offence in *R v Howes*, these offences are ‘concerned to protect young people, and often, protect them from themselves’.⁵⁴¹

The statement by the Queensland Civil and Administrative Tribunal in *Queensland College of Teachers v Morrow*⁵⁴² highlights the difficulty. It stated:

A teacher does not by virtue of being a teacher, exercise authority over a person, although a relationship of authority exists. Whether or not Mr Morrow would be considered to have exercised authority over the student concerned, thereby vitiating any consent she gave, is unknown.⁵⁴³

While the Law Society of New South Wales calls for ‘abuse’ rather than ‘exercise’ of a position of authority, the same concern arises.

While the Australian Capital Territory Court of Appeal's decision in *R v King*⁵⁴⁴ – that ‘to “abuse” a position means no more than to misuse it, in other words, to use it for an improper purpose’⁵⁴⁵ – might allay the concern to some extent, it is not clear what extra evidence a court would require to prove either ‘abuse’ or ‘exercise’ of authority.

We have no hesitation in saying that a schoolteacher should not engage in any sexual conduct with his or her 16- or 17-year-old students. There are no circumstances in which we would say that a student should be accepted to have consented freely to that conduct without being affected by the unequal position between the schoolteacher and student. There are no circumstances in which we would accept that such a ‘relationship’ was not exploitative. If the schoolteacher and student really want to be together, they can cease the relationship of schoolteacher and student or wait until the student leaves school or turns 18.

We do not see what evidence of ‘abuse’ – in the sense of misuse – or ‘exercise’ of authority should be needed beyond the existence of the relationship of authority. Schoolteachers should not engage in sexual conduct with their students, and we do not think it unreasonable that the criminal law requires this of them. We suspect many, if not most, schoolteachers would be appalled by such conduct, appreciating how exploitative any such relationship must be and recognising the long-term damage it could do to the student. That the student appears to be an enthusiastic participant in or even the instigator of the contact should be no excuse – teachers should be expected to be able to act professionally and exercise self-control.

Drawing on the ‘special care’ categories in section 73(3) of the *Crimes Act 1900* (NSW), we have no hesitation in concluding that the position that applies to schoolteachers should also apply to persons such as:

- a step-parent, guardian or foster parent of the victim, or the de facto partner of a step-parent, guardian or foster parent of the victim
- custodial officers of an institution in which the victim is an inmate
- a health professional if the victim is a patient of the health professional.

The Law Society of New South Wales and Legal Aid NSW submitted that the other category of ‘special care’ in section 73(3) of the *Crimes Act 1900* (NSW) – where the offender has an established personal relationship with the victim in connection with the provision of religious, sporting, musical or other instruction to the victim – is too broad and that it should be narrowed or a similar-age consent defence should be available.

Given the breadth of the types of instruction included and the potential informality of the circumstances in which they could be given, circumstances might arise where there is not inequality between the parties and any sexual contact between them may not necessarily be exploitative. In these circumstances, it might not be appropriate for the criminal law to deny children who are over the age of consent the ability to consent to such sexual contact.

However, it is clearly the case that relationships formed through these types of instruction can provide opportunities for the instructor to gain access to children and to abuse them. Our public hearings have examined many circumstances involving religious instruction, and we have also examined circumstances involving sporting and musical instruction.

We do not consider that this category of relationships of ‘special care’ should be narrowed or removed.

We note that Victoria has re-enacted its categories of care, supervision or control in section 37 of the *Crimes Act 1958* (Vic). The definition is inclusive, and some 12 categories of relationship are listed. They include the child’s sports coach and, in relation to religious instruction, ‘a religious or spiritual guide, or a leader or official (including a lay member) of a church or religious body, however any such guide, leader, official, church or body is described, who provides care, advice or instruction to [the child] or has authority over [the child]’.⁵⁴⁶

This category appears to be at least as broad as the New South Wales category in relation to religious instruction and may be broader.

Victoria has provided the following defences in the *Crimes Act 1958* (Vic):

- the ‘offender’ reasonably believed that the child was 18 years of age or more: s 49X
- the ‘offender’ and child were married: ss 49Y(1)(a), 49Y(2)(a)
- the ‘offender’ and child were in a domestic partnership, the ‘offender’ was not more than five years older than the child and the domestic partnership commenced before the child came under the ‘offender’s’, care, supervision or authority: ss 49Y(1)(b), 49Y(2)(b)
- the ‘offender’ reasonably believed that the ‘offender’ and child were married or in a domestic partnership: s 49Z
- the ‘offender’ reasonably believed that the child was not under the ‘offender’s’ care, supervision or authority: s49AZ.

The only ‘similar-age consent defence’ in Victoria is effectively where the ‘offender’ and child are in a domestic partnership that commenced before the relationship of care, supervision or authority.

A similar-age consent defence could be considered. However, the appropriateness of such a defence would need to be considered carefully. A ‘victim’ who did not come to see the relationship as exploitative would be unlikely to complain or give evidence as a complainant. Further, while the ‘victim’ and ‘offender’ being of the same age might reduce the likelihood of inequality and exploitation, it does not necessarily eliminate them.

Similarly, a defence based on the 'offender' reasonably believing that the child was not under the 'offender's' care, supervision or authority might be considered. However, we note concern about potential uncertainty for a jury as to whether a relationship of authority continues 'out of hours', and we would not want any reasonable belief defence to be available in circumstances where the person in a position of authority in relation to the child wished to argue that the position of authority only applied at certain locations or times, or in certain settings, such that the authority could be 'switched on and off'.

Recommendations

27. State and territory governments should review any position of authority offences applying in circumstances where the victim is 16 or 17 years of age and the offender is in a position of authority (however described) in relation to the victim. If the offences require more than the existence of the relationship of authority (for example, that it be 'abused' or 'exercised'), states and territories should introduce legislation to amend the offences so that the existence of the relationship is sufficient.
28. State and territory governments should review any provisions allowing consent to be negated in the event of sexual contact between a victim of 16 or 17 years of age and an offender who is in a position of authority (however described) in relation to the victim. If the provisions require more than the existence of the relationship of authority (for example, that it be 'abused' or 'exercised'), state and territory governments should introduce legislation to amend the provisions so that the existence of the relationship is sufficient.
29. If there is a concern that one or more categories of persons in a position of authority (however described) may be too broad and may catch sexual contact which should not be criminalised when it is engaged in by such persons with children above the age of consent, state and territory governments could consider introducing legislation to establish defences such as a similar-age consent defence.

14 Limitation periods and immunities

14.1 Introduction

Historically, some child sexual abuse offences have been subject to a limitation period. The limitation period imposes a maximum period from the date of the alleged offence during which a prosecution may be brought. If that time limit has expired, the offence essentially lapses and it is too late to prosecute.

Generally, limitation periods have reflected the law's concern to achieve finality and, in criminal law, to avoid unfairness to the accused. However, given what we know about the time many victims and survivors will take to report child sexual abuse, limitation periods clearly have the potential to cause real injustice in protecting an alleged perpetrator from being charged.

This has been recognised for some time.

For example, in 1992 the New South Wales Government introduced legislation to remove the limitation period of 12 months which applied to some child sexual abuse offences where the child was aged 14 or 15 years at the time of the offence. In the second reading speech, the then Attorney General, Minister for Consumer Affairs and Minister for the Arts said:

The historical basis of the section was to protect the accused by limiting the time for commencement of certain sexual assault prosecutions to six months after the date of the offence. This was designed to prevent the possibility of a complainant blackmailing an innocent man. The time limit was later extended to 12 months. As we are now aware, there may be many reasons why a victim might fail to complain within 12 months of the offence. Often too victims will not initially disclose all of the offences that have occurred, but may do so over a period of time ...

To allow offenders to avoid prosecution because of the lack of early complaint of a child of 14 years or over is therefore unjustifiable, and section 78 will be repealed under this bill.⁵⁴⁷

A number of survivors have told us in private sessions of the difficulties they have encountered because of limitation periods when they tried to pursue a criminal justice response to the abuse they suffered. We have heard a number of examples from South Australia and the Australian Capital Territory. Concerns have also been raised with us about limitation periods in New South Wales, and we are aware that the issue has arisen in other jurisdictions.

There are two aspects to the effective repeal of limitation periods:

- First, the limitation period itself must be repealed so that there is no longer any limitation period within which a prosecution for the offence must be brought.

- Secondly, any immunity which has already arisen for a perpetrator as a result of the operation of the limitation period up until the time it was repealed must be abolished. This effectively allows the repeal of the limitation period to operate retrospectively. Otherwise, merely removing the limitation period will not ‘revive’ the opportunity to prosecute for offences where the limitation period had already expired. This second step must be taken to enable those previously protected by a limitation period to be prosecuted.

In submissions in response to the Consultation Paper, a number of interested parties commented on limitation periods and immunities. Some identified similar issues in relation to the interpretation of offences and the removal of common law presumptions.

14.2 Repeal of limitation periods

14.2.1 New South Wales

As noted above, in 1992 New South Wales repealed the limitation period for some child sexual abuse offences where the child was aged 14 or 15 years at the time of the offence.⁵⁴⁸

The repealed provision provided:

78 Limitation

No prosecution in respect of any offence under section 61E (1), 66C (1), 66D, 71, 72 or 76 shall, if the person upon whom the offence is alleged to have been committed was at the time of the alleged offence over the age of fourteen years and under the age of sixteen years, be commenced after the expiration of twelve months from the time of the alleged offence.

The offences covered by the limitation period included sexual and indecent assault offences, carnal knowledge and attempts to commit these offences.

It is now clear to us that New South Wales did not take, and has not subsequently taken, the further step of removing any immunity that had already arisen under the limitation period.

In the Consultation Paper, we stated that we had been told of one matter – not involving institutional child sexual abuse – that apparently cannot now be prosecuted because of the effect of the limitation period, despite the fact that the limitation period was repealed more than 20 years ago. We have been provided with a confidential submission in relation to that matter, which we discuss in section 14.3. While the abuse may not be alleged to have occurred in an institutional context within the meaning of our Terms of Reference, we note that it was not familial abuse and it appears to have allegedly occurred in the context of casual employment.

14.2.2 South Australia

Originally, section 55(3) of the *Criminal Law Consolidation Act 1935* (SA) imposed a six-month limitation period for charging a particular carnal knowledge offence.

In 1952, the *Criminal Law Consolidation Act 1935* (SA) was amended to remove the six-month limitation period and to replace it, in section 76A, with a limitation period of three years in respect of any sexual offence.

In 1985, section 76A was repealed with effect from 1 December 1985. From that date, there was no longer any limitation period on charging sexual offences. However, charges could not be laid for offences where the limitation period had already expired before 1 December 1985.

In 2003, South Australia enacted the *Criminal Law Consolidation Act (Abolition of Time Limit for Prosecution of Certain Sexual Offences) Amendment Act 2003* (SA). Section 72A of the *Criminal Law Consolidation Act 1935*, as inserted in 2003, provides:

72A – Former time limit abolished

Any immunity from prosecution arising because of the time limit imposed by the former section 76A is abolished.

This has removed any immunity that had previously arisen under the limitation period in section 76A before 1 December 1985 and has given the repeal of the limitation period retrospective effect.

14.2.3 Australian Capital Territory

In 2013, the Australian Capital Territory amended the *Crimes Act 1900* (ACT) to insert a new section 441 as follows:

Retrospective repeal of limitation period on criminal proceeding for particular sexual offences

- (1) Despite any law previously in force in the Territory that limited the time in which a criminal proceeding could be begun (a limitation law) for an offence against a repealed sexual offence provision, a criminal proceeding for the offence may be begun as though the limitation law had never been in force.
- (2) To remove any doubt, any right acquired by a person because of the commencement of the 1951 Act, or the 1976 Ordinance, not to be prosecuted for an offence against a repealed sexual offence provision is abrogated.

'Repealed sexual offence provision' is defined to include particular offences under the *Crimes Act 1951* (ACT) and the *Law Reform (Sexual Behaviour) Ordinance 1976* (ACT).

Some limited exceptions to the retrospective removal of the limitation period were inserted into section 441A of the *Crimes Act 1900* (ACT). They appear designed to prevent prosecutions that would no longer be in line with community standards.

14.2.4 Victoria

In 2015, Victoria enacted the *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic). It inserted a new section 7A in the *Criminal Procedure Act 2009* (Vic) to abolish any immunity from prosecuting because of time limits imposed under various former sexual offences.

In its submission in response to the Consultation Paper, the Victorian Government responded to the suggestion in the Consultation Paper that limitation periods should be removed with retrospective effect but that the removal should not revive any sexual offences that are no longer in keeping with community standards.⁵⁴⁹

The Victorian Government stated that the *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic) addressed this issue.⁵⁵⁰ It quotes as follows from the explanatory memorandum to the Act:

Clause 10 [of the Bill] provides for a new section 7A in the Criminal Procedure Act 2009. Subsection (1) of this new section removes any immunity from prosecution arising because of the time limits on the prosecution of certain sexual offences against children committed prior to 1991. Those historical time limits on prosecution currently continue to operate even though the legislative provisions creating the relevant offences (dating back to 1928) have been repealed. The effect of this provision is that the immunity from prosecution gained from the existence of the time limit on the commencement of proceedings is removed. This means that these historical sexual offences against children can now be prosecuted. This provision is modelled on that enacted in South Australia in the Criminal Law Consolidation (Abolition of Time Limit for Prosecution of Certain Sexual Offences) Amendment Act 2003. The High Court held in *PGA v The Queen* [2012] HCA 21 that the repealing provision did not create retrospective criminal liability, but did effectively remove the immunity that had applied after a specified period of time from the date of the alleged offence if a complaint had not been made within that period of time.

New section 7A(2) provides that subsection (1) does not apply if the relevant conduct would not constitute an offence under Victorian law applicable immediately before the commencement of clause 10 of the Bill. This means the historical time limits on prosecuting certain sexual offences against children will not be abolished where the conduct alleged would not constitute a sexual offence under current laws, as at the commencement of clause 10.

New section 7A(3) provides that where a prosecution of a person is enabled by the removal of the times limits by subsection (1), then that person may rely on certain defences that are currently available in relation to equivalent contemporary offences. For example, where a person is charged with a historic sexual offence against a child under 16 years, consent may be a defence where the person believed on reasonable grounds that the other person was 16 years or older. This defence applies to the contemporary offence of sexual penetration of a child under 16 years but did not apply to some of the historic sexual offences against children under 16.⁵⁵¹

The Victorian Government submitted that:

The removal of historical time limits in Victoria does not revive sexual offences which no longer constitute an offence under current laws and extends existing defences to historical offences. This provides an effective mechanism for addressing injustice without inappropriately criminalising certain conduct.⁵⁵²

14.3 What we were told in submissions and Case Study 46

In their submissions, many survivors and survivor advocacy and support groups expressed support for the removal of all limitation periods.⁵⁵³

Ms Robyn Knight submitted:

It is clear now that child sexual abuse victims often don't disclose the information until they are in a position of reflecting back on their lives. In my case it wasn't until 38 years later. It wasn't until I had reached a point in my life where I was content and secure enough to revisit such a terrible time. My abuser is still a paedophile 38 years later, he still committed a crime and he should still have to pay for it despite how long ago it happened. Limitation periods must be removed.⁵⁵⁴

Relationships Australia NSW submitted:

All remaining limitation periods that prevent charges being brought for child sexual abuse offences should be removed. Survivors of childhood abuse report that they feel they have to 'work so hard' to prove to the present day authorities, the police and judicial system, that they were abused.⁵⁵⁵

Care Leavers Australasia Network (CLAN) submitted:

Obviously, CLAN is also in support of abolishing any remaining limitations periods. Both civil and criminal limitations periods should be removed for ALL child abuse offences, not just sexual abuse. The damage that ANY child abuse can do to a person is extensive and often many have not been able to recover. The physical and psychological damage of

ALL types of abuse can last a lifetime and affect a person in all areas of their life. This sort of damage should be addressed by the courts and these victims need a chance to have some justice done for them. Unfortunately, many Care Leavers have died before limitation periods were removed and they never had the opportunity to have their abuse addressed. We do not want this to be the outcome for the Care Leavers who are in the care system today.⁵⁵⁶ [Emphasis original.]

We received a confidential submission in relation to the matter we referred to in section 14.2.1 that cannot now be prosecuted because of the effect of a limitation period that was repealed in New South Wales in 1992 but not with retrospective effect. If the victim was 14 or 15 years old when they were abused and the abuse occurred before the limitation period of 12 months was repealed in 1992, it remains statute-barred. The repeal under section 78 of the *Crimes Act 1900* (NSW) was not made retrospective in that the immunity from prosecution for a perpetrator who committed the abuse before 1992 remained in place.

The confidential submission stated that another victim of the abuser also came forward and the charges relating to the abuse she suffered were able to proceed because she was 16 years of age at the time of the abuse. Understandably, this has added to the younger victim's sense of injustice in that her charges could not proceed, while the older victim's charges resulted in conviction and placement of the offender on the child sex offender's register.

In her confidential submission, the survivor told us that she understands that the limitation period has been removed in terms of civil claims, 'but for me personally this was about criminal justice and this man being held to account for a heinous crime that I have still not psychologically or emotionally healed from even after 30 years'.

In her evidence in the public hearing in Case Study 46, Ms Shireen Gunn, representing the Ballarat Centre Against Sexual Assault (CASA) Men's Support Group, said:

we know that survivors can often take a long time to come forward. Their view is that there should be no limitation, because of the strength that they need to come forward, and often they can be in counselling for a long period of time before they feel that they are brave enough to actually attempt making a report and then going through the legal system.⁵⁵⁷

In its submission in response to the Consultation Paper, the New South Wales Office of the Director of Public Prosecutions (ODPP) stated:

The ODPP does not support the creation or retention of limitation periods on prosecution, particularly so where the victim is a child.

We agree that the policy basis for the limitation in the repealed section 78 *Crimes Act* is out of step with contemporary understanding of the extent and dynamics of child sexual abuse. The limitation period's impact, in our experience, has been ameliorated by the fact it was limited to carnal knowledge and indecent assault offences and in most cases complaints of this nature involved other offending that was not caught by the limitation.

We appreciate that there would be a sense of injustice for victims where prosecutions have not been possible due to the operation of section 78 and so agree that it is appropriate to now make the repeal retrospective to enable consideration of the institution of proceedings in these matters.⁵⁵⁸

In his submission in response to the Consultation Paper, the Victorian Director of Public Prosecutions (DPP), Mr John Champion SC, stated that a few matters that had not been prosecuted because of the limitation period have been revisited for possible prosecution, and a small number of matters have now been investigated and prosecuted following the removal of the limitation period in 2015.⁵⁵⁹

Mr Champion submitted:

I am of the view that there should not be any statutorily-prescribed time limits for the prosecution of sex offences. The effect of the passage of time on the viability of a potential prosecution should be a matter to be assessed in accordance with the prosecutorial discretion, in each case on its merits.

This view is addressed in my Policy on the general prosecutorial discretion, which recognises 'staleness of the offence' as one aspect of the 'public interest' limb of the test.⁵⁶⁰

In his submission in response to the Consultation Paper, the Tasmanian DPP, Mr Daryl Coates SC, stated that no time limits apply to sexual assault offences other than in relation to the summary offence of assault with indecent intent.⁵⁶¹ He submitted:

In practical terms, that offence is only charged for conduct where the touching of the complainant is above the clothes and is not prolonged. If, for example, the conduct was prolonged and involved other sexual assaults, the policy of this Office would be to charge the person with indecent assaults, or for it to become part of a maintaining a sexual relationship charge. Therefore, I do not regard limitation periods in Tasmania as a problem.⁵⁶²

In relation to the application of section 78 of the *Crimes Act 1900* (NSW), Legal Aid NSW stated that section 78 operates prospectively and not retrospectively and, where pre-1992 matters are charged in ignorance of section 78, they stated that 'they are invariably withdrawn following representations to the NSW ODPP concerning the limitation period'.⁵⁶³

Legal Aid NSW submitted that the removal of the limitation period should continue to operate prospectively only, stating:

Particular injustice would arise in these matters if amendments were passed to retrospectively remove any immunity that had already arisen under the previous section 78 limitation period.⁵⁶⁴

In his submission in response to the Consultation Paper, Judge Berman SC, a Judge of the District Court of New South Wales, confirmed that the limitation periods continue to operate in New South Wales. He referred us to his recent judgment in *R v RL (No 2)*⁵⁶⁵ as a recent illustration of the problems which can arise.⁵⁶⁶

In that case, the accused had been found guilty on a count relating to abuse of a 15-year-old complainant in 1969 and had pleaded guilty to two further counts. When he appeared for sentencing, his counsel raised the limitation period in section 78 of the *Crimes Act 1900* (NSW). The Crown conceded that the accused should not have been charged with the count for which he was convicted and that he should not have been convicted. Judge Berman stayed any further proceedings on the conviction.⁵⁶⁷

14.4 Discussion and conclusions

Although we understand that there are very few limitation periods that still apply to child sexual abuse offences, we remain of the view that any remaining limitation periods for charging child sexual abuse offences should be removed and the removal should have retrospective effect. However, this removal should not revive any sexual offences that are no longer in keeping with community standards – such as the criminalisation of homosexual sexual acts, the decriminalisation of which was noted in Chapter 10. The Victorian legislation provides an example of how this effect can be avoided.

We acknowledge that there may be many reasons – apart from limitation periods or immunities – that prevent the prosecution of older offences. For example, the alleged perpetrator may be dead or too old for a prosecution to be viable. In some cases, the passage of time, perhaps combined with the age of the perpetrator and the relatively less serious nature of the offence, may be factors that would support a staying of a prosecution or weigh against charges being laid. Merely removing the limitation period and any immunity cannot guarantee that a prosecution will be brought.

However, limitation periods and immunities are arbitrary barriers to prosecutions, particularly given the lengthy periods of delay associated with the reporting of child sexual abuse. They can only work injustice against survivors.

The arbitrariness of the application of limitation periods and immunities is clearly revealed by the example of the failure to repeal the limitation periods in section 78 of the *Crimes Act 1900* (NSW) with retrospective effect. It cannot be a just outcome that offences in relation to a complainant who was 16 years old at the time of her abuse can be prosecuted, but offences – allegedly committed by the same perpetrator – in relation to a complainant who was 14 years old at the time of her abuse cannot be prosecuted because of the continued application of an historical limitation period.

We do not accept Legal Aid NSW’s submission that ‘particular injustice would arise’ if immunities were removed retrospectively in relation to section 78 of the *Crimes Act 1900* (NSW). Where a perpetrator has sexually abused a child, they should not retain the benefit of an immunity from prosecution for the offences which was granted at a time when the nature and impact of such offending was so poorly understood.

Removing limitation periods and immunities does not operate unfairly against alleged perpetrators, as they retain the right to seek the court’s assistance, particularly through staying proceedings, to protect against any abuse of process or in circumstances where they cannot receive a fair trial.

Recommendations

30. State and territory governments should introduce legislation to remove any remaining limitation periods, or any remaining immunities, that apply to child sexual abuse offences, including historical child sexual abuse offences, in a manner that does not revive any sexual offences that are no longer in keeping with community standards.
31. Without limiting recommendation 30, the New South Wales Government should introduce legislation to give the repeal of the limitation period in section 78 of the *Crimes Act 1900* (NSW) retrospective effect.

PART IV THIRD-PARTY OFFENCES

15 Third-party offences

15.1 Introduction

Institutional child sexual abuse particularly (although not exclusively) raises the issue of whether third parties – that is, persons other than the perpetrator of the abuse – should have some criminal liability for their action or inaction in respect of the abuse.

Many survivors have told us that they disclosed being abused at or around the time of the abuse to other adults in the institution, but those adults did not report the abuse to police or take steps to protect the child from further abuse. Many survivors have told us that, even if they did not explicitly disclose the abuse at the time, they believe that other adults at the institution must have known of the abuse and should have reported it or taken other steps to stop the abuse.

In a number of our case studies, we have heard of circumstances where abuse was not reported or where steps were not taken to protect children. We summarise some examples in section 15.2.

Third-party offences raise the difficult issue of whether what could fairly easily be identified as a *moral* duty – to report child sexual abuse to police and to protect a child from sexual abuse – should become a *legal* obligation, breach of which would be punishable under the criminal law.

The criminal law generally imposes negative duties which require a person to refrain from doing an act. It is unusual, although not unprecedented, for the criminal law to impose a positive duty which requires a person to act. A positive duty to report or take action in response to serious crimes may be considered more onerous, because it requires a person to take action despite their not being responsible for committing the crime.

However, there are good reasons for the criminal law to impose positive obligations on third parties to act in relation to child sexual abuse. For example:

- It is often very difficult for the victim to disclose or report the abuse at the time or even reasonably soon after it occurred. We know that many victims and survivors do not report the abuse until years, and even decades, later and some never disclose or report. If persons other than the victim do not report, the abuse – and the perpetrator – may go undetected for years.
- Children are likely to have fewer opportunities and less ability to report the abuse to police or to take effective steps to protect themselves, leaving them particularly in need of the active assistance and protection of adults.
- Perhaps more so than with other serious criminal offences, those who commit child sexual abuse offences may have multiple victims and may offend against particular victims over lengthy periods of time. A failure to report abuse or to protect the child may leave the particular child exposed to repeated abuse over time and may expose other children to abuse. The impact of child sexual abuse on individual victims may be lifelong, and the impact on their families and the broader community may continue into subsequent generations.

- The most effective deterrent through the criminal law may be the risk of detection. Promoting the earliest possible reporting should increase the likelihood of detection, regardless of whether a successful prosecution follows. If would-be perpetrators perceive that there is a real risk of being caught, they may be deterred from offending.

There are existing third-party offences. The common law offence of misprision of felony no longer applies in any Australian jurisdiction; however, New South Wales has retained a similar statutory offence. In 2014, in response to the Victorian Parliament Family and Community Development Committee *Betrayal of trust: Inquiry into the handling of child abuse by religious and other non-government organisations* (Betrayal of Trust report), Victoria enacted new offences of failure to disclose a child sexual offence and failure to protect a child from a risk of sexual abuse.

A further category of potential offences was identified in research commissioned by the Royal Commission. In *Sentencing for child sexual abuse in institutional contexts* (Sentencing Research), Emeritus Professor Arie Freiberg, Mr Hugh Donnelly and Dr Karen Gelb suggest that organisations – and not merely the individuals in them – should be held criminally responsible for the creation, management and response to risk when it has materialised in harm to a child.⁵⁶⁸

We summarise some relevant examples from our case studies in section 15.2. We then discuss third-party offences in the following categories:

- failure to report – in Chapter 16
- failure to protect – in Chapter 17
- offences by institutions – in Chapter 18.

In the Consultation Paper, we also raised the issue of protection for whistleblowers who disclose child sexual abuse, particularly institutional child sexual abuse. We sought submissions as to whether a criminal offence designed to protect whistleblowers who disclose institutional child sexual abuse from detrimental action would encourage reporting. We will address the issue of protection for whistleblowers in our final report rather than in this report on criminal justice.

15.2 Case study examples

Many of our case studies reveal circumstances where abuse was not reported or where steps were not taken to protect children, and some raise broader cultural issues.

The examples discussed in this section provide illustrations from different periods of time and in different settings. A more detailed discussion of each case study can be found in the relevant case study report, available on the Royal Commission's website.

The reports of some of our case studies are not yet finalised. When published, some of these reports are likely to provide further illustrations of these issues.

15.2.1 Case Study 6: Toowoomba school and Catholic Education Office

In Case Study 6 on the response of a primary school and the Toowoomba Catholic Education Office (TCEO) to the conduct of Gerard Byrnes, we found that:

- the school principal, Mr Terence Hayes, did not comply with the procedures in the school's applicable student protection kit in that he did not report the first allegations of sexual abuse, made on 3 and 6 September 2007, to the police⁵⁶⁹
- in relation to the second allegations of sexual abuse, both Mr Christopher Fry and Mr Ian Hunter of the TCEO should have ensured that the allegations contained in the draft disciplinary letter to Byrnes were reported to the police⁵⁷⁰
- upon receiving allegations of child sexual abuse against Byrnes in September 2007, the steps that Mr Hayes took to monitor Byrnes's conduct were inadequate and inappropriate to manage the risks that Byrnes posed to children at the school.⁵⁷¹ Mr Hayes should not have allowed Byrnes to continue in the position of student protection contact after he received the allegations against Byrnes in September 2007.⁵⁷² The safety of children at the school was put at risk because Mr Hayes:
 - did not comply with reporting procedures set out in the school's applicable student protection kit
 - did not report the allegations to the police
 - did not inform Mr Fry and Mr Hunter of the most serious allegation made against Byrnes⁵⁷³
- after Byrnes retired from his position effective 27 June 2008, Mr Hayes sought and enabled Byrnes' reappointment as a relief teacher knowing of the allegations of child sexual abuse against Byrnes.⁵⁷⁴ Neither Mr Fry nor Mr Hunter reported the allegations of sexual abuse against Byrnes to their supervisor, the assistant director of the TCEO, or to the director of the TCEO. This contributed to Byrnes being permitted to be appointed as a relief teacher in July 2008 because the assistant director of the TCEO, who agreed to his appointment, was not aware of the disclosures concerning the girls KH and KA⁵⁷⁵
- Byrnes was re-engaged as a relief or supply teacher at the school from 30 July 2008.⁵⁷⁶ Between 30 July and 14 November 2008, Byrnes performed duties as a relief teacher at the school on at least 15 separate days. Three of the 33 counts of indecent treatment for which Byrnes was ultimately convicted took place during this period.⁵⁷⁷

5.2.2 Case Study 11: Christian Brothers

In Case Study 11 on four Christian Brothers institutions in Western Australia, we found that:⁵⁷⁸

- in each of the decades from 1919 to the 1960s, the relevant Christian Brothers Provincial Council knew of allegations of sexual abuse against some Brothers in Christian Brothers institutions around Australia
- in each decade from the 1930s to the 1950s, allegations of child sexual abuse were raised against Brothers who had also been the subject of earlier allegations
- by the 1950s, communication between one or more of the then Superior General and the then Provincial reveals that at least one Brother was transferred to another Christian Brothers institution where he had contact with children after being the subject of an allegation that concerned children; however, in some cases, some Brothers were transferred to institutions where they would not have contact with children
- the leadership of the Christian Brothers from 1947 to 1968 failed to manage each of the institutions so as to prevent the sexual abuse of children living in those institutions.

15.2.3 Case Study 13: Marist Brothers

In Case Study 13 in relation to the Marist Brothers response to allegations of child sexual abuse against Brother John Chute, also known as Brother Kostka, we found that:

- the Marist Brothers, through a senior Brother or Provincial, knew about Brother Chute's sexual offending from as early as 1962, when Brother Chute admitted to sexually abusing a child. Brother Chute made another admission which resulted in a canonical warning in 1969 and further allegations were made in 1986 and 1993, during which time Brother Chute continued teaching at various schools⁵⁷⁹
- between 1962 and 1972, and 1983 and 1993, the relevant Provincial of the Marist Brothers took no, or no adequate, steps to ensure that Brother Chute did not have contact with children through his work as a Marist Brother⁵⁸⁰
- the Marist Brothers did not report any allegations of child sexual abuse to the police between 1962 and 1993. The church parties acknowledged that 'It is today a great source of regret to the Marist Brothers that Brother Chute's conduct was not reported to the police much earlier' so that later instances of abuse would not have occurred⁵⁸¹
- after Brother Chute was removed from teaching in 1993, the Marist Brothers received complaints from 48 of Brother Chute's former students alleging that Brother Chute had sexually abused them when they were children. Forty of these complainants attended Marist College Canberra, which was the last school at which Brother Chute taught from 1976 to 1993⁵⁸²

- Catholic Church Insurance concluded that there was ‘significant evidence’ from Brother Chute that three prior Provincials – Brother Quentin Duffy, Brother Othmar Weldon and Brother Charles Howard – had knowledge that Brother Chute had behaved in a sexually inappropriate way with young boys and had failed to act decisively to address the risk of this behaviour continuing.⁵⁸³

15.2.4 Case Study 18: Australian Christian Churches

In Case Study 18 on the response of the Australian Christian Churches and affiliated Pentecostal churches to allegations of child sexual abuse, we found that:

- in relation to the response of the Sydney Christian Life Centre and Hills Christian Life Centre (now Hillsong Church), and Assemblies of God in Australia (now Australian Christian Churches), to allegations of child sexual abuse made against Mr William Francis (‘Frank’) Houston:⁵⁸⁴
 - when allegations about Mr Frank Houston’s abuse of a child emerged in 1999, Pastor Brian Houston, the National President of the Assemblies of God in Australia, confronted his father, who confessed to the abuse
 - in 1999 and 2000, Pastor Brian Houston and the National Executive of the Assemblies of God in Australia did not refer the allegations of child sexual abuse against Mr Frank Houston to the police
 - in 2000, neither Hillsong Church nor its predecessors, Sydney Christian Life Centre and Hills Christian Life Centre, reported the suspension and subsequent withdrawal of Mr Frank Houston’s credentials as a minister to the NSW Commission for Children and Young People, as then required by section 39(1) of the *Commission for Children and Young People Act 1998* (NSW)
- in relation to the response of Northside Christian College and the Northside Christian Centre (now Encompass Church) to allegations of child sexual abuse made against the former teacher Kenneth Sandilands:⁵⁸⁵
 - Pastor Denis Smith had sufficient knowledge that Sandilands posed an unacceptable risk to children at the college from the late 1980s and failed to act to ensure the protection of the children of the college. He did not and should have considered each new allegation against the background of previous allegations. He did not and should have taken into account the breaches of the guidelines and earlier warning. He deliberately did not disclose the complaints to the Board and thus kept his inadequate handling of them from the scrutiny of the Board which he chaired
 - none of the allegations was reported to police or other authorities at the time it was made

- in relation to the response of Sunshine Coast Church to allegations of child sexual abuse against Jonathan Baldwin, a youth pastor at the church.⁵⁸⁶
 - Baldwin began abusing a boy, ALA, in 2004. For two years, the abuse continued and escalated. Members of the church eldership approached the senior pastor of the church, Dr Ian Lehmann, between 2004 and 2006 to raise concerns about the relationship between Baldwin and ALA
 - Dr Lehmann spoke to Baldwin about his relationship with ALA but took no further steps
 - Dr Lehmann failed to recognise the indicators of risk of child sexual abuse shown in Baldwin's behaviour towards ALA, despite personally observing some indicative behaviour and receiving reports of concerns from members of the pastoral team and directors of the Board of the Sunshine Coast Church. Despite the concerns raised by senior members of the Sunshine Coast Church and his own observations, Dr Lehmann did not take any steps to report the concerns to ALA's parents or the Assemblies of God in Australia
 - in April and May 2007, ALA disclosed the abuse to the senior pastor at his new church, who made arrangements for ALA to receive counselling. ALA and the senior pastor disclosed the sexual abuse to ALA's parents, and ALA then reported the sexual abuse to the police. Baldwin was arrested and charged a few days later.⁵⁸⁷

15.2.5 Case Study 22: Yeshiva Bondi and Yeshivah Melbourne

In Case Study 22, we examined two Jewish institutions in New South Wales and Victoria and their responses to allegations of child sexual abuse within their communities as follows:

- the Yeshivah Centre and the Yeshivah College in Melbourne (Yeshiva Melbourne), in relation to allegations of child sexual abuse made against David Cyprys, David Kramer and Aron Kestecher
- the Yeshiva Centre and the Yeshiva College Bondi (Yeshiva Bondi), in relation to allegations of child sexual abuse made against Daniel Hayman.

Both Yeshivah Melbourne and Yeshiva Bondi are part of the Chabad-Lubavitch movement, which is a sect of orthodox Judaism within the general class of movements described as Hasidism. Members of the Chabad-Lubavitch movement are sometimes, but not uniformly, referred to as 'ultra' orthodox Jews.⁵⁸⁸

In Case Study 22, some of the matters we found were as follows:

- In the Chabad-Lubavitch communities of Yeshivah Melbourne and Yeshiva Bondi there has been a significant level of controversy over how Jewish law concepts apply in contemporary Australian society and, in particular, how they apply to child sexual abuse. There was a tension in the evidence in Case Study 22 as to whether that controversy has been genuine or whether some members have misused the concepts to limit communication about, and publication of, incidents of child sexual abuse in the Yeshivah Melbourne and Yeshiva Bondi communities.⁵⁸⁹
- There was considerable evidence that some members of the community believed that alleging that another Jewish person may have sexually abused a child is engaging in *loshon horo* (unlawful gossip), and that conduct is against Jewish law. Similarly, there was considerable evidence that some members of the community believed that reporting a Jewish person to secular authorities such as police is considered to be engaging in conduct prohibited by either Jewish law or accepted principle (*mesirah*).⁵⁹⁰ Such beliefs resulted in some community members behaving in a range of ways towards the victims of sexual abuse and their families which caused great distress to those victims and their families. In some cases, victims and their families experienced such severe ostracism and shunning that they felt unable to remain in the community.⁵⁹¹
- In 2010, the Rabbinical Council of Victoria (RCV) determined that the Jewish community needed authoritative leadership on how Jewish law applied to the issue of child sexual abuse. To clarify the situation, the RCV issued an advisory resolution (the 2010 RCV Resolution). The 2010 RCV Resolution stated that the prohibitions of *mesirah* and *arka'ot* did not apply to information about child sexual abuse and that it was an obligation of Jewish law (a halachic obligation) to report child sexual abuse.⁵⁹²
- The 2010 RCV Resolution did not result in an immediate change in the community's approach to communication about child sexual abuse.⁵⁹³
- The application of Jewish law (in particular, the concepts of *mesirah*, *moser* and *loshon horo*) to communications about and reporting of allegations of child sexual abuse to secular authorities – in particular, police – caused significant concern, controversy and confusion amongst members of the Chabad-Lubavitch communities.⁵⁹⁴
- The evidence strongly suggests that, because of the way those concepts were applied, some members of those communities were discouraged from reporting child sexual abuse.⁵⁹⁵
- The evidence revealed a pattern in the handling of incidents of child sexual abuse:
 - repeated reports of child sexual abuse were made by or on behalf of survivors
 - those reporting abuse were assured that action would be taken
 - this was followed by apparent inaction (or no evidence of action) on the part of the institution.⁵⁹⁶

- In relation to complaints about Cyprys:
 - there was no evidence before us that Rabbi David Groner took any step in respect of Cyprys in response to the complaint made in 1984, the complaint made in 1986, the complaint made in 1996 or the complainant made in 2000⁵⁹⁷
 - there was no evidence that the complaint made in 1991 were ever recorded or that Yeshivah College Melbourne took any steps in respect of Cyprys⁵⁹⁸
 - Cyprys was not removed from the Yeshiva Centre Melbourne until 2011.⁵⁹⁹
- In relation to complaints about Kramer:
 - there was no evidence available to us of any contemporaneous record of the complaints that parents made in 1992 to Rabbi Groner, Rabbi Avrohom Glick and Rabbi Pinchus Ash and there is no record that the allegations were ever reported to Victoria Police⁶⁰⁰
 - Kramer was convicted of serious child sexual offences in the United States. In December 2011 Victoria Police charged Kramer with child sexual abuse offences and extradited him to Australia, where he ultimately pleaded guilty to the charges and was convicted and sentenced.⁶⁰¹
- The evidence before us established that Rabbi Groner’s response to reported incidents of child sexual abuse was wholly inadequate. The nature and frequency of reports to Rabbi Groner strongly suggest a pattern of total inaction.⁶⁰² In his practice of keeping complaints confidential, including not informing the principal, Rabbi Glick, Rabbi Groner failed in his obligation to the students of Yeshivah College Melbourne.⁶⁰³
- On the evidence of AVA, AVB, AVR, Mr Menahem (Manny) Waks, AVC and Mr Zephaniah Waks, we were satisfied that there was a marked absence of supportive leadership for survivors of child sexual abuse and their families within Yeshivah Melbourne. Halachic principles were stridently – even if incorrectly – applied. Criticism of those who spoke out was forceful. There were many occasions upon which Yeshivah Melbourne, the Committee of Management and Rabbi Telsner could have spoken in support of survivors of child sexual abuse and their families, drawn attention to the 2010 RCV Resolution and reinforced the halachic obligation to provide information about child sexual abuse. However, after public notices advised members of the community to provide information, public statements were made criticising discussion of the topic.⁶⁰⁴
- The leadership did not create an environment conducive to the communication of information about child sexual abuse. If anything, the mixed messages were likely to have produced inaction. It would appear unlikely that members of the community would have reported information without first seeking to discuss the issue with other community members. However, according to Rabbi Zvi Hersh Telsner’s sermons, that discussion was prohibited.⁶⁰⁵

- If Yeshivah Melbourne, the Committee of Management and Rabbi Telsner had shown leadership, survivors of sexual abuse and their families and supporters might have received a very different response from the members of the Yeshivah Melbourne community.⁶⁰⁶
- Mandatory reporting was introduced in Victoria in 1993. Despite its application to teachers and principals from mid-1994, Yeshivah College did not have a formal policy for responding to complaints of child sexual abuse until 2007.⁶⁰⁷
- In relation to complaints about Hayman, Rabbi Moshe David Gutnick identified that in 1987 he received an anonymous telephone call from a boy who complained of having been sexually abused by Hayman. Rabbi Gutnick thought the telephone call was likely to have been a prank. Nevertheless, he contacted the yeshiva and, to the best of his recollection, notified Rabbi Boruch Dov Lesches of the allegation, Rabbi Gutnick did not hear anything more from Rabbi Lesches about the issue. In August 2011, a man well known to Rabbi Gutnick contacted him and sought a meeting. Rabbi Gutnick told us that at the meeting the man told him that he had been the boy who had telephoned in the 1980s and complained of having been sexually abused by Hayman. Rabbi Gutnick said that it was not until that moment that he had ‘actually come to the realisation that [Hayman] was indeed a perpetrator’.⁶⁰⁸

15.2.6 Case Study 23: Knox Grammar School

In Case Study 23, we examined allegations of child sexual abuse of a number of former students of Knox Grammar School in Wahroonga, New South Wales, and the way that Knox Grammar School and the Uniting Church in Australia responded to those allegations.

Twelve former students gave evidence of their experiences at Knox. The father of one former student and the mother of another former student also gave evidence. Each of the former students gave evidence of the sexual abuse they suffered while at Knox and of the devastating effect that abuse had on them. The parents of the former students gave evidence about the impact of the abuse on their children and families.⁶⁰⁹

In 2009, a number of former Knox students went to the NSW Police Force to report child sexual abuse by teachers at Knox. After an investigation, five teachers from Knox were charged and ultimately convicted of child sex offences against students. These teachers were:

- Roger James
- Adrian Nisbett
- Damien Vance
- Craig Treloar
- Barrie Stewart.⁶¹⁰

In relation to allegations against Vance, we found the following:

- While Vance was employed at Knox, a student made a complaint to the headmaster, Dr Ian Paterson, about Vance, including that Vance had touched him inappropriately and made a sexual advance. At that time the student was 15 years old. Vance admitted the allegations.
- Dr Paterson permitted Vance to resign and did not notify the police. Vance subsequently obtained employment as a teacher at Keilor Downs College in Victoria and worked there between 1989 and 2002.
- In 1991, Vance contacted Dr Paterson to ask for a reference. Dr Paterson gave Vance a positive reference. Vance subsequently used that reference in support of his application for teaching positions in Victoria. Vance gave evidence that he was offered a teaching role subject to a referee check. However, Vance said that he never heard back from the school. There is no evidence to indicate whether the school contacted Dr Paterson for the referee check or whether Dr Paterson gave an adverse oral reference. However, we were satisfied that the evidence plainly established that Vance relied on Dr Paterson's reference, which was misleading by omission of a critical detail, while applying for teaching positions in Victoria. We were also satisfied that Dr Paterson ought to have notified the police of the allegations against Vance and that he failed to do so.⁶¹¹

In relation to allegations against Treloar, we found the following:

- In 1987, Mr Stuart Pearson, employed at Knox at that time as an in-house 'investigator', reported to Dr Paterson an incident of apparent sexual misconduct by Treloar with a student at Knox. After receiving this report, Dr Paterson met with Treloar and suspended him from teaching for the second half of the following year. Treloar was also removed from the boarding house. Neither Dr Paterson nor Mr Pearson notified the police or the Knox Council. Treloar remained at the school and went on to sexually abuse other boys.⁶¹²
- Over the course of 2006, Mr Pearson approached Mr John Weeks, who was by then the headmaster of Knox, to discuss concerns he held about teachers during his time at Knox. By August 2007, Mr Pearson informed Mr Weeks that it was clear to him that in about 1987 Treloar had attempted to have a 'sexual encounter' with one of the boys at Knox. The only action that Mr Weeks took after Mr Pearson gave him this information was to satisfy himself that Treloar was supposedly being supervised and was not coaching sport. In fact, Treloar coached sporting teams until the time of his arrest in 2009. We accepted Mr Weeks' acknowledgement that he could have done more to check whether Treloar was still coaching sporting teams between 2007 and Treloar's arrest in 2009.⁶¹³
- In 2010, Treloar was convicted of three counts of indecent assault on a person under the age of 16 and one count of inciting a person under the age of 16 to commit an act of gross indecency. The charges of child sexual abuse of students related to his time as a teacher at Knox.⁶¹⁴

In relation to allegations against Stewart, we found that:

- By 1992 Dr Paterson was aware of allegations that Stewart had sexually molested a student. In investigating the matter, Dr Paterson accepted that he did not ask Stewart whether he had sexually molested the student and did not notify the police. It is clear that a number of other senior staff members were also aware of the allegation. No action was taken by Dr Paterson or anyone else at the school.⁶¹⁵
- Dr Paterson accepted that the allegations made by a survivor, AJT, against Stewart were matters that, if proved, involved criminal conduct by Stewart. Dr Paterson also gave evidence that by 1990 he recognised that it was appropriate to advise the police about such inappropriate conduct towards boys and that he did not inform the police of the information he received about Stewart. He agreed that notifying the police would have been a step properly taken to advance or protect the interests of the boys of the school, particularly those being taught by Stewart, who was still a current teacher in the preparatory school as at 1992.⁶¹⁶

In relation to the ‘balaclava man’ incident, we found:

- The police were not in fact called and were not notified of the incident.⁶¹⁷
- Dr Timothy Hawkes was the housemaster of MacNeil House where the sexual assault was committed. We rejected Dr Hawkes’ evidence that he believed that the police had been notified. We found that, contrary to his evidence, Dr Hawkes knew that the police had not been called to investigate the sexual assault.⁶¹⁸
- Dr Hawkes, in his role as housemaster of MacNeil House, ought to have notified the police of the sexual assault in late 1988 or at least properly satisfied himself that the police had been called, but he failed to do so. In failing to do so, Dr Hawkes failed to act in the best interests of the boys under his care at MacNeil House.⁶¹⁹
- Dr Paterson accepted that he did not notify the police of the sexual assault in late 1988. He accepted that this was a failure, although he qualified that concession by saying it was a failure ‘looking back’. He accepted that the step of notifying the police would have been one which advanced the best interests of the boys in MacNeil House. We were satisfied that, by failing to notify the police, Dr Paterson failed to act in the best interests of the boys under his care at Knox.⁶²⁰
- We recognised that Dr Hawkes was more junior in the hierarchy of the school at the time and that Dr Paterson, as headmaster of Knox, had the primary responsibility to act decisively and protectively towards the students of Knox.⁶²¹

We also found that, in 1996, Inspector Elizabeth Cullen from the NSW Police Force attended at the school and met with Dr Paterson. Inspector Cullen told Dr Paterson she had received anonymous information about allegations of child sexual abuse against Nisbett, Treloar, Christopher Fotis, Vance and Stewart. Dr Paterson accepted that at the time he met with Inspector Cullen he would have had in his mind:

- the report about Nisbett that Mr Pearson prepared in 1986
- the incident involving Treloar in 1987
- his suspicions about Fotis having assaulted a student in 1988
- the incident involving inappropriate touching and the sexual advance admitted by Vance in 1989
- the information he had received in 1992 about allegations against Stewart.⁶²²

Dr Paterson did not reveal anything to Inspector Cullen about any of those matters. Instead, he allowed her to have access to files which Dr Paterson knew did not contain any information about those matters.⁶²³

In relation to the culture at Knox, we were satisfied that during the headmastership of Dr Paterson at Knox:

- his attitude and the culture he fostered at the school were dismissive of allegations of child sexual abuse
- he deliberately withheld information from the Knox Council
- he gave misleading references for staff
- his record keeping was poor.⁶²⁴

We accepted Dr Paterson's evidence that, in relation to the allegations against Stewart and the teacher ARZ, he was involved in a cover-up of those allegations. He also deliberately withheld information from Inspector Cullen. Dr Paterson did not notify the parents of boys who had made allegations against staff members. Through these actions, Dr Paterson failed to prioritise the welfare of the boys at Knox over the reputation of the school.⁶²⁵

15.2.7 Case Study 29: Jehovah's Witnesses and Watchtower Bible and Tract Society of Australia Ltd

In Case Study 29, we examined the experiences of two survivors of child sexual abuse within the Jehovah's Witness Church in Australia and the response of the organisation to those survivors' complaints and the systems, policies and procedures in place within the Jehovah's Witness organisation for raising and responding to allegations of child sexual abuse and for the prevention of child sexual abuse within the organisation.

In Case Study 29, some of the matters we found were as follows:

- The Jehovah’s Witness organisation relies primarily on Bible passages to set policies and procedures, including those for responding to child sexual abuse. The Governing Body generally issues policies, and Branch Offices may adjust them locally to meet the requirements of local laws. Views to the contrary of the Governing Body’s interpretation of the Scriptures are not tolerated. This is also the case for the organisation’s policies and procedures on responding to allegations of child sexual abuse.⁶²⁶
- The official position of the Jehovah’s Witness organisation is that it abhors child sexual abuse and that it will not protect any perpetrator. When an allegation of child sexual abuse is made to elders, the Jehovah’s Witness organisation conducts a ‘spiritual investigation’. Once a congregation member has reported an allegation to elders, the member is advised to leave the matter in the hands of the elders and ‘trust in Jehovah that it will be resolved’.⁶²⁷
- The Jehovah’s Witness organisation mandates that every allegation of child sexual abuse should be investigated by two (male) elders in order to establish the truth of the allegation. Before about 1998, it was the policy of the Jehovah’s Witness organisation to require a complainant of child sexual abuse to make their allegation in the presence of both the investigating elders and their alleged perpetrator. We heard that the organisation no longer requires this of complainants of child sexual abuse.⁶²⁸
- Investigating elders may take further action only if the truth of an allegation can be established according to the scriptural standards of proof. For those standards to be met, the elders must receive a confession by the accused and/or the testimony of two or three ‘credible’ eyewitnesses to the abuse. Investigating elders may also consider the evidence of two or three witnesses to separate but similar incidents of the same kind of abuse.⁶²⁹
- The Jehovah’s Witness organisation considers that if a person is accused of child abuse and they deny that allegation then, without the evidence of a second witness, ‘the congregation will continue to view the one accused as an innocent person’.⁶³⁰ If there is not enough evidence to prove an allegation of child sexual abuse according to the scriptural standards, the complaint can progress no further within the Jehovah’s Witness organisation’s internal disciplinary system and the matter is left ‘in Jehovah’s hands’.⁶³¹
- Regardless of the biblical origins of the two-witness rule, the Jehovah’s Witness organisation’s retention of and continued application of the rule to a complaint of child sexual abuse is wrong. It fails to reflect the learning of the many people who have been involved in examining the behaviour of abusers and the circumstances of survivors. It shows a failure by the organisation to recognise that the rule will more often than not operate in favour of a perpetrator of child sexual abuse, who will not only avoid sanction but also remain in the congregation and the community with their rights intact and with the capacity to interact with their victim.⁶³²

- The evidence before the Royal Commission was that it was not the practice of the Jehovah's Witness organisation to report child sexual abuse to authorities unless it is required by law to do so. At the time of the public hearing, the Jehovah's Witness organisation in Australia had recorded allegations, reports or complaints of child sexual abuse made against 1,006 members of the organisation. There was no evidence before us that the organisation reported any of those allegations to police or any other secular authority.⁶³³
- A letter in evidence before the Royal Commission showed that Watchtower Australia's own review of the 1,006 case files established that '383 alleged perpetrators had been dealt with by either police or secular authorities in the respective States or Territories in which they reside'. That letter did not describe or otherwise suggest that the Jehovah's Witness organisation had an active role in bringing allegations against the 383 identified perpetrators to the attention of secular authorities. Some of the 383 identified case files may have contained reference to but not had the involvement of the authorities.⁶³⁴
- Similarly, the case files record that 161 of the alleged perpetrators recorded in the files had been convicted of a child sexual abuse offence. It was not possible to conclude on the basis of this data that any of those convictions came about because of reports to the authorities by the Jehovah's Witness organisation. What this data did suggest was that, although the Jehovah's Witness organisation did not report allegations against those 161 offenders to the authorities, the offenders had nonetheless come to the attention of police.⁶³⁵
- There was no evidence before the Royal Commission that the Jehovah's Witness organisation either had or did not have a role or any involvement in bringing to the attention of secular authorities any complaint of child sexual abuse that was investigated by secular authorities.⁶³⁶
- We were satisfied that it is the general practice of the Jehovah's Witness organisation in Australia not to report allegations of child sexual abuse to the police or other authorities unless required to do so by law.⁶³⁷
- In our view, the Jehovah's Witness organisation should always report allegations of child sexual abuse to authorities where a complainant is still a minor at the time that the abuse comes to the attention of the organisation or where there are others who may still be at risk at the hands of the alleged abuser. In the case of a complainant who is still a minor, the organisation's justification that it is a survivor's 'absolute right' to make the report themselves is wrong and does nothing to protect that child and other children from sexual abuse.⁶³⁸

- The Royal Commission heard evidence that, before the public hearing in Case Study 29, the Jehovah’s Witness organisation did not consider that concealment offences were independent of obligations under mandatory reporting laws to report child sexual abuse.⁶³⁹ We do not accept that an elder of the Jehovah’s Witness organisation will never be obliged to report his knowledge or belief that child sexual abuse has been committed. Particularly where the abuser confesses to their crime, the obligation to report is compelling.⁶⁴⁰

15.2.8 Case Study 36: Church of England Boys’ Society

In Case Study 36, we examined the response of the Church of England Boys’ Society (CEBS) and the Anglican Dioceses of Tasmania, Adelaide, Sydney and Brisbane to allegations of child sexual abuse.

In the 1990s and 2000s a number of people involved in or associated with CEBS in the Anglican Dioceses of Tasmania, Sydney and Brisbane were convicted of child sexual abuse offences. These people included:

- Louis Daniels, a member of the clergy in the Diocese of Tasmania
- Garth Hawkins, a member of the clergy in the Diocese of Tasmania
- John Elliot, a lay CEBS leader in the Dioceses of Tasmania and Brisbane and later a priest in the Diocese of Brisbane
- Simon Jacobs, a lay CEBS leader in the Diocese of Sydney.⁶⁴¹

In addition, Mr Robert Brandenburg, a lay CEBS leader in the Diocese of Adelaide, was charged with a large number of child sexual abuse offences. He took his own life before the charges came to trial.⁶⁴²

In relation to the institutional response of CEBS to sexual offending within CEBS:

- We were satisfied that the CEBS National Council’s only formal response to child sexual offending by those involved in CEBS had been to revoke the CEBS national awards given to those offenders.⁶⁴³
- We were satisfied that there were no record-keeping practices within CEBS to monitor or keep track of CEBS leaders alleged to have perpetrated child sexual abuse.⁶⁴⁴
- The evidence before the Royal Commission established clear links between a number of the perpetrators, two of whom sexually abused at least two of the same boys. We were satisfied that those two perpetrators were aware of each other’s sexual interest in boys from at least 1990.⁶⁴⁵

- We found that there were networks of perpetrators in CEBS who had knowledge of each other's sexual offending against boys and who facilitated the sexual abuse of boys in or associated with CEBS.⁶⁴⁶
- We heard evidence from survivors and perpetrators that demonstrates commonality in the social contexts in which abuse occurred. With limited input or oversight by the relevant parish, diocese or CEBS at a national level, and either limited or no policies on appropriate contact between boys and CEBS leaders, most CEBS branches could operate in an autonomous and unregulated way. CEBS focused on promoting physical activities and overnight trips for boys that were organised by CEBS leaders and other men socially connected to CEBS leaders. Within this environment, a culture developed in which perpetrators had easy access to boys and opportunities to sexually abuse those boys.⁶⁴⁷
- The Anglican Dioceses of Tasmania, Adelaide and Brisbane have conducted three separate independent inquiries into child sexual abuse occurring within their own dioceses. There was no evidence before the Royal Commission that any investigation or inquiry has been conducted by any Anglican diocese or CEBS branch, or by the National Council of CEBS or the General Synod of the Anglican Church of Australia, into whether there was an organised network of offenders within CEBS, or a culture that facilitated child sexual abuse within CEBS, that crossed diocesan lines.⁶⁴⁸

16 Failure to report offences

16.1 Introduction

Reporting offences have received recent attention in relation to institutional child sexual abuse, including through:

- Victoria’s introduction in 2014 of its offence of failure to disclose a sexual offence committed against a child under 16, in response to recommendations in the Victorian Parliament Family and Community Development Committee report *Betrayal of trust: Inquiry into the handling of child abuse by religious and other non-government organisations* (Betrayal of Trust report)
- the New South Wales Police Integrity Commission’s June 2015 report on Operation Protea, which considered police misconduct in relation to ‘blind reporting’ of child sexual abuse and the New South Wales offence of concealing a serious indictable offence, discussed in section 9.3.2
- the charging of Catholic Archbishop Philip Wilson in New South Wales for the offence of concealing a serious indictable offence in relation to allegations of child sexual abuse.

The Royal Commission’s particular interest in relation to reporting offences is whether and how such offences should apply to institutional child sexual abuse and particularly whether institutions, or officers of institutions, should be subject to reporting obligations backed by Crimes Act or Criminal Code offences.

In the Consultation Paper and the public hearing in Case Study 46, we focused on the issue of whether we should recommend the introduction of a criminal offence for failure to report child sexual abuse.

In our work on religious institutions we also considered whether, if a criminal offence for failing to report child sexual abuse were introduced, clergy should be exempt or privileged from reporting information about abuse received through religious confession.

A ‘religious confession’ is a confession that a person makes to a member of the clergy in the member’s professional capacity according to the ritual of the church or religious denomination involved.

We considered this issue after hearing evidence in our case studies on Catholic Church institutions that both children being sexually abused and perpetrators of child sexual abuse told priests about the abuse in religious confession. We will discuss other issues related to the practice of religious confession and institutional child sexual abuse in Volume 17 of our final report, regarding religious institutions.

As noted in Chapter 15, in the Consultation Paper we raised the issue of protection for whistleblowers who disclose child sexual abuse, particularly institutional child sexual abuse. We will address the issue of protection for whistleblowers in our final report rather than in this report on criminal justice.

16.2 The regulatory context

The criminal law is not the only means by which reporting can be required or encouraged, and there may be circumstances in which it is not the most appropriate means for requiring or encouraging reporting. It is important to understand other regulatory requirements to report child sexual abuse because they provide the context in which the need for or likely effectiveness of criminal offences should be considered.

16.2.1 Mandatory reporting

Mandatory reporting laws, which require reporting of some allegations of child sexual abuse to child protection agencies, exist in all Australian jurisdictions. The Royal Commission commissioned research on the legislative history of mandatory reporting and, in 2014, published Associate Professor Ben Mathews' report, *Mandatory reporting laws for child sexual abuse in Australia: A legislative history*.⁶⁴⁹ This report discusses the history and current requirements for mandatory reporting and identifies the differences in requirements between jurisdictions.

Most jurisdictions identify particular professional groups as mandatory reporters, although in the Northern Territory the obligation applies to all persons. Some jurisdictions define 'children' to include all those under 18 years of age, while in Victoria it is under 17 years of age and in New South Wales it is under 16 years of age.

There are also differences between jurisdictions in the levels of knowledge or states of mind and types or extent of harm that trigger the obligation to report. Associate Professor Mathews states:

Duties are never so strictly limited that it only applies to cases where the person is certain that the child is being abused or neglected; but nor are they so wide as to apply to cases where a person may have the merest inkling that abuse or neglect may have occurred. While this is a reasonable approach, there are differences between the jurisdictions in how this state of mind is expressed, which may cause confusion for reporters. The legislation variously uses the concept of 'belief on reasonable grounds' (four jurisdictions), and 'suspects on reasonable grounds' (four jurisdictions). Technically, belief requires a higher level of certainty than suspicion.⁶⁵⁰

Table 6 in the executive summary of the report sets out the state of mind and abuse or extent of harm which trigger the mandatory reporting obligation and whether they apply to past, present or future abuse or harm in each jurisdiction.⁶⁵¹

Most jurisdictions impose fines as the maximum penalty for failing to make a mandatory report.⁶⁵² The Australian Capital Territory also provides for a maximum of six months imprisonment. New South Wales abolished the penalty in 2009 following the recommendations of the Special Commission of Inquiry into Child Protection Services in New South Wales, which identified that the financial penalty might influence defensive reporting by some mandatory reporters.⁶⁵³

Associate Professor Mathews states that prosecutions for failure to report under mandatory reporting duties are very rare, partly because the provisions focus on ‘encouraging reporting, rather than policing it’.⁶⁵⁴ He identifies six prosecutions in five Australian jurisdictions.⁶⁵⁵

16.2.2 Reportable conduct

New South Wales also has a reportable conduct scheme under Part 3A of the *Ombudsman Act 1974* (NSW). This requires designated government and non-government agencies to notify the Ombudsman of allegations of ‘reportable conduct’, which 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.

Section 37(1) of the *Ombudsman Act 1974* (NSW) creates general offences under that Act, including in relation to obstructing the Ombudsman or refusing or wilfully failing to comply with any lawful requirement of the Ombudsman. The maximum penalty is 10 penalty units. However, there is no specific offence for failing to report an allegation of reportable conduct, and it is not clear that the offences in section 37 would apply other than where the Ombudsman or an officer of the Ombudsman was exercising powers or making requirements in a particular case.

The Ombudsman assists institutions to comply with their obligations, including in relation to reporting to police. In their submission to the Royal Commission’s *Issues Paper No 8 – Experiences of police and prosecution responses* (Issues Paper 8), the Ombudsman and Deputy Ombudsman address how they see their reportable conduct oversight role facilitating their referral of allegations to police.⁶⁵⁶

Victoria and the Australian Capital Territory have also enacted legislation to establish reportable conduct schemes.⁶⁵⁷

16.3 Criminal law offences

16.3.1 Common law offence of misprision of felony

The common law offence of misprision of felony has been abolished in all Australian jurisdictions, explicitly or implicitly (that is, by not adopting the offence in a Criminal Code or by not using the category of ‘felony’).

In *R v Lovegrove*⁶⁵⁸ Cox J described what was required in order to avoid committing the offence in the following way:

A person who knows of the existence of a felony must tell the authorities what he knows about both the crime and the criminal. Of course, he must know, and realize that he knows, something worth telling — something that would materially assist the police in identifying a crime and tracking down the person responsible. He is not obliged to tell the police what they already know, or what he believes they already know. However, he is not absolved from his duty to tell merely because his knowledge of the crime may not be complete. He may know that the crime has been committed without knowing all the details and without knowing who committed it. In those circumstances he must disclose what he does know, and it may be that the police will be able to do the rest ...⁶⁵⁹

Justice Cox explained the policy rationale for criminalising a failure to report a crime as follows:

The policy that underlies the existence of the crime of misprision of felony is that serious crimes should be discovered to the authorities, and not regarded as private matters that may acceptably be kept from public view.⁶⁶⁰

Defences to misprision of felony included:

- a limited right against self-incrimination, depending on the severity of the offence⁶⁶¹
- if the person had a genuine belief that disclosing that information would endanger a third party or themselves⁶⁶²
- if the person feared retribution or intimidation by the offender – which may be particularly relevant for women and children, and people with disability, who are abused or who witness abuse⁶⁶³
- where a person is a lawyer acting under legal professional privilege⁶⁶⁴
- where a person has made an honest and reasonable mistake of fact.⁶⁶⁵

Victims have been convicted of failing to report offences committed against themselves. In the 1959 Victorian case *R v Crimmins*,⁶⁶⁶ a man was convicted of misprision of felony after he was shot and refused to disclose the name of the man who shot him or the location at which he was shot.

The common law offence may still be relevant if it is alleged to have been committed before the offence was abolished in the relevant jurisdiction. The date of abolition for each jurisdiction is shown in Table 16.1.

Table 16.1: Date of abolition of misprision of felony by jurisdiction

| Jurisdiction | Date of abolition of misprision of felony |
|------------------------------|---|
| Commonwealth | Not adopted in the <i>Crimes Act 1914</i> (Cth), which commenced on 29 October 1914 ⁶⁶⁷ |
| New South Wales | 25 November 1990 ⁶⁶⁸ |
| Victoria | 1 September 1981 ⁶⁶⁹ |
| Queensland | Not adopted in the <i>Criminal Code</i> (Qld), which commenced on 1 January 1901 ⁶⁷⁰ |
| Western Australia | Not adopted in the <i>Criminal Code</i> (WA), which commenced on 1 January 1914 ⁶⁷¹ |
| South Australia | 1 January 1995 ⁶⁷² |
| Tasmania | Not adopted in the <i>Criminal Code Act 1924</i> (Tas) schedule 1 (<i>Criminal Code</i> (Tas)), which commenced on 4 April 1924 ⁶⁷³ |
| Australian Capital Territory | 22 September 1983 ⁶⁷⁴ |
| Northern Territory | 1 January 1984 – not adopted in the <i>Criminal Code Act</i> (NT) schedule 1 (<i>Criminal Code</i> (NT)) ⁶⁷⁵ |

16.3.2 New South Wales Crimes Act offence of concealing a serious indictable offence

The offence under section 316(1)

In New South Wales, misprision of felony was replaced in 1990 by the offence of ‘concealing serious indictable offence’ in section 316(1) of the *Crimes Act 1900* (NSW). Section 316(1) provides:

If a person has committed a serious indictable offence and another person who knows or believes that the offence has been committed and that he or she has information which might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender for it fails without reasonable excuse to bring that information to the attention of a member of the Police Force or other appropriate authority, that other person is liable to imprisonment for 2 years.

This offence does not exist in other Australian jurisdictions, although most jurisdictions (including New South Wales but not South Australia) have enacted criminal offences for soliciting or accepting a benefit in exchange for failing to report an offence.⁶⁷⁶

A serious indictable offence is an indictable offence that is punishable by five years imprisonment or more,⁶⁷⁷ which would cover most but not all current child sexual abuse offences.⁶⁷⁸ It would not capture a number of child sexual abuse offences if they were alleged to have occurred at a time when the maximum penalty was lower than five years, even if the penalty is now five years or more.

The offence requires knowledge or belief that an offence has been committed. The belief in question is a subjective belief – that is, the person must actually hold the belief – but there is no requirement that the belief be reasonable.⁶⁷⁹ Mere suspicion is not knowledge or belief.

If the person has information which might be of material assistance, they must report it to a ‘member of the police force or other appropriate authority’.

As ‘other appropriate authority’ is not defined, it is not clear whether it might include situations where a person working in an institution could fulfil their obligation to report by passing on that information to a more senior colleague rather than the police.⁶⁸⁰ However, it may be questionable whether such a person would be an ‘authority’ let alone an ‘appropriate authority’ (although a person who did not report to police because they believed that a colleague would make the report may have a ‘reasonable excuse’ for not reporting).

Reporting child sexual abuse offences to the Kids Helpline, operated by the Department of Family and Community Services (FACS), probably would constitute reporting to an ‘appropriate authority’, particularly given its role in referring matters to the Joint Investigation Response Team (JIRT) Referral Unit (JRU). Similarly, reporting child sexual abuse offences to the Ombudsman under the reportable conduct scheme might also constitute reporting to an ‘appropriate authority’ for the purposes of avoiding committing an offence under section 316(1).

Section 316(1) provides for a defence of reasonable excuse. What constitutes a reasonable excuse is uncertain and is likely to depend on the purpose of the provision and the circumstances of each case.⁶⁸¹

In *R v Crofts*,⁶⁸² in what was apparently the earliest consideration of section 316(1) in the New South Wales Court of Criminal Appeal, the offender sought leave to appeal against the severity of his sentence. The offender had been sentenced to six months imprisonment following his guilty plea. Justice Meagher, delivering the first judgment, stated:

The section is a comparatively new section and this is the first case, so far as one knows, which has been brought under it. It is a section which has many potential difficulties, the chief of which is the meaning of the words ‘without reasonable excuse’, difficulties which are magnified when one endeavours to contemplate how those words would apply to the victim of the crime.⁶⁸³

Chief Justice Gleeson, as he then was, stated:

The evaluation of the degree of culpability involved in a contravention of s 316 of the Crimes Act could, depending upon the circumstances of the individual case, be an extremely difficult exercise. For that matter, as Meagher JA has mentioned, depending upon the circumstances of an individual case, it may be extremely difficult to form a judgment as to whether a failure to provide information to the police was ‘without reasonable excuse’.⁶⁸⁴

The New South Wales Law Reform Commission (NSW LRC) also stated that ‘there is very little case law on whether an innocent motive for concealment would provide a reasonable excuse under s 316’.⁶⁸⁵

The privilege against self-incrimination is likely to provide a reasonable excuse. That is, a person who fails to disclose to police what they knew about an offence in order to avoid disclosing their own involvement in the offence is likely to have a reasonable excuse.⁶⁸⁶

In *R v Imo Sagoa*,⁶⁸⁷ the accused was with the person who was ultimately convicted of murder before and after the murder occurred and possibly during the murder. Mr Sagoa was convicted under s 316(1). However, his appeal against his conviction was allowed because he had a lawful excuse that he did not wish to incriminate himself in the murder.

Obtaining information in the course of a privileged relationship – such as usually exists between a lawyer and their client or a health professional and their patient – does not necessarily provide a reason for non-disclosure. However, under section 316(4), legal practitioners, medical practitioners, psychologists, nurses, social workers, counsellors, clergy, researchers, schoolteachers, arbitrators and mediators can only be prosecuted under section 316(1) with the consent of the Attorney General.⁶⁸⁸ If any of these persons failed to disclose relevant information they obtained outside of their professional role, they would not fall under the limited protection of section 316(4).

The 2014 case of *Re David, Alan and Mary v The Director General Family and Community Services*⁶⁸⁹ considered suggestions of confidentiality outside of the professions that are given limited protection under section 316(4). In that case, a woman sought an injunction to restrain FACS from providing documents in its possession to the police. The documents contained information about sexual contact the woman had had with her brother many years before, when she was an adult and her brother was aged 12.

The Director-General of FACS argued that he was bound by law to provide material to the police or he would be criminally liable under section 316(1). The court found that the circumstances in which FACS had received the information attracted an equitable obligation of confidence. The court held that, even where the brother was now an adult and did not wish to pursue the matter further, FACS was still required under section 316(1) to disclose the documents to police, as the Director-General knew or believed that an offence had been committed and had information which might be of material assistance in securing the apprehension, prosecution or conviction of the woman. The court also held that a permanent injunction against disclosure would have a tendency to obstruct the administration of criminal justice.

Use of section 316(1)

Section 316(1) has been used to prosecute the concealment of the most serious crimes such as murder and manslaughter and less serious crimes such as robbery and drug offences. It appears that the offence has rarely been used to prosecute concealment of child sexual abuse offences.

The following three matters involving child sexual offences have been identified from an analysis of section 316(1) convictions recorded on the Judicial Commission of NSW Judicial Information Research System sentencing statistics database, from the years 2011 to 2014 in the Local Court and from the years 2008 to 2014 in the District Court.⁶⁹⁰

- In 2014, a woman was convicted in the District Court for concealing the sexual abuse of her children by her then partner, who committed some of the offences in her presence. She was sentenced to imprisonment for a total of 22 months. The woman had also been charged with aggravated indecency against her own children.
- In 2012, an offender was convicted in the Local Court for concealing the persistent sexual abuse of a 12-year-old boy and received a fixed term of imprisonment of three months and 23 days. He had also been charged with producing and disseminating child abuse material.
- In 2010, an offender was convicted in the District Court for concealing knowledge of aggravated indecent assault against a child and received a fixed term of imprisonment for 18 months. The offender had also been charged with child pornography and other child abuse offences.

Offences under section 316(1) are prosecuted in respect of many serious indictable offences other than child sexual offences. In the same periods in which the three matters involving child sexual offences discussed above were identified, there were:

- 46 prosecutions involving section 316(1) in the District Court and Supreme Court, of which only one matter was dismissed
- 114 prosecutions involving section 316(1) in the Local Courts, of which only two matters were dismissed
- 23 prosecutions involving section 316(1) in the Children's Court, of which only three matters were dismissed.⁶⁹¹

The following are some examples of cases involving successful prosecutions under section 316(1):

- A woman concealed a murder by her sons by telling police she knew nothing about it and gave false information to suggest others had committed the offence.⁶⁹²
- A man assisted his mother to dispose of parts of his father's body after she told him of the killing and asked for help.⁶⁹³

- A juvenile kept guard on a victim for some hours knowing for at least part of the time that the victim was to be killed by others when they returned. The offence under section 316(1) extended over a period of several months during which he failed to inform police of his knowledge of the events.⁶⁹⁴
- A woman witnessed a shooting murder by her partner but failed to report it to police.⁶⁹⁵
- A man failed to inform police of information that would lead to the arrest of a friend, who had set a man on fire. Police interviewed the man several times, but he made no comment about the circumstances surrounding the death.⁶⁹⁶
- A man played no active part in an armed robbery committed by friends in his presence and failed to report it to the police.⁶⁹⁷
- A juvenile who was present during a supermarket robbery failed to give information to the police and also threatened his girlfriend so that she would not give evidence about the crime.⁶⁹⁸
- A man who owned a property where police found 335 cannabis plants being cultivated in a shed failed to tell police that a large commercial quantity of cannabis was being cultivated at another property by others.⁶⁹⁹
- A man whose fingerprints were found on items containing pseudoephedrine (used to manufacture a prohibited drug) in an amateur drug laboratory failed to tell police the identity of the person who manufactured the drugs.⁷⁰⁰

Mr Daniel Noll, Director, Criminal Law Specialist, Policy and Strategy in the New South Wales Department of Justice, told our public roundtable on reporting offences that there are about 100 prosecutions under section 316(1) annually.⁷⁰¹

Previous considerations of section 316(1)

The offence of concealing a serious indictable offence has been controversial.

In a report published in 1999, the NSW LRC reviewed section 316 of the *Crimes Act 1900* (NSW) and questioned its effectiveness in generating information for the police.⁷⁰² The commission expressed disapproval for ‘substituting a legal duty which is enforced by a criminal sanction for a moral one unless there are overall substantial benefits to society in doing so’.⁷⁰³

The NSW LRC unanimously recommended that section 316(1) be repealed. A minority recommended that it be repealed and replaced with a new provision due to the following issues:

- its broad scope
- there is ambiguity about what constitutes a reasonable excuse
- it is unclear whether the legislation achieves its policy aims of enforcing disclosure

- numerous other offences apply where people assist a person to commit a crime, hinder police investigations or interfere with the criminal justice system
- the offence is potentially open to abuse by police in obtaining evidence from unwilling witnesses or as a holding charge
- it may interfere with research on crime because notification of the researchers' obligation to report serious offences may discourage people – victims, offenders and family members – from participating in the research.⁷⁰⁴

In releasing its report, the NSW LRC referred to situations in which the offence can operate unfairly, including:

- where a domestic violence victim would commit the offence if she did not notify the police when she was threatened or assaulted by her husband
- where the family members of a person who disclosed to them sexual offences committed against the person as a child would commit an offence if they did not report the offences
- where a person who did not report the theft of a chocolate bar would be guilty of the offence, even though most people in the community would not expect there to be a legal obligation to report such trivial offences.⁷⁰⁵

No legislative amendments were made in response to the NSW LRC's report.

As discussed in section 9.3.2, in 2015, the Police Integrity Commission considered the section 316(1) offence in relation to blind reporting of allegations of institutional child sexual abuse. The commission concluded that 'there is an urgent need for a reconsideration of blind reporting and of s 316 of the Crimes Act, including whether it should be repealed or substantially amended'.⁷⁰⁶ Difficulties with the section 316(1) offence were discussed in evidence before the commission, including concerns about suggesting the victim, or their friends or relatives, might be prosecuted for failures to report.⁷⁰⁷

The Royal Commission is not aware of any review of section 316(1) being conducted in response to the Police Integrity Commission's conclusion.

16.3.3 Victorian offence of failure to disclose a child sexual offence

The offence under section 327

Under section 327(2) of the *Crimes Act 1958* (Vic), an adult who has information that leads them to form a reasonable belief that a ‘sexual offence’ has been committed in Victoria against a child by another adult must disclose that information to a police officer as soon as it is practicable to do so unless they have a reasonable excuse for not doing so. The maximum penalty for a failure to disclose is three years imprisonment.

The offence commenced on 27 October 2014. The Victorian Attorney-General described it as a ‘community-wide duty to report information about a sexual offence against a child to police’.⁷⁰⁸

‘Sexual offence’ is defined to include:

- rape and sexual assault
- incest
- sexual offences against children, including sexual penetration, indecent acts, persistent child sexual abuse, grooming and the failure by a person in authority to protect a child from a sexual offence
- sexual offences against persons with a cognitive impairment
- other sexual offences including administration of drugs, procuring and bestiality
- sexual servitude.

It includes an attempt to commit these offences and an assault with intent to commit these offences. It does not include child pornography offences, although the broader Victorian grooming offence in section 49B of the *Crimes Act 1958* is included.

The test of ‘reasonable belief’ is both subjective and objective. The person must have the belief, and it must be reasonable. Mr Greg Byrne PSM, Special Counsel, Criminal Law Review, Victorian Department of Justice and Regulation, told our public roundtable on reporting offences that an objective standard – that a reasonable person would form the belief, even if the accused did not – was not adopted in part to align with mandatory reporting but also because of the general approach in criminal offences of focusing on the offender’s subjective state of mind.⁷⁰⁹

The Victorian Government’s fact sheet on the offence provides the following guidance about what is a ‘reasonable belief’:

A ‘reasonable belief’ is not the same as having proof. A ‘reasonable belief’ is formed if a reasonable person in the same position would have formed the belief on the same grounds.

For example, a 'reasonable belief' might be formed when:

- a child states that they have been sexually abused
- a child states that they know someone who has been sexually abused (sometimes the child may be talking about themselves)
- someone who knows a child states that the child has been sexually abused
- professional observations of the child's behaviour or development leads a professional to form a belief that the child has been sexually abused
- signs of sexual abuse leads to a belief that the child has been sexually abused.⁷¹⁰

The fact sheet also states:

The offence requires a person to report to police where they have information that leads them to form a 'reasonable belief' that a sexual offence has been committed against a child under 16. Under the offence, people will not be expected to disclose unfounded suspicions as a suspicion does not constitute a 'reasonable belief'.⁷¹¹

Section 327(3) sets out two grounds that will constitute a reasonable excuse for failure to disclose:

- a fear on reasonable grounds for the safety of any person (other than the alleged offender) if the person were to disclose the information to police, and the failure to disclose is a reasonable response in the circumstances
- a belief on reasonable grounds that the information has already been disclosed to police – an example is given of the person having already complied with their mandatory reporting obligations under the *Children, Youth and Families Act 2005* (Vic).⁷¹²

Section 327(4) excludes as a reasonable excuse concern for the perceived interests of the alleged offender or any organisation. This would prevent protection of the interests, including the reputation, of an institution from constituting a reasonable excuse for failure to disclose.

Under section 327(5) and 327(6), a person does not commit the offence of failure to disclose if:

- the information came directly or indirectly from the victim
- the victim was of or over the age of 16 years at the time of providing the information
- the victim requested that the information not be disclosed,

unless the victim has an intellectual disability and does not have the capacity to make an informed decision about disclosure and the person is or ought reasonably to have been aware of this.

This exception would prevent an obligation to disclose where an adult victim, or a child victim who is 16 years or older, discloses abuse to an institution and asks that it not be disclosed.

In justifying limitations on the right to protection of families and children, including through treating different children (that is, all those under 18 years of age) differently, the Statement of Compatibility for the Crimes Amendment (Protection of Children) Bill 2014 required under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) stated:

The law considers that at 16 years a person has sufficient maturity to make decisions about their sexual conduct. This also includes sufficient maturity to make decisions about the reporting of sexual offending against oneself or about dealing with attempts by others to foster a (lawful) sexual relationship.⁷¹³

The Attorney-General stated in the second reading speech:

The bill also respects the position of a victim who does not want details of the offending disclosed and who is sufficiently mature to make that judgement. Setting the age at which a victim is to be treated as having that maturity is a matter of judgement. The bill sets that age at 16, being the age at which the law already recognises a capacity for certain judgements in relation to sexual matters. The obligation to disclose therefore does not apply where the information comes from a person aged 16 or over who requests that the offence not be reported to police.⁷¹⁴

There is also an exception where the person comes into possession of the information when they are a child: section 327(7)(a). This exception would prevent an obligation to disclose arising for child victims themselves or for other children who witnessed or otherwise gained knowledge about abuse.

There is an exception for various categories of privileged information, including information obtained through a religious confession, provided that there is no criminal purpose involved in the confession; and information subject to legal professional privilege: section 327(7)(b). The exceptions apply by reference to the privileges under Part 3.10 of Chapter 3 of the *Evidence Act 2008* (Vic), which includes the privilege for religious confessions in section 127 of the *Evidence Act 2008* (Vic). This privilege applies to both the fact that a religious confession was made and the content of a religious confession: section 127(1).

Confidential communications by victims to counsellors or medical practitioners are also subject to an exception: section 327(7)(c). Mr Byrne of the Victorian Department of Justice and Regulation told the public roundtable that these exceptions were designed to ensure that the general obligation of disclosure would not apply to people who provide services to the child. This is to avoid deterring children from seeking that kind of support.⁷¹⁵

There is an exception for information obtained solely through the public domain: section 327(7)(d). This exception removes any obligation to report information obtained through media reports, for example, even if this information causes a person to form the required belief that a sexual offence has been committed.⁷¹⁶

There is also an exception where the victim has already turned 16 years of age before 27 October 2014: section 327(7)(f). That is, institutions need not disclose historical allegations, even if they were made when the victim was under 16 years of age and even if they were made by a person other than the victim.

This appears to be a 'one-off' exclusion for offences that could be considered already historical at the time the offence commenced. It appears that it would not apply, for example, if a person other than the victim made the allegation (directly or indirectly) at this time, it was sufficient to form the reasonable belief, and the victim turned 16 after 27 October 2014. In this case the obligation to disclose would apply, even if the victim were now over 16 years of age and regardless of the victim's views on disclosure, if they were known. As the information would not have come from the victim, whether directly or indirectly, perhaps this circumstance might most likely arise where either an alleged offender made an admission or another victim disclosed the abuse they suffered and named others who they say were also abused.

Use of section 327

The offence in section 327 is relatively new. It commenced on 27 October 2014.

Detective Senior Sergeant Michael Dwyer of the SANO Task Force, Child Exploitation Task Forces, Crime Command, Victoria Police, told our public roundtable on reporting offences that, as at 11 April 2016, three matters of failing to report had been recorded since the offence commenced and that he thought they were in the process of being prosecuted.⁷¹⁷

Background and issues in relation to section 327

The need for criminal law sanctions for failing to report child abuse – in addition to mandatory reporting under child protection legislation – was considered by the Protecting Victoria's Vulnerable Children Inquiry (Cummins Inquiry), which reported in January 2012.

It recommended that:

The Crimes Act 1958 (Vic) should be amended to create a separate reporting duty where there is a reasonable suspicion a child or young person who is under 18 is being, or has been, physically or sexually abused by an individual within a religious or spiritual organisation. The duty should extend to:

- A minister of religion; and
- A person who holds an office within, is employed by, is a member of, or a volunteer of a religious or spiritual organisation that provides services to, or has regular contact with, children and young people.

An exemption for information received during the rite of confession should be made.

A failure to report should attract a suitable penalty having regard to section 326 of the Crimes Act 1958 and section 493 of the Children, Youth and Families Act 2005.⁷¹⁸

In recommending that there be an exemption to the duty to report for information received during the rite of confession, the Cummins Inquiry noted that under section 127 of the *Evidence Act 2008* (Vic) religious confessions are privileged so a member of the clergy cannot be compelled to give evidence of the fact or contents of a confession in court proceedings.⁷¹⁹ The Cummins Inquiry concluded that the treatment of such information should be consistent with section 127 of the *Evidence Act 2008* (Vic).⁷²⁰

In November 2013, the Betrayal of Trust report included the following finding:

Given that criminal child abuse is a very serious offence against the criminal law, failure to report or concealment of an offence is more appropriately dealt with under the criminal law than under the welfare/child protection regime.⁷²¹

The Betrayal of Trust report recommended ‘that the Victorian Government consider amending Section 326 Crimes Act 1958 (Vic) to remove the element of “gain”, to ensure that a person who fails to report a serious indictable offence involving the abuse of a child will be guilty of an offence’.⁷²²

This effectively would have resulted in an offence comparable to the New South Wales offence in section 316(1) of the *Crimes Act 1900* (NSW) in relation to serious indictable offences involving the abuse of a child.

In considering whether there should be an exemption from the criminal offence for information provided during confession,⁷²³ the Betrayal of Trust report stated:

The protection of children and the vindication of their rights is an overwhelming consideration. However, the central question is whether the removal of the exemption/privilege is likely to be of assistance in exposing offenders and bringing them to justice.⁷²⁴

It referred to the Australian Law Reform Commission’s (ALRC’s) final report on *Evidence*.⁷²⁵ The ALRC recommended against a separate privilege for religious confessions.⁷²⁶ However, the then President of the ALRC, dissenting from the recommendation, noted that he was not aware that any law enforcement authorities in any of the jurisdictions that provide a privilege

for religious confessions ‘have been heard to complain that the existence of the privilege has hampered law enforcement in any significant way.’⁷²⁷ The Betrayal of Trust report concluded that the current privilege for information received during religious confession under section 127 of the *Evidence Act 2008* (Vic) was appropriate, noting that communications made for a criminal purpose were exempted from the privilege.⁷²⁸

While the offence in section 327 was enacted in response to both the Cummins Inquiry and the Betrayal of Trust report,⁷²⁹ the Deputy Secretary of the Victorian Department of Justice and Regulation, Ms Marisa De Cicco, told the public roundtable that, following the Betrayal of Trust report, the Victorian Government worked to identify a better, more specific approach than that recommended by the parliamentary committee because of the breadth of the New South Wales offence.⁷³⁰

One of the ways in which the offence in section 327 is narrower than the offence recommended in the Betrayal of Trust report is that it applies to sexual offences and not to physical or other forms of child abuse. Ms De Cicco told the roundtable:

The previous government took the view, I think perhaps in the context that this is a very broad obligation and imposed upon the whole community, that the focus should be on sexual offences and the particular harm caused by sexual offences and, in that sense, limiting the breadth of the obligation created by this offence.⁷³¹

Ms De Cicco referred to a number of differences between the Victorian offence in section 327 and the New South Wales offence in section 316(1), including the following:

- The Victorian offence only applies to adults and does not apply to children.⁷³²
- The Victorian offence does not require that the person knows that the information might be of material assistance to police, recognising that the person may not know what information police already hold.⁷³³

There was some debate and discussion about the standard of belief required to trigger the obligation to report under section 327 in Victoria. Ms De Cicco told the public roundtable:

It was the subject of quite some discussion at a policy level, and it did cause quite some concern. We had discussions even within our own State-based service agencies and non-government organisations that we did consult with. There was a concern – and it’s always a difficult balance: cast it too low, in terms of a suspicion, then potentially in the mind’s eye of general community members, what does that mean and how broadly would the reporting then be?

In the fact sheet that we published to accompany the offence when it was first introduced, we gave some examples, you know, ‘A reasonable belief might be formed when a child states they have been sexually abused; a child states that they know someone who has been sexually abused’ – and we go on and give a few examples of that to try to guide and steer. But because it is pitched at the general community, it is a difficult one.⁷³⁴

The Chair asked participants at our public roundtable whether anyone would suggest that the criminal offence should adopt a lower standard of ‘reasonable suspicion’. No participant expressed support for such an approach.⁷³⁵

However, Dr Chris Atmore, Senior Policy Advisor from the Victorian Federation of Community Legal Centres, suggested that, if it proves to be a particularly high threshold, you could adopt a lower threshold for an offence that only applied to institutions.⁷³⁶ In response to Ms Karyn Walsh’s question on why Victoria did not target institutions with its offence, Ms De Cicco told the roundtable that the Betrayal of Trust report recommended both a targeted offence (the failure to protect offence discussed in Chapter 17) and a broader failure to disclose offence.⁷³⁷

Dr Atmore told the roundtable:

I think the problem is that most Victorians would have no idea that they actually could get into trouble for not disclosing if they think that a child has been sexually abused, because all the discussion around Betrayal of Trust and the media coverage, and so on, was focused on organisations, and then you sort of ended up with this recommendation that applied to almost everyone.⁷³⁸

There is also the difficulty of too quickly forming a belief in response to an allegation. NSW Deputy Ombudsman, Mr Steve Kinmond, told the roundtable:

if you think of the reportable conduct scheme, we would caution people against forming any belief until there has been a proper examination of the evidence. I can see some problems. It is one thing saying good evidence was provided; it is another thing being able to prove that the person who received the information had formed a belief as to the truth of that.⁷³⁹

There has also been debate and discussion about what the appropriate age is for the section 327 offence. Mandatory reporting requires reporting in respect of children aged 16 and 17, while the section 327 offence applies to children under 16. Ms De Cicco told the public roundtable:

The age issue is one that we still debate internally ourselves, should it be 16, should it be 17, and indeed, even more recently, there have been issues raised with us as to whether or not it shouldn’t be up to 18. We ourselves continue to have the debates as to where that particular age level should be set. Being a broader offence and applying to all persons, not a particular class of persons in terms of the obligations around disclosure, in the first instance, again, we went with 16, but it is a matter that, as I say, we still debate internally.⁷⁴⁰

Mr Julian Pocock, representing Berry Street, told the public roundtable that the age differences create difficulties for Berry Street in giving clear guidance to staff, many of whom are mandatory reporters.⁷⁴¹

Mr Byrne of the Victorian Department of Justice and Regulation identified difficulties that would arise if the offence were to apply beyond the age of consent. He told the public roundtable:

One of the difficulties that arises with changing the age and the failure to disclose offence, at the moment it is relatively straightforward in that it involves a sexual offence against a child under 16 by a person who is 18 or older, so it is an adult, so it is quite straightforward. An 18 year old and a 17 year old can engage lawfully in sexual activity. If the disclosure obligations apply to 17 year olds and 18 year olds, there would then be more focus on what was the nature of that activity between them, which was, prima facie, it's lawful.

The only circumstance in which it would not be would be either because it is rape or some general offence, or there is a relationship of care, supervision or authority, which may be more like the circumstances you're familiar with. It just adds an extra complication about the lawfulness of some sexual activity engaged in by some 17 years olds.⁷⁴²

Ms De Cicco also told the public roundtable that, more recently, the Victorian Royal Commission into Family Violence has recommended an amendment to the section 327 offence to restrict prosecutions where the accused is a victim of family violence so that a victim of family violence could only be prosecuted for failing to disclose under section 327 with the approval of the DPP.⁷⁴³

The offence has been contentious, particularly in relation to family violence issues. Dr Atmore of the Victorian Federation of Community Legal Centres told the public roundtable about the difficulties the offence creates for women experiencing family violence. One of the difficulties is how the exceptions that require non-disclosure to be a 'reasonable response in the circumstances' might be interpreted in situations of family violence.⁷⁴⁴

Ms De Cicco told the roundtable that the concerns that Dr Atmore raised were understood and debated within government, but it was believed that the offence would bring a greater focus and be a mechanism by which community attitudes to this sort of offending and reporting could be changed.⁷⁴⁵ The Victorian Government's fact sheet on the section 327 offence emphasises situations of family violence in explaining the need for exemptions to the obligation to disclose.⁷⁴⁶

In answer to a question, Ms De Cicco told the roundtable that the section 327 offence will be reconsidered in light of the Victorian Royal Commission into Family Violence and that the Victorian Government has indicated that it will implement the Victorian Royal Commission's recommendations.⁷⁴⁷

16.3.4 An example from the Republic of Ireland

In the Betrayal of Trust report, the Victorian Parliament Family and Community Development Committee discussed an example of legislation introduced in Ireland in 2012.⁷⁴⁸ Ireland introduced an offence targeting reporting of child abuse following a number of inquiries into the abuse of children in Catholic Church institutions. Those inquiries detailed incidents in which complaints of abuse made to church authorities were not referred to the police.

The *Criminal Justice (Withholding of Information against Children and Vulnerable Adults) Act 2012* commenced on 18 July 2012. Section 2 of the Act creates an offence for a person who knows or believes that an offence has been committed by another person against a child and has information that they know might be of material assistance in securing the apprehension, prosecution or conviction of that person for that offence, to fail, without reasonable excuse, to disclose that information to the police.

Apart from its narrower focus on offences against children, the Irish offence is quite similar to the New South Wales offence in section 316(1). It requires knowledge or belief; information that might be of material assistance; and disclosure to the police.

However, it differs from the New South Wales offence in that it explicitly provides that neither victims nor persons who know about the child abuse offence but do not report it at the request of the victim can be guilty of the offence.

If a victim does not have the capacity – whether due to age or some other impairment – to form a view on whether the offence should be disclosed to the police, and the offender is not a family member, the parent or guardian can advise on behalf of the victim that the victim does not want the offence to be reported to the police. The parent or guardian concerned must have reasonable grounds for acting on behalf of the victim. They must show that they are acting in the best interests of the victim and have considered the wishes of the victim. There is a presumption that a child under 14 years of age does not have the capacity to decide whether to report an offence.

If the victim does not have the capacity to decide whether the offence should be disclosed to the police and the offender is a family member, a designated professional (which includes doctors, nurses, psychologists and social workers) who is providing services to the child for the harm or injury caused by the offence can advise that they do not think the offence should be disclosed if they can demonstrate that they are acting to protect the health and welfare of the victim.

There is no exemption from the section 2 offence for priests who have received information about offences through religious confession. However, it is unclear whether a religious confessions privilege operates so that clergy are entitled not to disclose that information.

Section 2(4) of the Act provides that:

This section is without prejudice to any right or privilege that may arise in any criminal proceedings by virtue of any rule of law or other enactment entitling a person to refuse to disclose information.

In debating the *Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Bill 2012*, referring to section 2(4), the Republic of Ireland Minister for Justice and Equality told the Irish Parliament that it ‘will continue to be a matter for a court before which a person is prosecuted to determine whether there is a particular privilege or whether it applies in the circumstances of a particular case’.⁷⁴⁹

A Keith Thompson has written in his study *Religious Confession Privilege and the Common Law* that ‘religious confession privilege already has an established base in Irish common law’, under the decision of *Cook v Carroll*.⁷⁵⁰ However, in the Select Committee on Justice, Defence and Equality Debate on the Bill, the Minister for Justice and Equality also said that at the time of the Bill, the existence or extent of the religious confessional (or ‘sacerdotal’) privilege in criminal proceedings in Ireland was uncertain, because it had not been judicially considered.⁷⁵¹

Since the commencement of the Act, so far as we can ascertain, the issue of whether a privilege for the religious confession exists has not yet arisen in proceedings in relation to the section 2 reporting offence, so it is unclear whether a religious confessions privilege applies in relation to the offence.

16.4 Religious confessions

As discussed above, the Cummins Inquiry and the Betrayal of Trust report each considered the question of whether a failure to report offence should apply to clergy regardless of whether they receive information about child sexual abuse offences in religious confession. They concluded that it should not.

Further, the Republic of Ireland introduced a failure to report offence which did not exempt information received during religious confession, although it is unclear whether clergy would be entitled not to disclose that information because of the operation of a religious confessions privilege.

We have also considered whether there should be an exemption or privilege from a failure to report offence for religious confessions.

The issue arose specifically in our case studies regarding Catholic Church institutions, in which we heard evidence of clergy receiving information about child sexual abuse in religious confession.

We also heard accounts from a number of survivors in our private sessions of the disclosures of sexual abuse they made to priests in religious confession.

16.4.1 Consultations and case studies 50 and 52

In our work on religious institutions, we conducted public consultations and hearings on the practice of religious confession in the context of institutional child sexual abuse. In some of those, we addressed whether information about child sexual abuse learned in religious confession should be subject to civil reporting obligations.

On 5 May 2016, we released *Issues Paper No 11 – Catholic Church Final Hearing* (Issues Paper 11). We sought submissions on a number of issues that may have contributed to the occurrence of child sexual abuse in Catholic Church institutions or affected the institutional response to that abuse, including the operation of the Sacrament of Confession (also called the ‘Sacrament of Reconciliation’ in the Catholic Church). A number of submissions addressed that issue.

On 6 February 2017, the Royal Commission began Case Study 50 in relation to the institutional review of Catholic Church authorities. We heard evidence from a panel of six clergy witnesses specifically about the significance of the Sacrament of Reconciliation in the Catholic Church as well as how the seal of confidentiality applies in respect of religious confessions of child sexual abuse.

The panel included a sacramental theologian, Dr Frank O’Loughlin; a moral theologian, Father Laurie McNamara CM; a New Zealand liturgical theologian, Dr Joseph Grayland; and a canon lawyer, Professor Ian Waters. It also included the chair of the Australian Bishops Conference Commission for Doctrine and Morals, Bishop Terence Curtin; and the chief executive officer of Catholic Social Services, Father Frank Brennan SJ AO, who has published commentary on the Royal Commission’s consideration of the Sacrament of Reconciliation.

Other witnesses in that case study also gave evidence on religious confession, including a number of the archbishops of the Catholic Church in Australia and psychologists who worked with Catholic clergy perpetrators of child sexual abuse.

On 17 March 2017, the Royal Commission began Case Study 52 in relation to the institutional review of Anglican Dioceses of Grafton, Tasmania, Adelaide, Sydney, Brisbane and Newcastle. We heard evidence about the role of religious confession within Anglican Church liturgy and practice as well as steps taken to reconsider the seal of confidentiality in respect of religious confessions of child sexual abuse by the General Synod of the Anglican Church.

We heard evidence about these developments from Mr Garth Blake SC, the chair of the Professional Standards Commission, as well as the Primate, Archbishop Philip Freier, of the Diocese of Melbourne and Archbishop Glenn Davies of the Diocese of Sydney.

16.4.2 Religious confessions and their significance to particular faiths

Introduction

From our public hearings and consultation processes, we understand that our consideration of whether there should be an exemption or privilege for religious confessions from a failure to report offence is a matter of particular concern to the Catholic Church. However, our consideration of this issue is also relevant to the members of a number of other Christian churches that have a rite of religious confession, including the Anglican, Orthodox and Lutheran churches.

The Royal Commission understands that the concepts of repentance and forgiveness are deeply embedded in the Christian tradition. The Catholic Church teaches that confession, also known as reconciliation or penance, is one of the seven sacraments of the Church that were instituted by Jesus Christ.⁷⁵² The current *Catechism of the Catholic Church* states that ‘During his public life Jesus not only forgave sins, but also made plain the effect of this forgiveness: he reintegrated forgiven sinners into the community of the People of God from which sin had alienated or even excluded them’.⁷⁵³

In the Catholic tradition, the person confessing their sins is often referred to as the penitent, and the priest who hears the confession is usually referred to as the confessor. The sacrament consists of four actions by the penitent and confessor: contrition (or sorrow for the sin committed, along with the intention of not sinning again), confession (the oral confession of sins to the priest), satisfaction (penance or atonement, usually in the form of prayers, mortification or good works) and absolution (the priest speaking God’s words of forgiveness).⁷⁵⁴

The confessional seal

The ‘confessional seal’ or ‘seal of confession’ refers to the obligation of a confessor not to reveal what a penitent tells them in religious confession.

In the Catholic Church

The Royal Commission understands that the inviolability of the confessional seal is a matter of great importance to Catholics. Archbishop Anthony Fisher OP, the Archbishop of Sydney, gave evidence of its significance in Case Study 50:

When a Catholic comes to a priest to confess, they understand they’re talking to God, and the priest is there to mediate that, to encourage that, to confirm that. But they think their conversation is to God. For a priest to repeat anything that has occurred during that confession would be a very serious breach of trust with them and contrary to our understanding of the sacrament.⁷⁵⁵

Several canons of the 1983 Code of Canon Law, the compendium of the Catholic Church's internal law, refer to the confessional seal:

- **Canon 983§1:** The sacramental seal is inviolable. Therefore, it is absolutely wrong for a confessor in any way to betray the penitent, for any reason whatsoever, whether by word or in any other manner.
- **Canon 984:** The confessor is wholly forbidden to use knowledge acquired in confession to the detriment of the penitent, even when any danger of disclosure is excluded. A person who is in authority may not in any way, for the purpose of external governance, use knowledge received in confession at any time.
- **Canon 1388§1:** A confessor who directly violates the sacramental seal incurs a *latae sententiae* excommunication reserved to the Apostolic See – that is, an automatic penalty of excommunication, which can only be lifted by the Pope. A confessor who violates the sacramental seal only indirectly is to be punished according to the gravity of the delict.⁷⁵⁶

The inviolability of the confessional seal has a long history in the Catholic Church. Dr Grayland, a liturgical theologian, has written that, in the early Christian Church, penance and absolution for serious sin was a public ritual involving the church community, rather than a private ritual.⁷⁵⁷

Historians, including Kurtscheid, McNeill and Thompson, note that the practice of private, secret or 'auricular' confession, whereby the penitent confesses their sins privately to a priest, was spread by Irish monks from the sixth century but say there is some evidence that it may have earlier origins.⁷⁵⁸ Kurtscheid, McNeill and Thompson also state that, from the ninth century, and possibly earlier, priests who violated the seal of confession were liable to be removed from office and sent into lifelong exile.⁷⁵⁹ Kurtscheid suggests that a decree of Pope Leo I addressed to 'the bishops of Campania, Samnium and Picenum' in 459 AD, in which he identified the practice of reading out the penitent's transgressions in an open assembly as an abuse that must cease, represents 'the first papal decretal safeguarding the secret of confession'.⁷⁶⁰

Nolan writes that, in 1215, the Fourth Lateran Council decreed that all Catholics who had attained the 'age of reason' were required to confess their sins to a priest at least once a year on pain of excommunication and also that any priest breaking the sacramental seal in any way was liable to be laicised and imprisoned for life.⁷⁶¹

However, Kurtscheid, in his history of the confessional seal, has documented that the question of whether there were any circumstances in which it was permitted to break the seal was the subject of debate among theologians in the late medieval and early modern periods. For example, over several centuries in France, some theologians taught that information about plots against the king or the state was exempt from the confessional seal. Kurtscheid gives several examples where the seal was broken but stresses that this French teaching was only ever a minority position. Kurtscheid notes that a central concern throughout these centuries-long debates was: 'How can the obligation of the seal be reconciled with the precept of charity, which mandates that we should shield our neighbour against physical and spiritual injury to the best of our ability?'⁷⁶²

In our public hearing for Case Study 50, Archbishop Timothy Costelloe SDB, the Archbishop of Perth, gave evidence that the obligation upon a priest to uphold the confessional seal is solemn and because of its operation, he would feel bound never to break the seal and report to civil authorities someone's confession that they were abusing a child.⁷⁶³ Archbishop Denis Hart, Archbishop of Melbourne, gave evidence that he would feel similarly bound.⁷⁶⁴

In relation to exactly what information is covered by the confessional seal, in Case Study 50 witnesses provided divergent evidence. One matter on which there was significant divergence was whether a child penitent's disclosure that they were being sexually abused by an adult would be subject to the seal or not.

On the one hand, we received evidence from Archbishop Fisher that if a child penitent confessed their sexual abuse by an adult to him that, 'I believe I'm bound by the seal of confession not to repeat it'.⁷⁶⁵ On the other hand, Dr O'Loughlin wrote in a précis of evidence to us that, 'The confessional seal applies only to the confessing person's own sins. Not to those of anyone else.'⁷⁶⁶ Bishop Curtin told us that, in his view, a child telling a priest of their sexual abuse by an adult would not constitute a confession of the child's sin and therefore not fall within the confessional seal.⁷⁶⁷

In the Anglican Church

In the Church of England, Canon 113 of 1603 recognised that the confessional seal could be broken in exceptional circumstances, including where the information related to 'such crimes as by the laws of this realm [the priest's] own life may be called into question for concealing the same' (this was a reference to the crime of high treason).⁷⁶⁸

On the recommendation of the Doctrine Commission of the Anglican Church, in 2014 the General Synod of the Anglican Church of Australia voted to amend its Canon Concerning Confessions 1989 so that the canonical requirement of absolute confidentiality would no longer apply to religious confessions of serious crimes and other acts that have led, or may lead, to serious or irreparable harm. The Doctrine Commission of the Anglican Church has described this Royal Commission as having provided the context for the proposed changes.⁷⁶⁹

A report prepared for the General Synod by the Doctrine Commission reaffirmed the importance of confidentiality in ministry as a general principle. However, it recommended that, in cases of religious confessions of serious crimes and other acts that have led or may lead to irreparable harm, including domestic violence and sexual abuse of children, a minister should encourage the penitent to report to the police voluntarily, accompany the person to ensure this happens and provide support, but if the person will not go to the police then the minister may reveal the contents of the communication to the appropriate civil or church authorities.⁷⁷⁰

The Doctrine Commission report made a number of arguments in support of the changes, including that:

- there are ‘clear deficiencies with the principle of absolute confidentiality’
- absolute confidentiality privileges the penitent confessing to serious crimes above past, present or future victims: ‘This fails to recognise that we live in a community and are responsible for our human relationships’
- the pastoral priority in all matters of abuse must lie with victims and potential victims.

The Doctrine Commission stated:

Insofar as the practice of absolute confidentiality of confessions has hampered our pastoral effectiveness to so many, we should subject it to scrutiny. Its deployment appears to some to indicate self-protection and ecclesial self-interest, and not godly wisdom or best pastoral practice. Maintaining the practice of absolute confidentiality leaves priests and bishops open to manipulation by unscrupulous offenders, because the making of a confession then paralyzes communication and action.⁷⁷¹

However, in Case Study 52 we were told there is a question as to the validity of the 2014 amendment to the Canon Concerning Confessions 1989.⁷⁷²

We heard that, at the time of our case study, the 2017 General Synod of the Anglican Church of Australia intended to revisit the issue by voting on a canon expressly removing the seal of confidentiality over confessions of child sexual abuse and related matters.⁷⁷³

16.4.3 Legal privileges that may apply to religious confessions

Under Australian law, categories of communications are privileged, or exempted, from disclosure by compulsion. In some Australian jurisdictions, a religious confessions privilege operates so that clergy can refuse to disclose information they receive in religious confession.

In respect of religious confessions, section 127 of the Uniform Evidence Act grants a specific privilege from the general requirement to give evidence in court proceedings. The privilege applies in the Australian Uniform Evidence Act jurisdictions – the Commonwealth, Victoria, New South Wales, Tasmania, the Australian Capital Territory and the Northern Territory.

Section 127(1) of the Uniform Evidence Act provides:

A person who is or was a member of the clergy of any church or religious denomination is entitled to refuse to divulge that a religious confession was made, or the contents of a religious confession made, to the person when a member of the clergy.

The privilege under section 127 is absolute.

As noted in section 16.3.3, there is an exception to the Victorian offence of failing to disclose a child sexual offence under section 327 of the *Crimes Act 1958* (Vic) for information that is privileged under section 127 of the *Evidence Act 2008* (Vic).

Three jurisdictions – New South Wales, Tasmania and the Australian Capital Territory – also include a professional confidential relationship privilege in Division 1A of Part 3.10 of the Uniform Evidence Act.⁷⁷⁴ Unlike the religious confessions privilege under section 127, the privilege provides a balancing test rather than an absolute exemption from disclosure. It allows a court to direct that evidence of a protected confidence not be adduced, balancing the harm that would be caused to the confider if the evidence were given against the desirability of the evidence being given.⁷⁷⁵

A ‘protected confidence’ falling within the privilege is a confidential communication made to a person – the ‘confidant’ – in the course of a relationship in which the confidant was acting in a professional capacity and when the confidant was under an express or implied obligation not to disclose its contents.⁷⁷⁶ It is possible that, if there was no specific privilege for religious confession, a court might consider a religious confession to fall within this category.

A number of jurisdictions internationally have also, at various times, recognised a common law priest–penitent privilege for religious confessions.⁷⁷⁷ However, in Australia, whether a common law religious confessions privilege exists is not entirely clear.⁷⁷⁸ There is a lack of case law testing the issue,⁷⁷⁹ and there does not appear to be any Australian case considering the religious confessions privilege in a jurisdiction in which it is not legislatively granted.

Mabey writes that the commonly held view is that there is no privilege for priests or penitents under common law in Australia.⁷⁸⁰ Also, in 1993, the Western Australian Law Reform Commission stated that it appeared there was no common law privilege for priests in relation to confidential information disclosed by a penitent, including in religious confession.⁷⁸¹ There is no apparent basis for suggesting that the common law in Australia has developed such a privilege since then.

However, the Truth Justice and Healing Council submitted to the Royal Commission that there ‘is a solid basis for arguing that a common law religious confessional privilege would be recognised in Australia’ if the subject were to be litigated in a jurisdiction where the privilege is not recognised in legislation.⁷⁸²

16.5 Discussion in the Consultation Paper

16.5.1 Should there be a criminal offence?

Although it may be obvious, it is worth stating that, at a minimum, institutions or relevant staff and volunteers within them must comply with any legal obligations to report, including by reporting to:

- police under the New South Wales and Victorian offences
- child protection agencies under mandatory reporting obligations
- oversight agencies under reportable conduct schemes.

In the Consultation Paper, we identified the issue as being whether all other states and territories should follow New South Wales and Victoria by introducing criminal offences to require reporting to police and, if so, how the reporting obligation should be framed.

As discussed in Chapter 2, the criminal justice system enables society to express its condemnation of certain types of behaviour through state-sponsored agencies of investigation, fact-finding and punishment. In addition to the purpose of punishing the particular offender, the criminal justice system also seeks to reduce crime by deterring others from offending.

The New South Wales offence reflects the public interest in the reporting of a serious crime which is believed to have occurred so that the police may investigate. While it might be argued that a general positive duty to report compels citizens to betray their fellow citizens, friends and family to the police, it can also be argued that citizens have a duty to assist the police in fulfilling one of the state's primary obligations, which is to investigate crimes.⁷⁸³ As Ashworth states, 'loyalty can rarely be more important than bringing a serious offender to justice'.⁷⁸⁴

Not all moral duties in relation to policing are reflected in legal duties imposed by the criminal law. For example, in introducing the amending legislation in 1990 which replaced the common law offence of misprision of felony with the statutory offence in section 316(1) of the *Crimes Act 1900* (NSW), the then New South Wales Attorney General referred to some common law offences that were to be abolished but not replaced by statutory offences. The then Attorney General stated:

though the common law offence of refusing to assist a public officer in the execution of his or her duty is abolished, it has not been replaced by a statutory offence. That is not to say that the public should not be encouraged to assist police. However, there are far more appropriate methods of encouraging this participation and it is inappropriate that those who do not assist should be guilty of a criminal offence. It is a public duty to assist police or other law enforcement officers in the execution of their duties. Not to do so should not be a crime.⁷⁸⁵

However, for the reasons referred to in section 15.1, we suggested in the Consultation Paper that there may be good reasons for the criminal law to impose obligations on third parties – including a duty to report – in relation to child sexual abuse. A duty to report, in particular, may be essential in bringing child sexual abuse offences to the notice of police because they so often occur in private.

The Betrayal of Trust report recommended that a criminal offence was needed in addition to ‘welfare’ reporting under mandatory reporting obligations. It stated that the ‘mandatory welfare reporting system gives first priority to protecting the “at-risk” child, while criminal reporting focuses on catching, prosecuting and convicting offenders’.⁷⁸⁶ The Australian Law Reform Commission (ALRC) and NSW LRC also considered the advantages and disadvantages of placing reporting offences in either child protection or criminal law in the context of family violence.⁷⁸⁷

A reporting offence may be particularly important in the case of institutional child sexual abuse. Institutions may face a conflict between their duty to protect children and their interest in protecting the reputation of the institution, and the existence of a criminal offence may encourage them to report.

At our public roundtable on reporting offences, Mr David Shoebridge MLC, Greens member of the Legislative Council in the New South Wales Parliament, told the roundtable that, in his opinion, one of the reasons why the Catholic Church in New South Wales has improved its reporting to the police so that it no longer makes blind reports is because of the legal obligations to report created by the New South Wales offence in section 316(1).

Mr Shoebridge said:

The church hasn’t jumped to this point [of not blind reporting] and many organisations haven’t jumped to that point. They have been driven there because of the underpinning legal obligation. They have been responding to the concerns about litigation and potential criminal liability and so the law has played a really important role in developing good practice.⁷⁸⁸

16.5.2 The scope of a criminal offence

In the Consultation Paper, we suggested that there were three broad approaches to the scope of a reporting offence:

- a broad offence that applies to all serious crimes and requires all people with the relevant knowledge or belief to report to police – such as the New South Wales offence in section 316(1) and as recommended in the Betrayal of Trust report
- an offence that targets child sexual abuse offences and requires all people with the relevant knowledge or belief to report to police – such as the Victorian offence in section 327 and the Irish offence
- an offence that targets institutional child sexual abuse offences and requires those within institutions with the relevant knowledge or belief to report to police.

Broad offence

The main issue with a broad offence such as the New South Wales offence in section 316(1) is whether it is too broad.

Many people may not be aware that they are subject to the obligation to report serious crimes to police.

There might be justice in charging and securing the conviction of a person for failure to report child sexual abuse years after the abuse occurred when the survivor makes a report which brings to light information about what institutional leaders knew about the abuse at the time it occurred.

However, the main purpose of a criminal offence of failure to report, at least in relation to child sexual abuse, should be to encourage people to report at the time of the abuse, both to protect the particular child being abused and to protect other children.

The effectiveness of the offence, particularly in relation to child sexual abuse, might depend largely on awareness of the offence. For other crimes that tend to come to police attention much more quickly, independent knowledge of the offence may be less important.

A broad offence does not allow for the recognition of the complexities associated with child sexual abuse reporting. It applies to the victim themselves and to family members of the victim. It applies to other children who know of the abuse, at least once they are old enough to be criminally liable. It applies to third-party failures to report even when the victim is now an adult and could report themselves or where an adult victim decides not to report.

There is little guidance as to what is a 'reasonable excuse' for not reporting, but there is no certainty that these sorts of circumstances would constitute a reasonable excuse.

At our public roundtable on reporting offences, Mr Shoebridge suggested that one way of distinguishing between survivor advocacy and support groups and institutions in which the abuse was alleged to have occurred for the purposes of the obligation to report would be to give content to the element of 'reasonable excuse' as a defence to the criminal offence, perhaps through guidelines that distinguished between victim-oriented organisations and potentially culpable organisations.⁷⁸⁹

However, it may be difficult to craft particular categories of reasonable excuse for particular categories of crimes – such as child sexual abuse – in circumstances where the offence applies to all serious crimes.

While prosecutions might be unlikely in some of these circumstances on discretionary grounds, the offence is broad enough to catch many circumstances where society would not necessarily condemn a failure to report.

In the Consultation Paper, we suggested that a broad offence requiring the reporting of all serious crimes would extend considerably beyond the focus of our Terms of Reference.

Targeted child sexual abuse offence

In the Consultation Paper, we suggested that an offence that targets child sexual abuse might allow for much greater recognition of some of the complexities associated with child sexual abuse.

As the Victorian offence in section 327 demonstrates, particular provision can be made so that reporting is not required if an older victim (16 in the Victorian offence) does not wish a report to be made. The Victorian offence also targets offending by adults against children rather than offending by other children.

There can also be more carefully crafted defences – the equivalent of a ‘reasonable excuse’ under the broader offence – to cover fear for safety and disclosure to authorities under other schemes, such as mandatory reporting. There can also be exceptions for child victims and for those who obtained the information when a child.

The Victorian offence also provides clear exceptions for professionals who provide services to help children so that children are not discouraged from seeking services and support.

However, the discussion in section 16.3.3 in relation to the Victorian offence illustrates that there are still a number of potential difficulties with a targeted child sexual offence that applies to all people with the relevant knowledge or belief. In particular:

- many people may not be aware of the offence or that it applies to them, yet its effectiveness in encouraging reporting might depend largely on awareness of the offence
- because it applies to everyone, the standard of belief that triggers the obligation to report is very high – a ‘reasonable belief’ that a child sexual abuse offence has been committed
- because it applies throughout the community, it could catch situations of family violence and criminalise non-reporting by victims of family violence.

In the Consultation Paper, we suggested that an offence targeting the reporting of all child sexual abuse might extend beyond the focus of our Terms of Reference, although not to the same extent as the broad offence. We also suggested it might raise issues as to whether it is appropriate to have special offences for child sexual abuse as opposed to other serious criminal offences.

Targeted institutional child sexual abuse offence

An example of a targeted institutional child sexual abuse offence is given in the recommendations of the Cummins Inquiry, which preceded the inquiry that led to the Betrayal of Trust report in Victoria.

The Cummins Inquiry received a submission that religious organisations and communities directly and indirectly pressure victims not to disclose abuse to the police, although it did not make any finding on whether there were then current practices in religious organisations in Victoria that diverted claims of abuse from state authorities.⁷⁹⁰ The Cummins Inquiry noted that Victoria no longer has the common law duty to report crime to the police under misprision of felony.⁷⁹¹ It recommended that:

The Crimes Act 1958 (Vic) should be amended to create a separate reporting duty where there is a reasonable suspicion a child or young person who is under 18 is being, or has been, physically or sexually abused by an individual within a religious or spiritual organisation. The duty should extend to:

- A minister of religion; and
- A person who holds an office within, is employed by, is a member of, or a volunteer of a religious or spiritual organisation that provides services to, or has regular contact with, children and young people.

An exemption for information received during the rite of confession should be made.

A failure to report should attract a suitable penalty having regard to section 326 of the Crimes Act 1958 and section 493 of the Children, Youth and Families Act 2005.⁷⁹²

While the Cummins Inquiry's recommendation focused on physical and sexual abuse within religious or spiritual organisations, it provides an example of how an offence that targets sexual abuse within a broader range of institutions could be framed.

In the Consultation Paper, we suggested that a significant benefit of an offence that targets institutions might be that it would allow a lower standard of knowledge or belief than would be reasonable for offences that apply to the community at large. The Cummins Inquiry recommended that the reporting obligation apply where there is a 'reasonable suspicion', which is clearly a lower standard than knowledge, belief or a reasonable belief. This means that the obligation to report would apply in a broader range of circumstances and where the reporter has less knowledge or certainty of the abuse.

A lower standard might be considered reasonable in an offence in relation to reporting institutional abuse that applies to those working or volunteering in institutions, because the category of people subject to the offence is narrower, those people could be informed of and educated about their obligations and the obligation is more confined in terms of the abuse covered.

An offence that targets institutions and institutional abuse would avoid any difficulties for service providers and survivor advocacy and support groups who provide services to victims and survivors. However, they are also protected under the Victorian offence because reporting is not required where the victim is the source of the information and is over 16 and does not wish the information to be reported, and through specific exceptions for counsellors and medical practitioners.

An offence that targets institutions and institutional abuse might avoid the need to adopt 16 years, rather than 18 years, as the age at which the victim can decide whether they wish the matter to be reported so that the offence covers all children. As discussed in Chapter 13, a number of offences in relation to persons in positions of authority effectively raise the age of consent to 18 years, so any uncertainty about whether sexual activity involving older children was consensual or an offence would be less likely to arise.

In the Consultation Paper, we identified that an offence that targets institutional abuse and reporting by institutional staff and volunteers is clearly comfortably within the focus of our Terms of Reference. However, we suggested that it might raise issues as to whether institutional child sexual abuse should be subject to different reporting obligations than child sexual abuse generally and whether it is appropriate to have special offences for child sexual abuse as opposed to other serious criminal offences.

In the Consultation Paper, we sought submissions on whether there should be a criminal offence for failure to report and, if so, whether it should apply to:

- all serious criminal offences
- child sexual abuse
- institutional child sexual abuse.

We also sought submissions on the details of a more targeted reporting offence, including:

- the age from which a victim's wish that the offence not be reported should be respected
- the standard of knowledge, belief or suspicion that should apply
- any necessary exceptions or defences to prevent the offence having undesirable or unintended consequences, such as discouraging victims and survivors from seeking support and services or applying to victims in circumstances of family violence.

16.6 What we were told in submissions and public hearings

16.6.1 Submissions in response to the Consultation Paper and Case Study 46

Survivor advocacy and support groups

In their submissions in response to the Consultation Paper, a number of survivor advocacy and support groups expressed general support for failure to report offences. So did a number of survivors who made submissions.⁷⁹³ Mr Daryl Higgins submitted that:

Failing to report sexual abuse by senior staff should be treated as a very serious crime. The staff who knew of the offences and the institution should face the full force of the law.⁷⁹⁴

Mr Peter Gogarty submitted that there should be a nationally consistent, retrospective offence of concealing child abuse similar to section 316(1) of the *Crimes Act 1900* (NSW) but ‘which addresses the specific circumstances of child abuse concealed by officials of institutions which have a responsibility for the care of children’.⁷⁹⁵ Mr Gogarty recommended:

All Australian jurisdictions adopt uniform ‘third party’ offences regarding ‘knowledge’ of CDA [sic – CSA – child sexual abuse] offences occurring and failing to act to report the offending and to prevent its further occurrence. Such offences should be drafted to ‘capture’ both organisations and individuals within the ‘management’ structure. Reason: To date, no Australian citizen, and potentially no-one in the world has been convicted for concealing the offences of repeat CSA offenders. This is both a moral and legal issue which is at odds with community expectations. Allowing a person to commit crime, safe in the knowledge that no personal consequence attaches, cannot be allowed to continue.⁷⁹⁶ [Emphasis original.]

Mr Gogarty told the public hearing in Case Study 46 that he supported reporting offences. Speaking of the Royal Commission’s case studies, he said:

We’ve had such consistency of stories about people in high places who either have extraordinarily selective memories or selective memory losses, who are happy to point the finger at subordinates in their organisation or somebody who has passed away, and to date we’ve not had, as far as I’m aware – not a single person – other than the fact that this Commission has done a great job of putting them in the spotlight for a while, we’ve not had a single case of one of those people being brought to account.

I can't get my head around, on a personal level, that there is a good chance that somebody knew what was happening to me in 1976, it continued until 1978, and until somebody else reported that offender in 2001, nobody did anything to help.

I've stood in a sentencing hearing against my perpetrator and apologised to other victims and their families for me not doing something about it. I can't comprehend that nobody in a position of authority has ever been asked to account for that.⁷⁹⁷

Mr Gogarty told the public hearing that he considered these offences should have retrospective effect.⁷⁹⁸

Pastor Bob Cotton submitted that the offence under section 316(1) of the *Crimes Act 1900* (NSW) is inadequate in relation to the maximum penalty, the requirement for the Attorney General's approval to charge ministers of religion and the exclusion of the confessional.⁷⁹⁹ He expressed support for the Victorian offence, except for the maximum penalty of three years, which he submitted is inadequate. He submitted that a new offence should be targeted at concealing child sexual offences and have a higher maximum penalty.⁸⁰⁰ He submitted it should apply retrospectively because 'many of these crimes are undetected for years and in some cases decades. It is only recently that we have begun to understand the gravity and life destroying effects of child sex abuse'.⁸⁰¹

People with Disability Australia (PWDA) suggested that failures to report either specific allegations made or broad awareness of abuse within an institution is a problem. However, PWDA expressed some concern about creating failure to report offences 'without adequate attention being paid to the lack of protections for whistleblowers'.⁸⁰² We will address the issue of protection for whistleblowers in our final report rather than in this report on criminal justice.

PWDA recommended that a failure to report offence be created that requires reporting of suspicions of abuse but only where the victim has consented to the sharing of the report. It submitted:

There are important and very good reasons that victims and survivors may not wish to have crimes committed against them reported. It may impede disclosure if victims and survivors are aware that crimes may be reported without their consent. Additionally, disclosure is a sensitive matter that can expose a traumatic incident to narratives of criminality which may be experienced by a victim as a loss of control. Whilst we would of course encourage reporting, we believe that centring the victim's needs is more important than creating a criminal offence for those who do not report even without the victim's consent.⁸⁰³

Care Leavers Australasia Network (CLAN) submitted that:

when discussing the issue of offences for NOT reporting, CLAN do believe that this is an extremely useful tool in encouraging everyone in society to protect children and to have the child's best interests at heart. Unfortunately, sometimes the only way to ensure that the right thing is done is through the threat of a penalty or punishment.

While this legal obligation may be treated discretionally by the DPP's office depending on the circumstances, having some legislation enforcing the concealment of a crime as a punishable offence will do more to assist children and other vulnerable persons than if it didn't exist.⁸⁰⁴ [Emphasis original.]

CLAN submitted that the offence in section 316(1) of the *Crimes Act 1900* (NSW) should not be repealed, even if it is not enforced in all circumstances, because its existence 'guides society about what the right, moral, and expected thing to do is'.⁸⁰⁵ It stated its support for the introduction of failure to report offences nationally.⁸⁰⁶

The Victorian Aboriginal Child Care Agency (VACCA) reported on its consultations in which community members expressed supported for a failure to report offence as well as other third-party offences. It emphasised the importance of individuals and institutions being accountable for abuse suffered while children are in their care.⁸⁰⁷ VACCA stated that this is vital both to provide justice for victims and survivors and to prevent current and future child sexual abuse in an institutional context.⁸⁰⁸

Micah Projects submitted that survivors expressed support for the proposal that failure to report offences would apply to people within institutions who fail to report abuse. It stated:

Overall people felt that mandatory reporting of child abuse should apply to anyone in a position of trust in relation to a child inside an institution and who had a duty of care over children. Concern was expressed about exactly who a person should report to given people's experience with police in the past.⁸⁰⁹

It suggested that reportable conduct schemes allow reporting to authorities other than the police.⁸¹⁰

Micah Projects also noted the concerns in relation to family violence and queried why the Victorian failure to disclose offence applies broadly rather than targeting institutions.⁸¹¹

It also expressed support for an offence that applies to any person in a position of authority in relation to 'deliberate and intentional omission or acts to cover up information and evidence in relation to an investigation of child sexual abuse'.⁸¹²

The CREATE Foundation submitted:

It is critical that criminal justice reforms outline clear and transparent legislation, processes, and resources to keep children safe across all institutions, at all levels and that individuals and the institutions they are part of are held accountable for failure to protect young people and *failure to disclose harm*.⁸¹³ [Emphasis added.]

The Victim Support Service South Australia submitted that 'professionals and organisations have a moral obligation – and should also have a legal obligation to report child sexual abuse and violence against children'.⁸¹⁴ It expressed support for a targeted child sexual abuse offence, such as the Victorian offence, and an offence targeted at institutional child sexual abuse such as

the one recommended by the Cummins Inquiry.⁸¹⁵ It also submitted that a parent or caregiver should not be convicted in cases where they have decided it would not be in the best interests of the child to report to police but that there should not be a blanket legislative protection for parents or caregivers.⁸¹⁶

The In Good Faith Foundation (IGFF) referred to historical cases in which abuse has not been reported and expressed support for mandatory reporting offences and for failure to report offences, including the removal of any remaining reference to 'gain' when reporting on issues of child sexual assault.⁸¹⁷ It also expressed support for the reporting duty recommended by the Cummins Inquiry, 'as it extends to both religious Ministers and lay workers as well as providing an appropriate age bracket'⁸¹⁸ (the recommended offence would have applied in relation to abuse of a person who is under 18).

Ms Clare Leaney and Mr Glenn Davies, representing IGFF, told the public hearing in Case Study 46 that they supported offences for failure to report and that those offences should cover the confessional, whether in terms of those disclosing abuse they suffered or abuse that they committed against others.⁸¹⁹

The North Queensland Catholic Clergy Abuse Reference Group submitted that there should be a 'mandatory reporting criminal law which is national and consistent requiring every citizen to disclose abuse'.⁸²⁰ It submitted that:

[We support] nationally consistent criminal law provisions and penalties for all Australians. This requires persons who have information to form a reasonable belief that a sexual offence has been committed against a child are required under the law to disclose that information to the police.⁸²¹

In relation to the Victorian offence, it submitted that reporting should be required even over the age of 16 years.⁸²² It also expressed support for the offence recommended by the Cummins Inquiry targeting ministers of religion and persons working in religious organisations, referring to reports that victims, witnesses and families who reported through church officials had believed assurances that the abuse would be dealt with properly.⁸²³

The National Association of Services Against Sexual Violence (NASASV) expressed support for a failure to report offence 'where it is clearly evident and able to be proved that some person had knowledge of the offending and took no action'. However, it submitted that there would need to be defences to allow for situations involving fear or duress and where mental capacity or age was an issue.⁸²⁴

The Centre Against Sexual Violence Queensland (CASV) stated that it 'can see the benefit of having an offence targeting institutional child sexual abuse offenses and having those within institutions with the relevant knowledge or belief to report to the police'.⁸²⁵ It expressed support for offences targeting the institutions but submitted:

having a specific offence targeting institutional child sexual abuse offenses does not negate the need to also have a broader offence targeting child sexual abuse offences that require all persons with the relevant knowledge or belief of child sexual abuse occurring to report to the police. When the criminal offense is broadened to include adult members of the community, rather than just members of an institution with children in their care, it is reasonable that more concrete knowledge or evidence of child sexual abuse occurring would be required for not reporting to be considered an offence.⁸²⁶

Similarly, Ballarat CASA Men's Support Group submitted that there should be offences for failing to report child sexual abuse, particularly if an adult is aware of a child being sexually assaulted. However, it also submitted that, in family violence situations, it needs to be recognised that 'a mother may not be able to report due to power and control dynamics'.⁸²⁷

In the public hearing in Case Study 46, Ms Shireen Gunn, representing the Ballarat CASA Men's Support Group, contrasted the view of the men's group with concerns that Ballarat CASA would have in relation to situations of family violence:

Their [the Ballarat CASA Men's Support Group's] view is that if there is someone in authority or someone who is connected to the child who is aware that abuse is occurring, or has a strong suspicion, and doesn't report, they feel that they should be held accountable.

But in saying that, too, my agency [Ballarat CASA] would also qualify that, in that we would see that it needs to be understood in the context of family violence as well, where you couldn't make a blanket ruling, because in those situations of family violence, you can have a mother who can be very disempowered and controlled, who may be aware of abuse but unable to report that abuse.

I think that while the men are saying very clearly that anybody who is aware should be held accountable, that's very much from a subjective viewpoint, whereas if you step outside of that and look at the bigger picture, which is what our agency would do, we would see that the mothers in some of those situations, if it was in familial abuse or, indeed, someone who is intimidated and controlled by the perpetrator as well, is unable to report.⁸²⁸

The Victims of Crime Commissioner for the Australian Capital Territory expressed support for a failure to report offence applying to all serious criminal offences, 'particularly where a child is at risk of further abuse'.⁸²⁹

The South Australian Commissioner for Victims' Rights expressed support for a failure to report offence, stating '[s]ilence nourishes sexual abuse and sexual exploitation of children and other vulnerable people'.⁸³⁰

Protect All Children Today (PACT) expressed concern about failure to report offences. It submitted:

We appreciate the complexities associated with third-party offences and whether they should be legally binding, with breaches punishable by law. There are so many conflicting issues associated with child sexual abuse including a carer's inability to accept that the perpetrator may be someone they love and trust. There are often a myriad of reasons why carers are unsupportive of their child who has been sexually abused. Guilt plays a significant part in the process and sometimes people may experience concerns about a possible offence, but not the actual evidence to substantiate if it is actually occurring. People should definitely be encouraged to report abuse, but we question the value of this action becoming a criminal offence taking the resources (policing and legal) away from real perpetrators and their victims.

The other concerns we have with this approach are:

- if an offence is fabricated due to a personal vendetta or grievance with an individual person or institution;
- if the abuse is not actually occurring or unsubstantiated, much needed resources could be wasted investigating unwarranted claims; or
- if an actual perpetrator accuses someone else of the abuse to take the focus away from their offending.

We also suggest the term 'reasonable suspicion' is open to interpretation and a clear definition would need to be established and communicated.⁸³¹

Jannawi Family Centre also submitted that it did not support third-party criminal offences. It referred to the lack of effective education and information for professionals to protect children; and systems that may not adequately respond to reports.⁸³² It submitted:

As a service which aims to intervene to protect children, there are many systemic and social barriers which we confront in doing so. These barriers are significant and powerful and can deter many from adequately undertaking their roles, fulfilling obligations or developing confidence to intervene. The use of a criminal offence to induce action is a doubtful approach to use, in the same way that it does not necessarily act as a deterrent. A potential approach could be to utilise insurance premiums and liability in gross failures to report harm as the experience and clarity of hindsight does not necessarily transfer to current harm which may be occurring.⁸³³

Institutions

The Association of Heads of Independent Schools of Australia (AHISA) expressed support for third-party criminal offences but submitted that they should be developed in tandem with preventative measures.⁸³⁴

AHISA referred to Professor Ben Mathews' report on mandatory reporting, particularly in relation to why people fail to report – he identified the lack of certainty about whether the child has been sexually abused or not – and where failures to report have been prosecuted. AHISA submitted:

the effectiveness of failure to report offences to prevent further harm or provide justice for victims can be limited by human uncertainty on the one hand and the interaction of professional failure and regulatory ambiguity on the other.⁸³⁵

AHISA stated that appropriate education to address uncertainty in identifying behaviour that warrants reporting can be and is already addressed in schools through regular professional development.⁸³⁶ AHISA also referred to the value of the New South Wales reportable conduct scheme in providing schools with expert advice if any suspicion of grooming behaviour or abuse arises.⁸³⁷

AHISA submitted:

Where professional failure does occur, it is AHISA's view that a failure to report offence of itself – irrespective of whether it requires reporting on reasonable belief or reasonable suspicion – can only be effective when it functions as a penalty to a mandatory reporting law that defines reportable conduct or which is linked to regulations that define such conduct.⁸³⁸

Ms Beth Blackwood, representing AHISA, told the public hearing in Case Study 46:

I think that the association [AHISA] – first and foremost its primary objective is to embed a culture of child safety and protection in our schools. We believe that successful regulation will ensure that those cultures are embedded in our schools.

We need a set of standards that are explicit and clearly understood by those within our schools, that they know exactly what is expected of them, to whom they must report and how those standards will be implemented in their schools. There are some areas where, at this point in time, that clarity is not available.⁸³⁹

The Anglican Church of Australia Royal Commission Working Group submitted that:

Any criminal offence in relation to a failure to report should acknowledge the difference in responsibilities between those of institutional officials and those of family members or support persons to whom the abuse is disclosed.

It should allow a survivor to disclose their abuse to a support person, who is not an institutional representative or subject to mandatory reporting obligations, without that person having any obligation to report.⁸⁴⁰

It also stated that some dioceses have determined that their employees and office holders will act as mandatory reporters even if the mandatory reporting legislation does not apply to them.⁸⁴¹

In answer to a question about Mr Shoebridge's concern that institutions face a conflict of interest in assessing whether a victim consents to reporting, Mr Garth Blake SC, representing the Anglican Church of Australia Royal Commission Working Group, told the public hearing:

I have to accept that there is a potential for a conflict. It depends how it's managed. Complaints of this nature normally will be dealt with by a contact person being assigned to the survivor, intended to provide support along the way and a chance to speak through issues. Commonly also a counsellor will be offered and also the opportunity to talk with a counsellor about those issues.

If the survivor or complainant is a child, that is very clear; it needs to be reported. If, however, the survivor is an adult and doesn't wish the matter to be reported and has taken proper advice and that's supported by a counsellor, for example, that raises particularly difficult issues. As we've mentioned in our submission, there's a conflict within our church, a conflict of approaches. Some parts of the church will report, but it will be blind reporting. Others will report the identity of the survivor. There's no common view within the Anglican Church as to the appropriate way to handle that situation.⁸⁴²

Mr Blake agreed that the divergence of views is based on balancing the public interest against the interest of the individual and referred to respecting the agency of survivors. He said:

The experience, as I've listened to counsellors, is that often it takes survivors a long period of time to be ready to make a report and that the process of even putting words around what happened to them can again take a long period of time. To sort of compel them to work out what the narrative is before they're really ready can be counterproductive.⁸⁴³

The Truth Justice and Healing Council referred to the limitations and difficulties associated with section 316(1) of the *Crimes Act 1900* (NSW) and stated that it saw merit in repeal of this offence as recommended by the NSW LRC.⁸⁴⁴

The Council restated the recommendation it made in its submission in response to Issues Paper 8 to the effect that:

there should be a nationally consistent criminal law provision in Australia requiring a person who has information leading the person to form a reasonable belief that a sexual offence has been committed against a child to disclose that information to the police unless the person has a reasonable excuse for not doing so.⁸⁴⁵

Mr Francis Sullivan, representing the Truth Justice and Healing Council at the public hearing in Case Study 46, explained the Council's preference for the approach of the Victorian offence rather than the New South Wales offence as follows:

That idea ... is really based on what has become the Victorian legislation enacted last year, and that is where it says that where an individual has information that they believe would form a reasonable belief that a sexual offence has been committed against a child, they have to disclose that to the police, unless there's a reasonable excuse for not doing so.

We just think that that wording is clearer, it's tighter, and it's the type of wording or drafting of legislation that should be consistent across Australia in every jurisdiction, and to that end, that's why we would suggest that it should also apply in New South Wales.⁸⁴⁶

The Council also restated its concerns as to whether the Victorian offence in section 327 of the *Crimes Act 1958* (Vic) was adequate. In relation to the Victorian offence, it submitted:

the fact that an obligation to report child sexual abuse did not apply in circumstances where the victim was now mature and requested that the information not be disclosed meant that the section did not meet the interests of child safety in a case where the alleged perpetrator might still be alive.⁸⁴⁷

In relation to the Victorian exception where the victim is over 16 years of age and does not want the information reported, Mr Sullivan told the public hearing:

we think one of the gaps, potential gaps, in the Victorian legislation occurs when somebody comes and reports the fact that they were abused as a child but now are over the age of 16. Although there's no obligation to report, it may be possible that the perpetrator is still alive, and, therefore, there is a risk to the community. We think, in those circumstances, the obligation to report should override everything else.⁸⁴⁸

Mr Sullivan agreed that the Council considers that the vulnerability of children generally should outweigh interests of privacy, confidentiality and support for the particular victim and, if the perpetrator is still alive, there should be a duty to report.⁸⁴⁹

In answer to a question about Mr Shoebridge's concern that institutions face a conflict of interest in assessing whether a victim consents to reporting, Mr Sullivan said:

I think Mr Shoebridge is on to something there. I mean, we've often said that, as far as the Catholic Church is concerned, the days of it investigating itself or anything about that are over, because there is a perceived conflict of interest, and it can be said in the past that the interests of the institution helped determine how particular complaints were handled. So I can take that point. But certainly if you have a duty at law, hopefully that overrides any conflict.⁸⁵⁰

The Council submitted that the offence it proposes should include a defence of 'reasonable excuse' as the Victorian provision does and that it should contain an exemption for information communicated on an occasion of privilege, including in the context of a religious confession.⁸⁵¹

Mr Sullivan also commented on the exemption for information obtained during religious confession.⁸⁵² Mr Sullivan said that if there was evidence of perpetrators admitting their abuse of children in religious confession, the exemption would need to be addressed as a public policy issue.⁸⁵³ Mr Sullivan gave his opinion that, 'at the end of the day, there's also a value to the seal of confession that Catholics preserve in themselves'.⁸⁵⁴

Mr Sullivan told the public hearing that if a reporting obligation were introduced that did not exempt information obtained during religious confession, 'in fairness to what I have said, our attitude would certainly be that when the law of the country is set, then all citizens, whether you're a priest or otherwise, need to heed the law, obey or disobey, and take the consequences'.⁸⁵⁵

The Council expressed its opposition to the offence targeting religious institutions recommended by the Cummins Inquiry. It submitted:

Persons who work in Church institutions must be subject to the law of the land in the same way as all other individuals in society. However, to single them out for special criminal liability would be unfair and unconscionable. There is no reason why institutional child sexual abuse should be made subject to different criminal reporting obligations than child sexual abuse generally.⁸⁵⁶

Governments and government agencies

The New South Wales Government referred to the offence in section 316(1) of the *Crimes Act 1900* (NSW) and submitted:

While the consideration of repeal or amendments to section 316 is beyond the scope of the NSW Child Sexual Offence [sic] Review, the Review will consider whether an offence of failure to report should be introduced which is specifically directed at child sexual offences. This will include consideration of the nature and scope (including defences and exceptions) of an offence, as well as practical implications. Importantly, an offence of failure to report will also be considered against NSW's regulatory context, including the reportable conduct scheme under the *Ombudsman Act 1974* (NSW), mandatory reporting obligations under the *Children and Young Persons (Care and Protection) Act 1998* (NSW), and reporting obligations under the *Child Protection (Working with Children) Act 2012* (NSW).⁸⁵⁷

The New South Wales Government also suggested that, if an offence were to be specifically directed at failing to report child sexual abuse, it would need to be considered in the context of the concern identified in the Special Commission of Inquiry into Child Protection Services in New South Wales (Wood Special Commission of Inquiry) that penal consequences for failing to report resulted in overcautious reporting.⁸⁵⁸

The Victorian Government outlined the failure to disclose offence under section 327 of the *Crimes Act 1958* (Vic). It acknowledged the complex policy issues and competing considerations raised in developing the offence, including in relation to family violence. It stated '[w]hether the current defences and exceptions are appropriate in their scope may become more apparent in due course, as police investigate possible further cases'.⁸⁵⁹ It noted that four matters have been recorded by Victoria Police, but no prosecutions for the offence have commenced.⁸⁶⁰

In relation to the age at which the victim should be entitled to decide whether the offence is reported, it explained the choice of 16 years in Victoria and noted that the Republic of Ireland has adopted a threshold of 14 years.⁸⁶¹

The Victorian Government also noted the reporting threshold and submitted that:

A threshold of 'reasonable suspicion' may require more people to disclose information to police, on more tenuous grounds, and it is unclear how valuable such information would be to police (and what the consequent impact on police resources would be). In addition, given the sensitivities surrounding such offences, a low threshold is likely to be met with opposition from some stakeholders.⁸⁶²

In answer to a question about why Victoria introduced a provision targeting child sexual abuse rather than a general provision such as section 316(1) in New South Wales, Mr Byrne, Special Counsel, Criminal Law Review in the Victorian Department of Justice and Regulation, representing the Victorian Government, told the public hearing in Case study 46 that Victoria had repealed its broader provision, so it was effectively starting from scratch. He said:

The Betrayal of Trust Report adopted the view that every member of society has a moral and ethical responsibility to report to police any information or knowledge they have about serious crime being committed, so it was from that basis that the offence was established. ...

It applies to any person with information, any adult with information. And then there were several issues that arose during consultation about trying to clarify what did it mean to have information, to have a knowledge or belief of information that may be of assistance to police, and there was some concern, for instance, that a person wouldn't know what would be of assistance to police, because they don't know what the police know.

Therefore, the basis of the offence was to say if a person has information which causes them to form a reasonable belief that an offence has been committed, then that is sufficient for the basic structure of the offence.⁸⁶³

In answer to a question as to whether turning the moral or ethical duty into a legal duty caused any significant controversy, Mr Byrne referred to the issues related to reporting in family violence situations and the defence in section 327(3)(a) and the further changes recommended by the Victorian Royal Commission into Family Violence.⁸⁶⁴

In its submission, the Victorian Government noted its commitment to implement all recommendations of the Victorian Royal Commission into Family Violence, one of which was to amend section 327 to require the Director of Public Prosecutions (DPP) to approve a prosecution where the alleged offender is a victim of family violence and to consider legislative amendments to reconcile section 327 with section 493 of the *Children, Youth and Families Act 2005* (Vic).⁸⁶⁵

We discuss section 493 of the *Children, Youth and Families Act 2005* (Vic) in Chapter 17 in relation to failure to protect offences.

The Tasmanian Government stated its recognition that ‘institutional failure to report, or protect children from, child sexual abuse can have devastating impacts for victims, families of victims and the community’.⁸⁶⁶ However, it submitted:

there are complexities in relation to this issue that should be acknowledged, including that in some institutions significant barriers to reporting exist for a variety of reasons. For example, reporters may not fully understand when they objectively would be considered to hold the requisite belief to report or they may not understand what objective steps they ought to take to protect a child. The rule of law requires that a person who has a duty or obligation under the law should be able to clearly and unequivocally understand those duties and obligations.

It is also important to recognise that additional offences or a crime in relation to failure to report may, in of itself, discourage reporting. Criminal prosecutions that are based on proof of a belief are often difficult to prosecute unless the offender makes admissions in relation to their state of mind. An analysis of the capacity for criminal law reform in this area should be considered with regard to the capacity of the crimeto encourage reporting and the intersection with the Royal Commission’s Redress and Civil Litigation Report recommendation in relation to the introduction of a statutory duty on institutions.⁸⁶⁷

The Victorian Commission for Children and Young People expressed its in principle support for failure to report offences. It referred to the work it is involved in in developing relevant regulatory systems; and the role of civil law in driving cultural change. It submitted:

The introduction of consistent criminal offences and sanctions across Australia should promote the safety of children while allowing time for the development of more effective behaviours, policies and practices on the part of individuals and organisations in preventing and responding to child sexual abuse.⁸⁶⁸

The Commission for Children and Young People also suggested that it might be appropriate to consider offences in relation to all child abuse rather than child sexual abuse.⁸⁶⁹

Mr James McDougall, representing the Commission for Children and Young People, outlined for the public hearing in Case Study 46 the work done in Victoria in relation to Child Safe Standards and a reportable conduct scheme. In answer to a question as to whether there is a place for both a criminal offence of failure to report and a regulatory scheme, Mr McDougall said:

I think they are necessary parts of a scheme that is going to, at the same time as setting very clear standards, also provide a process for raising awareness in the community more broadly about what is acceptable and what is not acceptable behaviour and how organisations and all of us as individuals can more effectively keep children safe.⁸⁷⁰

The Queensland Family & Child Commission (QFCC) expressed its support for consideration of the option of offences along the lines of Victoria's failure to report offence. However, it also submitted that the offence should be specific and targeted to avoid burdening child protection systems with high numbers of unsubstantiated reports.⁸⁷¹

Citing the Queensland Child Protection Commission of Inquiry, the QFCC submitted:

While third-party offences and mandatory reporting encourage citizens to notify authorities about suspected abuse, they can also lead to over-reporting, which makes child protection systems less efficient, and can cause damage to families unnecessarily reported.⁸⁷² [Reference omitted.]

The QFCC described the amendment to mandatory reporting laws that was made to reduce over-reporting in Queensland following the Commission of Inquiry. A person who makes a mandatory report is now protected from liability for making the report only if they act 'honestly and reasonably'; acting 'honestly' is no longer sufficient.⁸⁷³

The QFCC recommended that we consider the findings of the Commission of Inquiry in relation to over-reporting to ensure that any new provisions 'do not unnecessarily add to the overburdened child protection systems'.⁸⁷⁴

The QFCC also submitted that international research suggested that universal mandatory reporting laws may not be an effective means to identify children who have suffered physical or sexual abuse. It suggested that the Victorian failure to report offence may be more effective because it focuses specifically on sexual abuse.⁸⁷⁵ The QFCC observed that, because the Victorian offence is fairly new, its effectiveness is difficult to assess, and a full analysis of the operation and effectiveness of the Victorian offence would be welcomed.⁸⁷⁶

Directors of Public Prosecutions

The New South Wales Office of the Director of Public Prosecutions (ODPP) expressed its support for retaining a criminal offence in relation to failure to report. It submitted that, if the broad offence in section 316(1) of the *Crimes Act 1900* (NSW) were ever repealed, it would support a specific offence along the lines of the Victorian offence.⁸⁷⁷

The Victorian DPP expressed his agreement with the policy intention behind the failure to report offence in section 327 of the *Crimes Act 1958* (Vic) but said that he could not meaningfully comment further because the Victorian Office of Public Prosecutions (OPP) has not yet prosecuted or been asked to advise on this offence.⁸⁷⁸

Legal bodies and representative groups

In its submission in response to the Consultation Paper, the Law Council of Australia stated its support, and the support of the Law Institute of Victoria (LIV), for the creation of a new criminal offence of failure to disclose a sexual offence committed against a child.⁸⁷⁹ It referred to the LIV's submission to the Betrayal of Trust inquiry, which recommended 'a model that required religious personnel to report to police a reasonable suspicion that a minor is being, or has been physically or sexually abused by an individual within a religious or spiritual organisation'.⁸⁸⁰

It referred to the Victorian offence in section 327 of the *Crimes Act 1958* (Vic) and stated:

The Law Council and LIV do not oppose mandatory reporting requirements that are broader than the LIV's recommendation in its 2012 submission and note that the LIV welcomed the Victorian provision that encompassed all child sexual abuse. However, the Law Council and LIV raise the question of whether or not reasonable belief puts the matter too high and suggests that reasonable suspicion may be a more appropriate standard, although this should not include vague or uncertain information, such as rumours and the like.⁸⁸¹

The Law Council of Australia submission also discussed religious confessions in the context of a failure to disclose offence.⁸⁸² It expressed the view that if an exception for religious confessions were considered necessary, the exception 'should allow for a balancing of the need for confidentiality against the need for disclosure'.⁸⁸³

Under the failure to disclose offence created by the Victorian Parliament at section 327 of the *Crimes Act 2010* (Vic), there is an exemption for various categories of privileged information by reference to the privileges under Part 3.10 of the *Evidence Act 2008* (Vic), including the religious confessions privilege. In relation to that exemption, the Law Council of Australia and LIV submitted that 'the discretionary balancing test would be much fairer than an absolute exemption for religious confessions'.⁸⁸⁴

In answer to a question as to whether a substantially objective test should be adopted – such that a person should be obliged to report if they had reasonable grounds to suspect regardless of whether they actually suspected – Mr Arthur Moses SC, representing the Law Council of Australia, told the public hearing in Case Study 46:

does it get to the stage where, if somebody who you regard to be credible or otherwise informs you of particular conduct, whether at that point that triggers the obligation to disclose it without any further investigation or review. And we have that within the legal profession with some of the matters that we deal with, without going into the details, when we investigate professional conduct complaints.

It's a matter of whether or not we have sufficient evidence within our possession before we have an obligation to refer matters off to the police. During the course of a professional conduct complaint, allegations are made. At the point where we believe that there has been an indictable offence committed, we then have a mandatory obligation to hand over all material to the police. So we don't get to that until we consider it.

On the lower standard ... I am just wondering if we then get to the stage that the moment you are informed of something, is that what then triggers you reporting the matter to the police without further inquiry or otherwise on your part? I think I would find that a bit problematic in terms of imposing that on an individual.⁸⁸⁵

Mr Stephen Odgers SC, who gave evidence concurrently with Mr Moses, told the public hearing:

I approach it from the basis of fundamental principle, that criminal offences should require fault elements and that negligence should not be sufficient for serious criminal offences, and this would be an offence which would be serious and it should require actual suspicion on the part of the person, at the very least.

I'm torn as to whether or not belief should be required. I can see arguments both ways on that, but I would be very opposed to any attempt to impose liability on the basis that you should have suspected where you did not in fact suspect.⁸⁸⁶

The Australian Lawyers Alliance (ALA) submitted that section 316(1) should be retained. It stated:

Suggestions have been made that s 316 should be amended or abolished. The ALA thinks that in substance, s 316 is appropriate, the obligation is one which should be on every citizen (subject to some exceptions for victims, legal privilege and perhaps the confessional), and would not wish to see it abolished. ...

In our view, it is hard to see why serious criminal offences of all types should not be reported and not merely child sexual offences.⁸⁸⁷

In relation to whether a victim who fails to report their own abuse should be charged, the ALA submitted:

As to whether any penalty should lie with a victim who fails to report, we would suggest that there be a broad discretion as to whether or not any action be taken, having regard to the injury inflicted, psychological state and the particular circumstances of the individual. There will be many circumstances where children and indeed, some adults, could not reasonably be expected to report their own abuse. This will often be the case in Indigenous and Torres Strait Island communities, for example. On the other hand, individuals who were able to and could readily have reported and thus saved others, having reached adult years, should have an obligation to report appropriately. The involvement of an institution in the decision to report or withhold information about the abuse from the police may be a relevant consideration, especially if the institution has discouraged or failed to explore the possibly [sic] of reporting the abuse with the victim.⁸⁸⁸

The Law Society of New South Wales Young Lawyers Criminal Law Committee expressed its support for both an offence similar to the Victorian offence in section 327 of the *Crimes Act 1958* (Vic) and a failure to report offence targeted at institutions.⁸⁸⁹ It submitted that specific offences are warranted because of the nature of child sexual abuse, particularly the uniquely vulnerable position of the victim, in spite of the existence of a general reporting offence such as section 316(1) of the *Crimes Act 1900* (NSW).⁸⁹⁰ It stated:

A specific legal duty to report abuse would combat the culture of denial that is characteristic of child sexual abuse in institutional settings. It would also reinforce community expectations regarding the conduct of responsible adults in their interactions with children.⁸⁹¹

In relation to the Victorian offence, the Criminal Law Committee submitted:

the Committee supports recommendations to introduce offences similar to the *Crimes Act 1958* (Vic) s 327, and adopting a 'reasonable belief' standard. However, the Committee submits that 'police' in s 327(2) should be replaced with 'appropriate authority' to enable States to make their own jurisdictional arrangements; for example, where state police do not have a dedicated child abuse/sexual offences investigation team. Such an offence should have exclusions similar to those in the Victorian legislation to ensure that the interests of the victim are fully safeguarded.⁸⁹²

In relation to the offence targeted at institutions, the Criminal Law Committee supported a lower standard of 'reasonable suspicion' and an aggravated offence where there are repeated failures to report.⁸⁹³

In relation to the offence in section 316(1) of the *Crimes Act 1900* (NSW), the Criminal Law Committee stated its agreement with the view of the NSW Police Integrity Commission and the NSW LRC that the section should be repealed.⁸⁹⁴

Mr Liam Cavell, representing the Criminal Law Committee in the public hearing in Case Study 46, was asked to explain why the committee supported both a broader reporting offence focused on child sexual abuse, such as the Victorian offence, and an offence directed specifically at institutions. Mr Cavell told the public hearing:

We formed the view that section 316 in its broad application doesn't serve the policy objectives that it needs to in encouraging specific types of reporting. Also, the carve-out in section 316 about a reasonable excuse for failing to report doesn't take account of particular circumstances that might arise in child abuse reports, such as the one outlined in the consultation paper about a 16-year-old who perhaps requests not for that disclosure to take place.

So we felt that it was important to have a more targeted offence that put the onus on somebody who hears a report to report that offence.

I think it's also important, or we think it's important, from an education standpoint, for those who work within the sectors where people may be reporting these types of offences to have more clear guidance, and that can come in the form of a more specific offence.⁸⁹⁵

Mr Cavell agreed that the 'reasonable belief' standard under the broader offence would require a higher state of persuasion than the 'reasonable suspicion' standard under the second offence targeted at institutions.⁸⁹⁶

knowmore expressed its support for a failure to report offence targeting institutional child sexual abuse. It submitted that the offence should apply to staff, employees, office holders, board or committee members and volunteers.⁸⁹⁷ knowmore stated that, given its clients' experiences:

[knowmore] considers that a failure to report offence targeting institutional child sexual abuse will increase accountability of institutions to report child sexual abuse, will create a more robust reporting culture within institutions and will assist in the detection and prevention of institutional child sexual abuse.⁸⁹⁸ [Reference omitted.]

In relation to the details of the offence, it submitted that it should not apply where an adult survivor of institutional child sexual abuse does not wish for their complaint to be referred to police and that this 'consent' requirement should apply from 18 years of age.⁸⁹⁹ It also submitted that there should be a defence of 'reasonable excuse', such as where the person was informed that a report had already been made to police by the institution or appropriate representative.⁹⁰⁰

knowmore submitted that a failure to report offence would reflect the seriousness of child sexual offences in institutions and that it was necessary in addition to mandatory welfare reporting systems, including because mandatory reporting generally does not cover all types of institutions which provide services to children.⁹⁰¹

As to broader offences, knowmore did not support a failure to report offence extending to all serious criminal offences, such as section 316(1) of the *Crimes Act 1900* (NSW).⁹⁰² It expressed some support for the Victorian offence in section 327 of the *Crimes Act 1958* (Vic) but submitted:

In principle, given the seriousness of child sexual abuse and the importance of safeguarding the best interests of the child, no distinction should be made between institutional and non-institutional child sexual offending and the duty to report. However, there may be some could be [sic]unintended consequences of broadening the application of the offence; for example, could it criminalize non-reporting by women experiencing family violence and other vulnerable groups (in circumstances where the fear of safety exception may not apply)?

Any such provision would only be effective in shifting reporting culture where there are significant awareness raising campaigns in the community.⁹⁰³

Mr Warren Strange, representing knowmore, explained knowmore's preferred approach to the public hearing in Case Study 46 as follows:

We generally support the failure to report offence. Our concern with the general one is that, on reported prosecutions, I think there's one current matter, we understand, and it hasn't been generally used, and I'm aware of the concern that defence lawyers have about how it's often used by police as a lever against people suspected of having information that might help them.

We're mindful that some people who might be caught by a particular targeted offence might be in circumstances where they are experiencing family violence, and it may be very difficult for them to disclose, or to disclose in a timely way. So we're comfortable with the proposition of a failure to report offence that recognises some of those realities. While I haven't read all of the submissions, I think some of the sexual assault services have addressed that perhaps in more detail than we have and they've explained those sorts of concerns at greater length.⁹⁰⁴

Mr Strange also discussed the difficulties of framing the offence and the standard of knowledge or belief that should apply. In answer to a question about whether he favoured a standard of reasonable belief over reasonable suspicion, he said he did not have a settled view and continued:

I think in that context you're also dealing with people who have responsibilities upon receipt of any information which raises a concern, and they are obliged to provide a safe environment to children in their care, which then incorporates the obligation to have regard to the information and to perhaps make some inquiries.

I think you are trying here, with an offence provision, to combat those people who wilfully have failed to act on reliable information and, in effect, have sought to cover up offending against children and to protect perpetrators.⁹⁰⁵

In relation to the awareness-raising campaigns in the community, Mr Strange told the public hearing:

We would see a need for a community engagement and education process around any such offence, and I think that could be successful in the sense that this [Royal] Commission has made very significant impacts upon society's awareness around child sexual abuse occurring in institutional contexts. To be effective, people need to understand that they are under a duty to report this type of information and that needs to be conveyed to people in a way that it can be readily understood by all members of society and practical examples given, practical guidance and an engagement process that gets the information out there.⁹⁰⁶

Victoria Legal Aid (VLA) stated that the offence in section 327(2) of the *Crimes Act 1958* (Vic) 'reflects existing community attitudes about the need for an additional level of protection for a particularly vulnerable cohort of victims'.⁹⁰⁷ It submitted that:

the subjective and objective test of 'reasonable belief' and the reasonable excuse provisions in section 327(2) are appropriate as they strike the right balance between protecting this vulnerable cohort from further abuse and not penalising a third party who fails to disclose in specific circumstances.⁹⁰⁸

VLA stated its opposition to a failure to report offence that extends to all serious criminal offences:

the need to protect victims from other serious offending does not justify the imposition of a positive duty on members of the community of which the failure to perform may invoke a punitive response. An expanded failure to disclose offence would place an inordinate burden on members of the community to disclose conduct that may or may not actually constitute serious offending simply to avoid offending against the new provision, and penalise people who inadvertently fail to recognise the conduct of a serious criminal offence. VLA also questions the utility of a provision that would presume an understanding on behalf of members of the community that a positive duty to take particular steps applies.⁹⁰⁹

VLA also referred to the difficulties that a broad reporting offence might create for family and friends, newly arrived migrants from culturally and linguistically diverse backgrounds and those in small, tight-knit communities.⁹¹⁰

Legal Aid NSW referred to the concerns of the NSW LRC and stated its support for the repeal of the offence under section 316(1) of the *Crimes Act 1900* (NSW).⁹¹¹ It submitted that this offence should be replaced with an offence targeting the failure to disclose child sexual assault offending, modelled on the Victorian offence.⁹¹² It submitted:

The offence should apply only to adult offenders and should contain safeguards that appropriately balance the welfare of victims of domestic and family violence and the interests of the child. As previously noted, there is no ‘young love’ defence to sexual offending in NSW. Therefore any reforms would need to ensure that the offence did not capture, for instance, gossip amongst teenagers about the sex lives of their friends. We also agree with the submission of the Law Council of Australia that the requisite level of knowledge of the commission of a sexual offence should be one of ‘reasonable suspicion’ rather than ‘reasonable belief’.⁹¹³

The Federation of Community Legal Centres (FCLC) in Victoria expressed its support for a narrow failure to report offence targeting institutional child sexual abuse. It submitted:

The Federation believes there should be a criminal offence in relation to failure to report, and that its scope should be reasonably narrow: it should target institutional child sexual abuse offences and require those within institutions with a reasonable suspicion to report to police.⁹¹⁴

It outlined a number of concerns with a broader offence such as the Victorian offence as follows:

- It may harm children who have suffered familial abuse if a mother might be incarcerated for failure to report and the child is left in the care of the state or with the perpetrator of the abuse.
- It is potentially detrimental to women experiencing family violence, as the ‘reasonable excuse’ defence and the requirement for DPP approval of any prosecution would not necessarily prevent injustice in all circumstances.⁹¹⁵

It submitted that a broader failure to report offence would undermine key aspects of the National Plan to Reduce Violence against Women and their Children.⁹¹⁶

The FCLC referred to a significant benefit of an offence targeting institutions being the ability to apply a lower standard of knowledge or belief. However, it submitted that, if the threshold is to be the lower one of ‘reasonable suspicion’, it would be appropriate to require the person within the institution to have some requisite degree of authority.⁹¹⁷

Judiciary

Judge Berman SC of the New South Wales District Court expressed support for retaining the offence in section 316(1) of the *Crimes Act 1900* (NSW) while also creating a specific offence targeting child sexual abuse offences. He stated that the specific offence should operate as a means of educating the community and submitted:

Too long, many people aware of child sexual abuse offences having occurred have preferred to say nothing. The creation of a specific offence such as that already in existence in Victoria, would be very welcome.⁹¹⁸

Academics

Associate Professor Penny Crofts submitted:

The Criminal Justice Consultation Report asserts that mandatory reporting offences raise ‘the difficult issues of whether what could fairly easily be identified as a moral duty ... should become a legal obligation, breach of which would be punishable under the criminal law.’ I disagree. Such a legal duty has been imposed by the majority of jurisdictions in Australia and can be justified by the harmful consequences of failing to report.

I support the creation of an offence targeting institutional child sexual abuse offences and requiring those within institutions with the relevant knowledge or belief to report to police.

The emphasis upon some kind of subjective element of knowledge, suspicion or belief is ostensibly appropriate. It is in accordance with our understandings of responsibility that we can only be responsible for what we knew or intended. How could a person or institution possibly be held criminally responsible for what they did not know? However, in many of the Royal Commission Reports, the issue was not that individuals knew or believed that child sexual grooming and/or abuse was occurring, but that they had not recognised the grooming or offending behaviour at all. This is where the importance of an account of collective or organisational wrongdoing becomes essential.⁹¹⁹

In relation to Case Study 12, Associate Professor Crofts submitted:

despite eight separate complaints across time about an offending teacher’s behaviour, the former heads of the preparatory school and headmasters did not place sufficient or correct significance on the concerns raised with them about the offending teacher ...

The masters at the school would probably not have been prosecuted for failure to report because they lacked knowledge or belief that child sexual abuse was occurring. But it is this very lack of knowledge or belief that is the problem. Their failure to attach sufficient and

correct significance to the reports of inappropriate behaviour was due to an organisational failure to adequately train staff to recognise and report grooming behaviours. The absence of any knowledge or belief was a systemic problem – and the current criminal justice focus on individual, subjective blameworthiness is accordingly inappropriate and misguided.⁹²⁰

16.6.2 Submissions and evidence regarding the issue of religious confessions

Evidence of disclosures of child sexual abuse in religious confessions

The Royal Commission has heard evidence of Catholic priests being told about child sexual abuse in religious confessions. In a number of cases this evidence related to a victim disclosing his or her abuse to a priest during confession. For example:

- 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, VG, a survivor, gave evidence that as a child he told two priests in confession of his sexual abuse by a religious brother. He gave evidence that one of the priests subsequently told his abuser.⁹²¹
- In Case Study 26 in relation to the response of the Sisters of Mercy, the Catholic Diocese of Rockhampton and the Queensland Government to allegations of child sexual abuse at St Joseph's Orphanage, Neerkol, AYB, a survivor, gave evidence that as a child she told a priest in confession of her sexual abuse by another priest. She gave evidence that she was later abused by her confessor.⁹²²
- In Case Study 28 in relation to Catholic Church authorities in Ballarat, BAB, a survivor, gave evidence that as a child he told a priest of his abuse by a religious brother in confession and that the priest responded 'that didn't happen'.⁹²³

We also heard evidence of individuals disclosing their own offending during confession. For example, in Case Study 35 in relation to the Catholic Archdiocese of Melbourne, a priest had an offending priest attend on him and go into 'confessional mode', making a confession of child sexual abuse. The priest who heard the confession gave evidence that because of the confessional situation he 'couldn't speak to anyone' and he 'felt totally entrapped by that situation'.⁹²⁴

In Case Study 50, we heard evidence about how perpetrators of child sexual abuse used religious confession. For example, during this public hearing, Father Brennan gave evidence that a woman had told him that her father was a 'serial abuser' who 'went to confession regularly and went to priests who very readily forgave him, with what we might call very cheap

grace, and that he somehow felt vindicated in that and then went on to further abuse children in that family'. Father Brennan gave evidence that, prior to this woman's communication, he had been completely unaware of such cases.⁹²⁵

We also received evidence from two psychologists who have worked with clergy perpetrators of child sexual abuse in the Catholic Church.

We received a précis of evidence from Dr Marie Keenan.⁹²⁶ Dr Keenan is a psychologist and researcher who conducted a study of Irish Catholic Church clergy offenders. The results of Dr Keenan's study are published in *Child sexual abuse and the Catholic Church: Gender, power and organizational culture*.⁹²⁷

Dr Keenan wrote in her précis that:

The men in my research used the sacrament of reconciliation to seek forgiveness, resolve never to do this bad thing again and in some cases to ease their conscience.⁹²⁸

In Dr Keenan's study, eight out of nine clergy the subject of the study disclosed their acts of child sexual abuse in religious confession.⁹²⁹ According to Dr Keenan, the confessional was the main place of respite and support from emotional conflicts and loneliness for those clergy, and it became an important forum for ultimately disclosing their sexual abusing.⁹³⁰ They used the secrecy of the confessional to 'externalise' the issue of their abusing in safety.⁹³¹

Dr Keenan wrote in that study:

Receiving confession played a role in easing men's conscience in coping with the moral dilemmas following episodes of abusing, and it provided a site of respite from guilt. For some of the men, it also helped them think they were making an effort to change.⁹³²

Dr Keenan continued:

The very process of confession itself might therefore be seen as having enabled the abuse to continue, not only in how the men used the secrecy and safety of the confessional space to resolve the issues of guilt, but also in the fact that within the walls of confession, the problem of sexual abuse of children was contained.⁹³³

Dr Gerardine Robinson also gave evidence in Case Study 50. Dr Robinson is a psychologist and has treated 60 to 70 Catholic clergy child sex offenders at Encompass Australasia.⁹³⁴ Dr Robinson said that she thought that the proportion of clerical perpetrators she had seen that disclosed their offending in religious confession 'probably would be substantial' and that 'there would be a significant number who would tell me, and perhaps others who didn't' that they confessed their offending.⁹³⁵ Dr Robinson told us that some of the perpetrators she assessed 'would quite blithely say, "Yes, every time I offended, I went to confession"'.⁹³⁶

Dr Robinson was asked whether, in her clinical experience, she had encountered the phenomenon described by Dr Keenan – that is, that the act of religious confession was an important aspect of clergy child sex offenders continuing to offend because they felt a degree of absolution.⁹³⁷ Dr Robinson gave evidence that that was the case ‘most definitely, particularly in older clergy, not so much now, in younger clergy’.⁹³⁸ Dr Robinson had ‘seen that pattern, that an offender would offend against a child victim, go to confession and feel absolved, and do exactly the same thing again’.⁹³⁹

We also heard evidence from clergy who told us that they had never heard a confession in which a penitent confessed they had sexually abused a child⁹⁴⁰ or in which a child told them they were sexually abused.⁹⁴¹

Submissions and evidence in support of an exemption for religious confessions

Submissions

A number of submissions to Issues Paper 11, as well as the Truth Justice and Healing Council’s submission to Case Study 50, were opposed to any recommendation that would require clergy to report information received in religious confession.

Professor Michael Quinlan, the Dean of the Law School of the University of Notre Dame, Sydney, expressed his concern at the Royal Commission’s consideration of the seal of confession, which as a sacrament of the Catholic Church is ‘central to the operation of the Catholic Church and at the heart of the Catholic religious faith’.⁹⁴²

Professor Quinlan considered the prospect that the Royal Commission would recommend change in the area of the confession as a challenge to the freedom of religion for the Catholic Church and its followers.⁹⁴³ Professor Quinlan referred to the freedom of religion as guaranteed at international law and in Australian constitutional law.⁹⁴⁴

Mr David Collits, a practising Catholic, submitted that any limitation upon the scope of confidentiality attaching to the Sacrament of Confession at civil law must be resisted.⁹⁴⁵ He wrote that the policy underlying the confessions privilege is like the policy attaching to privileged communications between a lawyer and their client so that clients can obtain advice free of fear of prejudicial treatment, whereas in the confessional the penitent seeks forgiveness without fear of social stigma.⁹⁴⁶ He stated that ‘The confession is a sacred space in which the soul is touched by God’ and that ‘most if not all priests would rather be penalised under the criminal law than break the seal of confession’.⁹⁴⁷

Associate Professor A Keith Thompson of the Law School of the University of Notre Dame, Sydney, and author of a study on the religious confession privilege at common law, submitted his concerns about compelling priests to disclose the contents of religious confessions. He wrote

that the legal philosopher Jeremy Bentham opposed coercing disclosure of religious confessions and that Bentham concluded that the ‘advantage gained by the coercion of confessional disclosure’ would be ‘rare’.⁹⁴⁸

Catholics for Renewal, an advocacy group of Australian Catholics, referred to the argument that the seal of confession should not be recognised in civil law and that priests should be mandated to report admissions of child sexual abuse in the Sacrament of Reconciliation.⁹⁴⁹ It noted that ‘this argument is strengthened by the Church’s record of covering up child sexual abuse’.⁹⁵⁰ However, it submitted that mandated reporting would require confessors to ‘breach a sacred trust’ and that there would be little to be gained in protecting children and isolating perpetrators from ‘a potential source of guidance and contrition’.⁹⁵¹

The Truth Justice and Healing Council submitted to the Royal Commission that ‘the Commission ought not to make any recommendations abrogating civil law protections attaching to the seal of the confession’⁹⁵² and that ‘a religious confession should remain a privileged communication under the law in Australia’.⁹⁵³

In its submission, the Council wrote of the Sacrament of Confession:

It is because the Sacrament of Reconciliation touches so intimately upon a person’s relationship with God and their own moral integrity, that the Church holds that the seal of confession is inviolable. Current legal protections of the ‘seal of confession’ accord with the fundamental human right freely to practice one’s religion.⁹⁵⁴

The Council stated that to require disclosure of the content of a confession would be to interfere with a person’s inner thoughts and private communication with God.⁹⁵⁵ The Council explained this was why the seal of confession is so fundamental to Catholics and protected under canon law.⁹⁵⁶

The Council submitted that any recommendation of the Royal Commission that interfered with the seal of confession would be futile:

The Australian Church has no power to change the seal of its own volition. That could only be done by an act of the Magisterium affecting Catholic practice in all parts of the world.⁹⁵⁷

The Council expressed the view that abrogating the religious confessions privilege would also risk damaging respect for the court system if a Catholic priest, for example, were to refuse to disclose the contents of a confession and were jailed in consequence.⁹⁵⁸

The Council also submitted that, in its view, it would be unlikely for a perpetrator to confess their abuse of children; however, if they were to do so, the confession provides an opportunity for a priest to encourage an abuser to turn themselves in to the police.⁹⁵⁹ The Council considered that a child sex abuser would not seek the sacrament and disclose their abusing if the seal of confession were not protected at law.⁹⁶⁰

Oral evidence

During Case Study 50, Catholic clergy gave evidence opposing any civil requirement that clergy disclose information the subject of the confessional seal.

Dr O'Loughlin provided us with a précis of evidence in which he wrote that the 'Confessional Seal is not something that can be given up by the Church'.⁹⁶¹

Father Brennan gave evidence that, while he did not think it beyond the Royal Commission's remit to recommend that priests be required to report religious confessions of child sexual offences,⁹⁶² if he were required by law to do so, his options would be not to hear confessions, to breach the seal of the confessional and in doing so lose his priestly faculties, or to conscientiously refuse to comply with the law.⁹⁶³

Father Brennan also expressed his view that, if the confessional seal was not available for disclosures of child sexual abuse, the prospect of paedophiles confessing would evaporate and the opportunity for a priest to convince them to present to civil authorities would be removed.⁹⁶⁴

Father Brennan said:

I do think that for some Catholics there is a benefit of living in a society where they can confess, knowing that the seal of the confessional is kept intact, that it is something of the common good of the pluralistic, democratic society, and if that is a good that can be maintained without jeopardising children, then I say it should be.⁹⁶⁵

Dr Grayland expressed concern that, even if mandatory reporting of information the subject of the confessional seal were legislatively confined, Catholics would perceive that they could not attend confession because what they said in penance could be revealed in a court.⁹⁶⁶

Both Bishop Curtin and Father Waters gave evidence that a confessor could refrain from giving a penitent absolution until satisfied they had reported themselves to the authorities.⁹⁶⁷ Archbishop Hart told us that, if a penitent confessed to him that they had abused a child, he would withhold absolution until that had happened.⁹⁶⁸ In response to questioning about that scenario, Father Brennan had the following exchange with Commissioner Atkinson:

Commissioner Atkinson: But if, using Father Waters' hypothetical, you say, 'Come back and see me in two weeks' time, and if you have confessed to the authorities, I'll consider absolution', and if Sally's father doesn't come back, then you will not report to the authorities; is that correct?

Father Brennan: That's correct, and if the –

Commissioner Atkinson: Then the abuse of Sally will continue, most likely?

Father Brennan: Yes, yes. In much the same way, with deep regret, as with legal professional privilege, for example.⁹⁶⁹

Submissions and evidence opposing an exemption for religious confessions

We received evidence and some submissions in response to Issues Paper 11 that expressed general views that would support requiring clergy to report information they learn about child sexual abuse in religious confession.

We received submissions that commented on the barrier that the confessional seal represents to children's safety from child sexual abuse. AYB and Ms Mary Adams, who gave evidence to the Royal Commission in Case Study 26, submitted that 'patterns of guarded information and secrecy in the sacrament of confession about known individual behaviour compromised community and legal actions'.⁹⁷⁰

Dr Christopher Geraghty, a former Catholic priest and seminary lecturer in theology, expressed the view that a conscientious objection to civil reporting requirements in circumstances where a priest-confessor judged there was a present danger to children 'might be difficult to justify'.⁹⁷¹

In addition, Micah Projects, a survivor advocacy and support group, submitted that 'there should be mandatory reporting of abuse at all levels of [the] Catholic Church'.⁹⁷²

It recommended:

That the Catholic Church be bound by new legislation that follows the Irish *Children First Act* 2015 that requires priests and members of the clergy or any religious communities to be mandated reporters especially with regard to confession.⁹⁷³

Micah Projects stated the practice of confession 'should be in the best interest of the child not priest and the Catholic Church'.⁹⁷⁴

In Case Study 28, we also heard evidence from Father Adrian McNerney. He told us that he had come to the conclusion over the three to four years preceding in which the question had been considered in public discussion that, if he heard a religious confession of a crime, he would feel obliged to report it to the police even if the penitent did not give him permission to do so. He acknowledged that this position was inconsistent with the current teaching of the Catholic Church.⁹⁷⁵

16.7 Discussion and conclusions

16.7.1 The failure to report offence

The moral or ethical duty to report to police

Before discussing a criminal offence, we consider it important to make clear that persons who know or suspect that a child is being or has been sexually abused in an institutional context *should* report this to police – not necessarily as a legal obligation enforced by a criminal offence but because it is moral and ethical to do so.

Child sexual abuse is a crime which can and often does cause great harm to the child. It should be reported to police. There should be no doubt that police are the correct agency to which child sexual abuse should be reported.

Recommendation

32. Any person associated with an institution who knows or suspects that a child is being or has been sexually abused in an institutional context should report the abuse to police (and, if relevant, in accordance with any guidelines the institution adopts in relation to blind reporting under recommendation 16).

The failure to report offence

Turning to the issue of a criminal offence, we are satisfied that there are good reasons for the criminal law to impose obligations on third parties to report to police in relation to child sexual abuse.

As we discussed in Chapter 15, these reasons recognise the great harm that child sexual abuse can cause to victims. The impact of child sexual abuse on individual victims may be lifelong, and the impact on their families and the broader community may continue into subsequent generations. These reasons also recognise that, unlike other categories of crime, child sexual abuse is often not reported and stopped at the time of the abuse because the child victims face such difficulties in disclosing or reporting the abuse. When a perpetrator is not discovered and stopped from abusing a child, they may continue to abuse that child and other children.

We also agree with the Betrayal of Trust report's recommendation that a criminal offence is needed in addition to 'welfare' reporting under mandatory reporting obligations and that criminal reporting should focus on catching, prosecuting and convicting offenders.⁹⁷⁶

We make no criticism of the offences in section 316(1) of the *Crimes Act 1900* (NSW) or section 327 of the *Crimes Act 1958* (Vic). However, we have concluded that we should recommend a narrower offence targeted at institutions.

Our main concern in reaching this conclusion has been to identify a sufficiently lower standard of knowledge or belief to ensure that the sorts of allegations that a number of our case studies have revealed, and which were not reported to police, would be required to be reported to police in order to avoid committing the offence.

A significant difficulty with relying on the approaches adopted in section 316(1) of the *Crimes Act 1900* (NSW) or section 327 of the *Crimes Act 1958* (Vic) is that it must be proved that the accused had actual knowledge or in fact believed that the abuse occurred. If the accused did not witness the abuse and denies belief of any report or allegation made about it, it will be very difficult to prove the offence.

There may be circumstances where any denial by the accused of belief of a report or allegation is not credible, but, given the application of the criminal standard of proof, these circumstances may be quite limited – perhaps if the perpetrator admitted the abuse in some detail to the accused, it might be accepted beyond reasonable doubt that the accused did believe that the abuse occurred despite the fact that the accused denies that belief.

The offence recommended by the Cummins Inquiry – applying to all relevant institutions rather than only to religious or spiritual organisations – provides a starting point. The effect of that offence would have been to require reporting of a ‘reasonable suspicion’ that a child is being or has been abused by an individual within the organisation.

The standard of ‘reasonable suspicion’ has both subjective and objective elements. That is, it requires that:

- the accused in fact suspects the abuse is occurring or has occurred
- that suspicion is a reasonable suspicion for the accused to have formed.

We do not support a requirement of reasonableness. If abuse is in fact suspected, we consider that it should be an offence not to report it.

In addition to circumstances where the person has knowledge or a suspicion, we also consider that it should be an offence not to report where the person ‘*should have* suspected’ that a child was being or had been abused. We appreciate that this would impose criminal liability for failure to report a suspicion that the person did not form or, as Mr Odgers told the public hearing, it would remove the fault element and adopt a standard of negligence instead. However, the standard of negligence should be criminal negligence rather than civil negligence; there would need to be ‘gross negligence’ or a ‘great falling short’ of the standard of care required.

We are satisfied that this is a necessary step to take, particularly in light of the evidence we have heard from a number of senior representatives of institutions effectively denying that they had any knowledge or had formed any belief or suspicion of abuse being committed in circumstances where their denials are very difficult to accept. Some witnesses have conceded that they ‘should have’ suspected or that they ‘should have’ reported.

We consider that creating an offence of failing to report where the person *should have* suspected abuse will also assist to overcome any conflict between the institutional representative’s duty to report and their interest in seeking to protect the reputation of the institution. It will not be acceptable for them to resist forming, or refuse to form, a suspicion that a reasonable person in their circumstances clearly would have formed in order to avoid reporting.

The standard of ‘*should have suspected*’ requires a person to report where a reasonable person in the same circumstances as the person would have suspected. It allows for consideration of what the person knew – both inculpatory and exculpatory – and asks whether, with that knowledge and in those circumstances, a reasonable person would have suspected. As noted above, in line with the standard of criminal negligence, the offence would be committed on the basis that a suspicion *should have* been formed only where there is a great falling short of what would be expected of a reasonable person.

We consider that the failure to report offence should apply to all persons who are owners, managers, staff or volunteers of relevant institutions, including persons in religious ministry – which include a minister of religion, priest, deacon, pastor, rabbi, Salvation Army officer, church elder, religious brother or sister and any other person recognised as a spiritual leader in a religious institution – and other officers or personnel of religious institutions. At the least, the failure to report offence should apply to any person who is required to hold a Working with Children Check (WWCC) clearance for the purposes of their role in the institution.

However, we are satisfied that the failure to report offence should apply only to persons who are aged 18 or older. We recognise that people under 18 years of age may hold relevant roles in some institutions. However, we consider that the failure to report offence should only be capable of being committed by adults.

Relevant institutions should be defined to include institutions that operate facilities or provide services to children in circumstances where the children are in the care, supervision or control of the institution.

We consider that it should be made clear that the offence cannot be committed by individual foster carers or kinship carers. While the offence should apply to the services that arrange or supervise foster care and kinship care, we do not consider that individual foster carers or kinship carers should be caught by the offence. Their position is not comparable to those who work within the services and including them would effectively extend the offence to domestic carers in a family setting.

Facilities and services provided by persons in religious ministry and religious institutions should also be included.

The Victorian failure to protect offence, which we discuss in Chapter 17, includes a definition of a 'relevant organisation', which may be a useful precedent from which to start.

The offence recommended by the Cummins Inquiry covered sexual and physical abuse. Given our Terms of Reference, we recommend that the offence should apply in relation to the sexual abuse of children. We consider that there is a greater risk of sexual abuse remaining hidden than there is in relation to physical abuse. We also consider that focusing on sexual abuse should assist in reducing the risk of defensive reporting as identified by the Wood Special Commission of Inquiry in relation to mandatory reporting in New South Wales.

We consider that the offence should apply in relation to sexual abuse by adults associated with the institution, whether as owners, managers, staff, volunteers, contractors, religious leaders, officers or personnel of religious organisations. Limiting the offence to abuse by adults focuses on the abuse that is most likely to involve a perpetrator in a position of authority. It also removes some of the difficulties associated with adolescent peer consensual sex and should assist in reducing the risk of defensive reporting.

Targeting the offence so that it applies in relation to sexual abuse by adults associated with the institution largely removes the difficulties experienced in relation to including children who are above the age of consent. We are satisfied that, with this targeting, the offence should apply to the sexual abuse of children, being those who are younger than 18 years of age.

We are also satisfied that the offence should not be limited to sexual abuse of children who are connected with the institution. Such a limitation would prevent the offence from requiring reporting in circumstances where, for example, an adult associated with the institution is seen to have child exploitation material in their possession, but it is not clear whether the child exploitation material depicts a child associated with the institution. We consider that this should be required to be reported by relevant persons within the institution.

We also note that the Victorian Royal Commission into Family Violence stated that those who supported an amendment to section 327 of the *Crimes Act 1958* (Vic) 'argued that the Victorian Government should amend the offence to limit it to a failure to disclose by a person in authority within a relevant organisation' (reference omitted),⁹⁷⁷ rather than a failure to disclose by any person. Concerns appear to have been largely around avoiding penalising non-abusive parents experiencing family violence rather than better targeting institutions' obligations to report.⁹⁷⁸

We do not express any view on the concerns expressed about the Victorian offence in section 327 of the *Crimes Act 1958* (Vic), or the adequacy of the reasonable excuse for failure to report under section 327 based on fear for the safety of any person (other than the alleged offender), as we have not examined these issues. However, we note that the targeted failure to

report offence that we recommend would not raise these concerns as they arise in relation to circumstances of family violence and the potential obligation of the abused partner, or non-abusive parent, to report abuse to police.

It is necessary to determine the extent to which the reporting obligation should apply to knowledge gained or suspicions formed before the offence commences and whether or to what extent institutional staff and volunteers should be relieved of the obligation to report if the victim or survivor is the source of information about the abuse and has asked that the information not be disclosed.

It is inevitable that there will be a degree of arbitrariness about what knowledge or suspicions of abuse should be the subject of the recommended offence. We consider it would be too onerous for staff and volunteers of institutions to be at risk of committing a criminal offence unless on commencement of the offence they report all knowledge or suspicions they have or suspicions they should have formed at any time in the past.

We also consider that, whether suspicions arise before or after the offence commences, staff and volunteers of institutions should not be relieved of the obligation to report because of their belief that the victim or survivor does not want them to report. We are satisfied that the risk of conflict between the duty and interest of staff and volunteers of institutions is too great and that the focus must be on protecting children.

However, we consider that there should be some limit on the obligation to report knowledge or suspicions of abuse that is known to have occurred or is suspected of having occurred well before the knowledge is gained or the suspicion arises or should have arisen. We consider that the limit should be based on circumstances where there may be a current risk to the child or to other children.

We consider that, if the knowledge is gained or the suspicion arises after the failure to report offence commences and it relates to abuse that is known to have occurred or is suspected of having occurred more than 10 years before the knowledge is gained or the suspicion is or should have been formed, it need not be reported, provided that the relevant child is no longer a child and the person known to have abused the child or who is or should have been suspected of abusing the child is no longer associated with the institution or another relevant institution. In these circumstances, we consider that the child or other children are unlikely to face a current risk from the person known to have abused the child or who is or should have been suspected of abusing the child in an institutional context.

In summary, if the knowledge is gained or the suspicion is or should have been formed after the failure to report offence commences, we consider that the failure to report offence should apply if any of the following circumstances apply:

- A child to whom the knowledge relates or in relation to whom the suspicion is or should have been formed is still a child (that is, under the age of 18 years).

- The person who is known to have abused a child or is or should have been suspected of abusing a child is either:
 - still associated with the institution
 - known or believed to be associated with another relevant institution.
- If the knowledge gained or the suspicion that is or should have been formed relates to abuse that may have occurred within the previous 10 years.

If knowledge is gained or the suspicion is or should have been formed before the failure to report offence commences, we consider that the failure to report offence should apply if any of the following circumstances apply:

- A child to whom the knowledge relates or in relation to whom the suspicion is or should have been formed is still a child (that is, under the age of 18 years) and is still associated with the institution (that is, they are still in the care, supervision or control of the institution).
- The person who is known to have abused a child or is or should have been suspected of abusing a child is either:
 - still associated with the institution
 - known or believed to be associated with another relevant institution.

In any other circumstances, institutional staff and volunteers – indeed any persons – are at liberty to report suspected crimes to the police. We discuss institutional policies in relation to reporting to police and blind reporting in Chapter 9.

Recommendation

33. Each state and territory government should introduce legislation to create a criminal offence of failure to report targeted at child sexual abuse in an institutional context as follows:

- a. The failure to report offence should apply to any adult person who:
 - i. is an owner, manager, staff member or volunteer of a relevant institution – this includes persons in religious ministry and other officers or personnel of religious institutions
 - ii. otherwise requires a Working with Children Check clearance for the purposes of their role in the institution
 but it should not apply to individual foster carers or kinship carers.

- b. The failure to report offence should apply if the person fails to report to police in circumstances where they know, suspect, or should have suspected (on the basis that a reasonable person in their circumstances would have suspected and it was criminally negligent for the person not to suspect), that an adult associated with the institution was sexually abusing or had sexually abused a child.
- c. Relevant institutions should be defined to include institutions that operate facilities or provide services to children in circumstances where the children are in the care, supervision or control of the institution. Foster and kinship care services should be included (but not individual foster carers or kinship carers). Facilities and services provided by religious institutions, and any services or functions performed by persons in religious ministry, should be included.
- d. If the knowledge is gained or the suspicion is or should have been formed after the failure to report offence commences, the failure to report offence should apply if any of the following circumstances apply:
 - i. A child to whom the knowledge relates or in relation to whom the suspicion is or should have been formed is still a child (that is, under the age of 18 years).
 - ii. The person who is known to have abused a child or is or should have been suspected of abusing a child is either:
 - still associated with the institution
 - known or believed to be associated with another relevant institution.
 - iii. If the knowledge gained or the suspicion that is or should have been formed relates to abuse that may have occurred within the previous 10 years.
- e. If the knowledge is gained or the suspicion is or should have been formed before the failure to report offence commences, the failure to report offence should apply if any of the following circumstances apply:
 - i. A child to whom the knowledge relates or in relation to whom the suspicion is or should have been formed is still a child (that is, under the age of 18 years) and is still associated with the institution (that is, they are still in the care, supervision or control of the institution).
 - ii. The person who is known to have abused a child or is or should have been suspected of abusing a child is either:
 - still associated with the institution
 - known or believed to be associated with another relevant institution.

Interaction with mandatory reporting and reportable conduct

It will be apparent that the offence we recommend is not intended to be coextensive with mandatory reporting requirements. Unlike mandatory reporting, the offence is targeted at reporting suspected sexual abuse by adults associated with the institution.

The offence we recommend has some overlap with reportable conduct requirements, although it is targeted at sexual offences rather than broader sexual misconduct or other reportable conduct.

As the offence is intended to require ‘criminal’ reporting rather than ‘welfare’ reporting, we consider that the offence should require reporting to the police. However, states and territories should consider how the offence should interact with their other reporting requirements, including mandatory reporting and reportable conduct.

Our intention is not to require institutional staff and volunteers to make multiple reports to child protection, police and oversight bodies. However, we are satisfied that suspicions of abuse covered by the reporting offence we recommend must come to the attention of the police.

If states or territories are satisfied that their systems in relation to mandatory reporting or reportable conduct ensure that relevant reports made to child protection or oversight bodies will in fact be brought to the attention of police then it may be appropriate to provide a ‘reasonable excuse’ defence to the reporting offence if a report is made to one of those bodies. For example, under the Victorian offence in section 327 of the *Crimes Act 1958* (Vic), a belief on reasonable grounds that the information has already been disclosed to police – with the example given of a person having already complied with their mandatory reporting obligations – is a reasonable excuse for failing to disclose under section 327.

Recommendation

34. State and territory governments should:

- a. 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
- b. include appropriate defences in the failure to report offence to avoid duplication of reporting under mandatory reporting and any reportable conduct schemes.

16.7.2 The treatment of religious confessions

As described above, the failure to report offence we recommend applies to all adult persons who are owners, managers, staff or volunteers of relevant institutions, including persons in religious ministry and other officers or personnel of religious institutions.

We are satisfied that, where the elements of the reporting obligation are met, there should be no exemption, excuse, protection or privilege from the offence granted to clergy for failing to report information disclosed in or in connection with a religious confession.

We understand the significance of religious confession – in particular, the inviolability of the confessional seal to people of some faiths, particularly the Catholic faith. However, we heard evidence of a number of instances where disclosures of child sexual abuse were made in religious confession by both victims and perpetrators. We are satisfied that confession is a forum where Catholic children have disclosed their sexual abuse and where clergy have disclosed their abusive behaviour in order to deal with their own guilt.

We also heard evidence that the practice of religious confession is declining in the Catholic Church. Nevertheless, it remains possible that information about child sexual abuse by adult persons associated with a relevant institution is communicated to a priest hearing a religious confession.

Our inquiry has demonstrated the very grave harm caused by child sexual abuse, with the impacts of such abuse often reverberating for decades or even a whole lifetime. As noted above, child sexual abuse is a crime and should be reported to the police. Our inquiry has also demonstrated the significant risk that, if perpetrators are not reported to police, they may continue with their offending. Reporting child sexual abuse to the police can lead to the prevention of further abuse. In relation to the Sacrament of Confession, we heard evidence that perpetrators who confessed to sexually abusing children went on to re-abuse and seek forgiveness again.

In this context, we have concluded that the importance of protecting children from child sexual abuse means that there should be no exemption or privilege from the failure to report offence for clergy who receive information during religious confession that an adult associated with the institution is sexually abusing or has sexually abused a child.

In this respect, we note the reasoning of the Doctrine Commission of the Anglican Church in Australia to its General Synod in recommending the practice of absolute confidentiality be reconsidered for confessions of serious crimes such as child sexual offences and other acts risking serious and irreparable harm. The Doctrine Commission considered that the pastoral priority in all matters of abuse must rest with victims and potential victims of abuse.

We also note that the leadership of the Catholic Church, both in Australia and internationally, has publicly stated that protecting children from harm is an absolute priority.

In its submission to Case Study 50, the Truth Justice and Healing Council included a statement of commitment by the leadership of the Catholic Church in Australia. The statement said:

The leaders of the Catholic Church in Australia recognise and acknowledge the devastating harm caused to people by the crime of child sexual abuse. ...

The leaders of the Catholic Church in Australia commit ourselves to endeavour to repair the wrongs of the past, to listen to and hear victims, to put their needs first, and to do everything we can to ensure a safer future for children.⁹⁷⁹

In his evidence to the Royal Commission in Case Study 50, the Bishop of Parramatta, Bishop Vincent Long Van Nguyen, gave evidence that, 'if the Church is a good global citizen, then it has to show that the safety and protection of the innocent children must be of paramount interest, of absolute priority'.⁹⁸⁰

In a statement on 22 March 2014 announcing the establishment of the Pontifical Council for the Protection of Minors, Pope Francis said that:

The effective protection of minors and a commitment to ensure their human and spiritual development, in keeping with the dignity of the human person, are integral parts of the Gospel message that the Church and all members of the faithful are called to spread throughout the world. Many painful actions have caused a profound examination of conscience for the entire Church, leading us to request forgiveness from the victims and from our society for the harm that has been caused. This response to these actions is the firm beginning for initiatives of many different types, which are intended to repair the damage, to attain justice, and to prevent, by all means possible, the recurrence of similar incidents in the future.⁹⁸¹

The commitment to the safety of children is also set out in the Statutes of the Pontifical Commission for the Protection of Minors, Article 1§2 of which says that 'The protection of minors is of paramount importance'.⁹⁸²

As set out in section 16.6.2 above, in our consultations and public hearings, a number of organisations and individuals argued in favour of exempting or privileging communications in religious confessions of child sexual abuse from reporting obligations.

We have carefully considered these arguments and have concluded that they are insufficient to outweigh the risk to children of granting an exemption from the failure to report offence.

Arguments presented to us include that:

- requiring clergy to report information disclosed during confession would be in breach of the principle of freedom of religion
- the religious confessions privilege is similar in nature to legal professional privilege and should operate similarly to protect communications between a priest and a penitent
- there would be little utility in imposing a reporting requirement, as religious confession is infrequently attended and the practice of confession is such that information given about child sexual offences would not be of use to the police
- perpetrators of child sexual abuse are unlikely to attend religious confession anyway; however, in the face of a reporting requirement, perpetrators would cease to attend confession and would be unable to access a source of guidance and contrition
- priests would be unlikely to adhere to a reporting requirement, and there may be subsequent damage to the reputation of the legal system
- a reporting requirement is inconsistent with the privilege contained in the Uniform Evidence Act.

Freedom of religion

Submissions to the Royal Commission argued that any intrusion by the civil law on the practice of religious confession would undermine the principle of freedom of religion.

We heard that the Sacrament of Confession and the confessional seal are matters of very serious importance to the Catholic faith in particular and that disclosure by clergy of the content of a confession would interfere with a person's inner thoughts and private communication with God.

We acknowledge the submissions and evidence we received that a civil law duty on clergy to report information learned in religious confessions, even of child sexual offending, would constitute an intrusion into the religious practice and that complying with that obligation would raise serious issues of conscience for Catholic clergy. We accept this would be the case for any faith in which clergy are required by that faith's teachings or particular laws to keep religious confessions confidential.

However, the Royal Commission does not accept that, as a consequence, communications of sexual offences against children made in religious confession should be protected by the civil law.

When considering whether clergy members should be exempt from the failure to report offence, the recognition of the right to freely practise one's religious beliefs must be balanced against the right of children to be protected from sexual abuse.

In a civil society, it is fundamentally important that the right of a person to freely practise their religion in accordance with their beliefs is upheld. However, that right is not absolute. This is recognised in article 18 of the *International Covenant on Civil and Political Rights* on the freedom of religion, which provides that the freedom to manifest one's religion or beliefs may be subject to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

Although it is important that civil society recognise the right of a person to practise a religion in accordance with their own beliefs, that right cannot prevail over the safety of children. The right to practise one's religious beliefs must accommodate civil society's obligation to provide for the safety of all. Institutions directed to caring for and providing services for children, including religious institutions, must provide an environment where children are safe from sexual abuse. Reporting information relevant to child sexual abuse to the police is critical to ensuring the safety of children.

The Royal Commission has learned that people who commit sexual offences against children are often repeat offenders. We heard of many instances where, if adults who learned of sexual offences being perpetrated against children in an institution had informed police, further children within the institution may have been protected from sexual abuse.

If clergy are exempt from reporting information they learn in religious confession that an adult associated with their religious institution is committing child sexual offences, civil authorities may not receive information enabling them to intervene and remove an abuser's opportunity to abuse in an institution that provides them with access to children. We are satisfied that carries a risk to the safety of children.

Religious confessions privilege and legal professional privilege

We heard arguments that the religious confessions privilege is similar in nature to legal professional privilege and should operate similarly to protect communications between a priest and a penitent.

Specifically, we heard that, under legal professional privilege, clients can obtain advice free of fear of prejudicial treatment, whereas in the confessional the penitent seeks forgiveness without fear of social stigma.

We do not agree that the bases for the legal professional privilege and the religious confessions privilege are comparable. There is a fundamental difference.

Legal professional privilege operates within the context of the civil law system to protect communications between legal advisers and their clients from being disclosed without the permission of the client. The purpose of the privilege is to sustain the rule of law, in that the fair operation of the civil legal system requires that all citizens should have access to legal advice.

The confessional seal obliges a clergy member not to reveal what a penitent tells them in religious confession, the primary purpose of which is to obtain forgiveness or absolution for sins confessed. A religious confession privilege protects the practise of those who hold particular religious beliefs from the operation of the civil law.

We acknowledge that one of the elements of religious confession in the Catholic Church is contrition, or sorrow for the sin committed, along with the intention of not sinning again. However we received evidence, specifically from psychologists who have worked with perpetrator priests, of perpetrators confessing to child sexual abuse, receiving absolution and then proceeding to offend again. We heard that the process of attending confession itself may have enabled their offending to continue. In this manner the confessional may facilitate breaches of the civil law rather than enhance its operation.

Given the fundamentally different purposes of these privileges, we do not accept the argument that the religious confessions privilege should operate in a similar manner to legal professional privilege.

Declining attendance at confession and the practice of confession

We also received evidence that, at least in the Catholic Church, the practice of attending religious confession is declining.⁹⁸³ The implication is that disclosures about child sexual abuse in religious confession is a marginal issue and that any obligation to report such information will have limited practical effect.

The practice of religious confession is not limited to the Catholic faith. We do not accept that the declining practice of attending confession in the Catholic Church should determine this issue.

We have heard evidence and received submissions that the concepts of repentance and forgiveness as practised in the rite of confession remain central to the Christian tradition and the practice of the Catholic faith.

We have also heard evidence from a psychologist who studied clergy perpetrators in the Catholic Church that the Sacrament of Confession was a key forum that they used to resolve the guilt that arose from their offending, by obtaining forgiveness.

Based on the evidence before us, we consider that, for a perpetrator of faith, religious confession remains a forum in which abuse may be disclosed. The non-reporting of such information presents an unacceptable risk of harm to children.

Further, we received a submission from the Truth Justice and Healing Council that confirmed that children continue to participate in the Sacrament of Reconciliation in Catholic archdioceses and dioceses through parishes and schools.⁹⁸⁴ We have also received evidence that children have used the confession to disclose their experiences of abuse.

It does not follow that a generally declining attendance at confession in the Catholic Church means that there is no utility in requiring clergy to report information about child sexual abuse received in religious confession. It remains possible that information regarding child sexual abuse could be disclosed during religious confession, and in our view such information should be subject to reporting requirements.

We also considered the argument that information provided in religious confessions might not be useful to police in light of the practice in some faiths of confessors not knowing the identity of the penitent and that a penitent may not provide the details of when or where their offence was committed.⁹⁸⁵

We are satisfied these concerns are addressed in the targeted application of the failure to report offence. Where the elements of the reporting obligation are met, reporting serves the purpose of enabling police to consider the report in the context of all the information they know rather than relying upon a religious confessor's determination of whether it is useful to them.

Perpetrators' attendance at religious confession

We also received submissions to the effect that requiring clergy to report information learned during confession would have limited utility, as perpetrators of child sexual abuse are unlikely to attend confession.

Those submissions are not supported by the evidence before us. As addressed above:

- We heard of perpetrators confessing their offending against children and, in some cases, obtaining absolution and abusing again.
- Dr Robinson's evidence was that of the 60 to 70 Catholic clergy child sex offenders she treated at Encompass Australasia, a significant number told her that they confessed their offending.
- For Catholic clergy perpetrators of abuse in particular, Dr Keenan concluded that her research demonstrated that the confessional was a key forum used to resolve guilt in relation to offending, as its secrecy enabled perpetrators to externalise the issue of their abusing in safety. Dr Keenan concluded that the act of confessing played a role in enabling some of those perpetrators' abusing to continue.

We were also told that perpetrators would not attend religious confession if there was an obligation on clergy to report information received about child sexual abuse during religious confession, so imposing such an obligation would deny perpetrators a source of guidance and contrition as well as reduce opportunities for perpetrators to be persuaded to report themselves to police.

However, in our work we have learned that perpetrators of child sexual offences are often repeat offenders and that the intervention of civil authorities is required to prevent their offending.

We accept and acknowledge that religious confession serves a fundamentally important purpose for those who practise it. However, we do not accept that the guidance or encouragement to self-report that may be offered by confessors during religious confession is sufficient to protect children from the risk of harm presented by child sexual abusers seeking absolution for their actions.

In reaching this conclusion, we have given weight to the evidence before us of psychologists working with clergy perpetrators that the act of attending confession was, for some of them, part of a pattern of continued offending, because after confessing they would feel a degree of absolution. One of those psychologists, Dr Robinson, told us that in her experience she saw that pattern in older rather than younger clergy. However, it is possible that a clergy perpetrator of any age may attend confession, seek absolution and subsequently reoffend.

Our conclusion is also informed by the evidence of a clergy member that he would be constrained from taking action if a penitent perpetrator did not report themselves to authorities after he made absolution dependent upon self-reporting. That witness conceded that this would likely mean the abuse of a child would continue.

The risk to children of perpetrators of child sexual abuse going unchecked, or religious confession enabling a pattern of ongoing offending, is not displaced by the uncertain gain of perpetrators receiving guidance or possibly being persuaded to report to the authorities in religious confession.

It is important to note that our recommendation is not limited to communications about abuse made by perpetrators in confession. Clergy should also report information they learn in religious confession from children being sexually abused or from third parties, where the elements of the failure to report offence are enlivened.

Priests' adherence to the confessional seal

A number of individuals and organisations told us that Catholic priests would not break the confessional seal even in the face of a reporting obligation. Several individual priests told us that they would not break the confessional seal even in circumstances where they held information that indicated that abuse might be ongoing.

The protection of children from sexual abuse requires that communications made during religious confession are not exempt from the obligation to report to police. The suggestion that a group of people who would be subject to a reporting obligation may not comply with that obligation is not sufficient reason to exempt them from that obligation.

We are not persuaded by the argument that the potential prosecution and conviction of a Catholic priest for failing to report to the police information relating to child sexual abuse received in religious confession would undermine respect for the court system. We do not believe that the reputation of the courts would diminish by their enforcing such a law regardless of the occupation of the defendant.

The Truth Justice and Healing Council submitted that it would be futile for the Royal Commission to interfere with the seal of confession, as the Catholic Church in Australia has no power to change the seal of its own volition. We note that our recommendation that no exemption be made for religious confessions from the failure to report child sexual abuse offence is made to state and territory governments rather than the Catholic Church.

We acknowledge that if this recommendation is implemented then clergy hearing confession may have to decide between complying with the civil law obligation to report and complying with a duty in their role as a confessor. It is a matter for each faith within which a confessional seal operates to consider whether that practice could or should be changed. As noted above in section 16.4.2, the Anglican Church in Australia has already taken some steps to alter the operation of the confessional seal in the context of the Royal Commission's work regarding the sexual abuse of children.

The evidentiary privilege

As set out above, some categories of communications are exempt, or privileged, from disclosure by compulsion in courts of law. These are evidentiary privileges created both under legislation and by the common law.

In some Australian jurisdictions, a religious confessions privilege or exemption has been created by legislation and operates so that clergy can refuse to disclose to a court in evidence the fact or content of a religious confession. This privilege applies in the Australian Uniform Evidence Act jurisdictions – the Commonwealth, Victoria, New South Wales, Tasmania, the Australian Capital Territory and the Northern Territory.

Previous inquiries, including the Cummins Inquiry and the inquiry of the Victorian Parliament Family and Community Development Committee which led to the Betrayal of Trust report, have concluded that the evidentiary privilege is appropriate. In particular, the Cummins Inquiry concluded that communications about the content of a religious confession should be exempt from failure to report offences, as the treatment of such information should be consistent.

We are not persuaded that it is necessary to provide an exemption from a failure to report offence because of the existence of an evidentiary privilege. We note that reporting obligations in respect of child sexual offences seek to prevent future harm to children, whereas evidentiary privileges prescribe how matters are to be dealt with in court proceedings.

While we believe that there should be no exemption for religious confessions from the operation of the failure to report offence, we make no recommendation beyond this in relation to the religious confessions privilege in Uniform Evidence Act jurisdictions more generally. To do so would go beyond our Terms of Reference.

Some state or territory governments could, if minded, remove that privilege so that the fact and content of religious confessions is compellable as evidence in proceedings against, for example, perpetrators of child sexual abuse.

Recommendation

35. Each state and territory government should ensure that the legislation it introduces to create the criminal offence of failure to report recommended in recommendation 33 addresses religious confessions as follows:
- a. The criminal offence of failure to report should apply in relation to knowledge gained or suspicions that are or should have been formed, in whole or in part, on the basis of information disclosed in or in connection with a religious confession.
 - b. The legislation should exclude any existing excuse, protection or privilege in relation to religious confessions to the extent necessary to achieve this objective.
 - c. Religious confession should be defined to include a confession about the conduct of a person associated with the institution made by a person to a second person who is in religious ministry in that second person's professional capacity according to the ritual of the church or religious denomination concerned.

17 Failure to protect offences

17.1 Introduction

Some of the concerns raised about what are said to be failures to report under section 316(1) of the *Crimes Act 1900* (NSW) appear to arise where it is thought that, had the alleged abuse been reported, the perpetrator might have been prevented from committing further offences.

Perhaps more so than with other serious criminal offences, those who commit child sexual abuse offences may have multiple victims and may offend against particular victims over lengthy periods of time. For child sexual abuse offences, reporting may prevent (further) serious crime as well as disclosing offences that have already been committed.

This might suggest that, regardless of any offences in relation to reporting, offences should also target a failure to protect a child, or a group of children, from abuse, particularly in institutional contexts.

17.2 Victorian offence of failure to protect

17.2.1 Crimes Act 1958 (Vic) section 49C

Victoria introduced a new criminal offence under section 49C of the *Crimes Act 1958* (Vic) of failing to protect a child from a risk of sexual abuse. The offence commenced on 1 July 2015. It targets individuals in positions of authority working in institutions and was introduced in response to a recommendation in the Victorian Parliament Family and Community Development Committee report *Betrayal of trust: Inquiry into the handling of child abuse by religious and other non-government organisations* (Betrayal of Trust report).⁹⁸⁶

Section 49C(2) provides:

- (2) A person who –
 - (a) by reason of the position he or she occupies within a relevant organisation, has the power or responsibility to reduce or remove a substantial risk that a relevant child will become the victim of a sexual offence committed by a person of or over the age of 18 years who is associated with the relevant organisation; and
 - (b) knows that there is a substantial risk that that person will commit a sexual offence against a relevant child –

must not negligently fail to reduce or remove that risk.

In his second reading speech, the then Victorian Attorney-General said, 'One of the key aims of this offence is to promote cultural change in how organisations deal with the risk of sexual abuse of children under their care, supervision or authority'.⁹⁸⁷ He said:

All organisations having responsibility for children must take effective action against those within their organisation who pose a risk of child sexual abuse. In such cases, the law will make clear that it is not acceptable to put the interests of an adult or an organisation ahead of the interests of a child. The interests of the child must come first.⁹⁸⁸

The offence aims to prevent situations where 'known risks of a person within an organisation sexually abusing a child can be ignored, merely shifted or otherwise inadequately dealt with by persons in authority in an organisation'.⁹⁸⁹

The maximum penalty for a failure to protect is five years imprisonment.

The Victorian Government's fact sheet on the failure to protect offence provides the following description of the offence and its purpose:

The offence will apply where there is a substantial risk that a child under the age of 16 under the care, supervision or authority of a relevant organisation will become a victim of a sexual offence committed by an adult associated with that organisation. A person in a position of authority in the organisation will commit the offence if they know of the risk of abuse and have the power or responsibility to reduce or remove the risk, but negligently fail to do so.

This offence will encourage organisations to actively manage the risks of sexual offences being committed against children in their care and further protect them from harm.⁹⁹⁰

A relevant organisation is defined to be an organisation that exercises care, supervision or authority over children, whether as part of its primary function or otherwise.

Examples of relevant organisations include:

- churches
- religious bodies
- education and care services (such as childcare centres, family day care services, kindergartens and outside school hours care services)
- licensed children's services such as occasional care services
- schools and other educational institutions
- organisations that provide accommodation to children and young people, such as boarding schools and student hostels
- out-of-home care services
- community service organisations providing services for children

- hospitals and other health services
- government agencies or departments providing services for children
- municipal councils (for example, those that deliver maternal and child health services)
- sporting groups
- youth organisations
- charities and benevolent organisations providing services for children.⁹⁹¹

The Victorian Government's fact sheet provides the following guidance on who might be at risk of committing the offence as a person in authority in an organisation:

Whether someone is considered to be a person in authority will depend on the degree of supervision, power or responsibility the person has to remove or reduce the substantial risk posed by an adult associated with the organisation. People in authority will usually have the ability to make management level decisions, such as assigning and directing work, ensuring compliance with the organisation's volunteer policy and other operational arrangements.

Examples of people in authority may include residential house supervisors, CEOs, board, council or committee members, school principals, service managers and religious leaders. It may also apply to people with less formal involvement in an organisation. For example, a volunteer parent coach responsible for the supervision of a junior sports team may be a person in authority, even if their role is informal or limited.⁹⁹²

Persons in authority in an organisation are required to protect children from a substantial risk of a sexual offence being committed by an adult associated with that organisation if they know of the risk.

The Victorian Government's fact sheet provides the following guidance on when the person in authority 'knows' of the risk:

A person is generally taken to have knowledge of a circumstance if he or she is aware that it exists or will exist in the ordinary course of events. This requires a higher level of awareness than merely holding a tentative belief or suspicion.

However, it is expected that a person in authority will take steps to follow up on a suspicion or belief that children in their organisation were at risk of harm.⁹⁹³

The Victorian Government's fact sheet provides the following guidance on who is a 'person associated with' an organisation:

This may include a person who is an officer, office holder, employee, manager, owner, volunteer, contractor or agent of the organisation. This definition does not include a person who solely receives services from the organisation.

For example, a parent living in the community who is involved with child protection services or who has a child in out-of-home care, and who may pose a risk of sexual abuse to a child, would *not* be considered to be ‘associated with’ the Department of Health & Human Services under the offence. Similarly, parents of children attending a school or service will generally only be ‘associated with the organisation’ if they are also engaged as a volunteer, for example to assist in the classroom or attend an excursion or camp.⁹⁹⁴ [Emphasis original.]

The offence only applies to adults associated with the organisation. If the risk is posed by a child – a person under 18 years of age – the offence does not apply.⁹⁹⁵ This is the case regardless of the child’s role with the organisation – for example, as an employee or volunteer rather than as a child receiving services from the organisation.

The Victorian Government’s fact sheet provides the following guidance in relation to the meaning of a ‘substantial risk’:

The offence requires a person in authority to reduce or remove a known ‘substantial’ risk that an adult associated with the organisation may commit a sexual offence against a relevant child. It does not make it a criminal offence to fail to address every possible risk that a sexual offence may be committed against a child.

There are a number of factors that may assist in determining whether a risk is a substantial risk. These include:

- the likelihood or probability that a child will become the victim of a sexual offence
- the nature of the relationship between a child and the adult who may pose a risk to the child
- the background of the adult who may pose a risk to a child, including any past or alleged misconduct
- any vulnerabilities particular to a child which may increase the likelihood that they may become the victim of a sexual offence
- any other relevant fact which may indicate a substantial risk of a sexual offence being committed against a child.

When determining whether a risk is substantial, the courts will consider a variety of factors, which may include those listed above. The courts will consider all the facts and circumstances of the case objectively, and will consider whether a reasonable person would have judged the risk of a sexual offence being committed against the child abuse [sic] as substantial. It is not necessary to prove that a sexual offence, such as indecent assault or rape, was committed.⁹⁹⁶

The offence is committed only if the person in authority ‘negligently fails’ to reduce or remove the substantial risk. The Victorian Government’s fact sheet provides the following guidance on when a failure will be negligent:

Under the offence, a person is taken to have *negligently failed* to reduce or remove a substantial risk if that failure involves a great falling short of the standard of care that a reasonable person would exercise in the same circumstances. The offence does not require a person in authority to eliminate all possible risks of child sexual abuse.

For example, a person in authority who knows that an adult associated with the organisation poses a substantial risk to children, and moves that adult from one location in an organisation to another location where they still have contact with children, is likely to be committing the offence. Another example is where a person in authority employs someone in a role that involves contact with children, when the person in authority knows the employee left their last job because of allegations of sexually inappropriate behaviour involving children.⁹⁹⁷ [Emphasis original.]

The fact sheet also states:

The offence is unlikely to be committed where a person takes reasonable steps to protect a child from the risk of sexual abuse, for example, where an allegation is reported to appropriate authorities and the individual is removed from any role involving unsupervised contact with children pending an investigation.⁹⁹⁸

The fact sheet provides the following examples of what a person in authority should do to reduce or remove risk:

- A current employee who is known to pose a risk of sexual abuse to children in the organisation should be immediately removed from contact with children and reported to appropriate authorities and investigated.
- A community member who is known to pose a risk of sexual abuse to children should not be allowed to volunteer in a role that involves direct contact with children at the organisation.
- A parent who is known to pose a risk of sexual abuse to children in a school should not be allowed to attend overnight school camps as a parent helper.⁹⁹⁹

The fact sheet also provides guidance on risk management strategies and the child-safe standards framework and states that organisations should review existing policies and practices.¹⁰⁰⁰

17.2.2 Children, Youth and Families Act 2005 (Vic) section 493

In Chapter 16, we discussed the Victorian Government's submission in response to the Consultation Paper in relation to the failure to report offence in section 327 of the *Crimes Act 1958* (Vic).

In discussing section 327, the Victorian Government noted its commitment to implement all recommendations of the Victorian Royal Commission into Family Violence, one of which was to amend section 327 to require the Director of Public Prosecutions (DPP) to approve a prosecution where the alleged offender is a victim of family violence and to consider legislative amendments to reconcile section 327 with section 493 of the *Children, Youth and Families Act 2005* (Vic).¹⁰⁰¹

In relation to section 493, the Victorian Government stated:

Section 493 of the *Children, Youth and Families Act 2005* creates an offence for failing to protect a child from harm. The offence is punishable by a penalty of not more than 50 penalty units or up to 12 months imprisonment. Unlike section 327 of the *Crimes Act*, the offence in section 493 applies to a person who has a duty of care in respect of a child and covers a broader range of harm to the child (including significant physical, emotional or psychological harm). Section 493 also requires the person to 'take action' (rather than reporting the matter to police). Proceedings for the offence may only be brought after consultation with the Secretary of the Department of Human Services.¹⁰⁰²

The Victorian Government submitted that this aspect of the Victorian Royal Commission's recommendation is complex. It stated:

The Royal Commission into Family Violence does not discuss which aspects of each offence it prefers, or how the two offences should be reconciled. Rather, it notes the difficult policy considerations that apply in this area, that section 327 appears to have been 'drafted with these competing considerations in mind' and that some of the criticisms of section 327 also apply to section 493.¹⁰⁰³

The offence in section 493 of the *Children, Youth and Families Act 2005* (Vic) was raised in our public roundtable on reporting offences in April 2016. Dr Chris Atmore, representing the Federation of Community Legal Centres in Victoria, told the roundtable in relation to concerns about the failure to report offence in section 327 of the *Crimes Act 1958* (Vic):

The other significant issue, which we don't really think was resolved in the public material that was available, was why we proceeded to section 327 when section 493 of the *Children, Youth and Families Act* was on the books ... but as far as we are aware that [section 493] has never been used to obtain a successful conviction. We wanted to know more about why that was and hence, the Royal Commission into Family Violence's recommendation that that section needs to be reconciled with an amended section 327.¹⁰⁰⁴

Section 493 of the *Children, Youth and Families Act 2005* (Vic) is entitled 'Offence to fail to protect child from harm'. Section 493(1) provides as follows:

A person who has a duty of care in respect of a child –

- (a) who intentionally takes action that has resulted, or appears likely to result, in –
 - (i) the child suffering significant harm as a result of –
 - (A) physical injury; or
 - (B) sexual abuse; or
 - (ii) the child suffering emotional or psychological harm of such a kind that the child's emotional or intellectual development is, or is likely to be, significantly damaged; or
 - (iii) the child's physical development or health being significantly harmed; or
- (b) who intentionally fails to take action that has resulted, or appears likely to result, in the child's physical development or health being significantly harmed –

is guilty of an offence and liable to a penalty of not more than 50 penalty units or to imprisonment for a term of not more than 12 months.

The offence in section 493(1)(a) requires intentional action that results or appears likely to result in the specified harms. This appears to target deliberate action that harms a child rather than a failure to take action to protect the child.

The offence in section 493(1)(b) appears to target a failure to protect. However, the drafting of this offence is ambiguous. It requires an intentional failure to take action, but it is not clear if it is the action or the failure to act that must result or appear likely to result in the specified harm to the child. Presumably the legislative intention was to target an intentional failure to act to prevent the specified harm, but it is not clear that the drafting achieves such an intention.

This ambiguity is avoided in the offence in section 195A of the *Crimes Act 1961* (NZ) cited by the Victorian Royal Commission into Family Violence in connection with its discussion of section 493,¹⁰⁰⁵ which relevantly provides:

195A Failure to protect child or vulnerable adult

- (1) Every one is liable to imprisonment for a term not exceeding 10 years who, being a person described in subsection (2), has frequent contact with a child or vulnerable adult (the victim) and –
 - (a) knows that the victim is at risk of death, grievous bodily harm, or sexual assault as the result of –

- (i) an unlawful act by another person; or
 - (ii) an omission by another person to discharge or perform a legal duty if, in the circumstances, that omission is a major departure from the standard of care expected of a reasonable person to whom that legal duty applies; and
 - (b) fails to take reasonable steps to protect the victim from that risk.
- (2) The persons are –
- (a) a member of the same household as the victim; or
 - (b) a person who is a staff member of any hospital, institution, or residence where the victim resides.

Similarly, the offence in section 5 of the *Domestic Violence, Crime and Victims Act 2004* (UK), also cited by the Victorian Royal Commission into Family Violence, appears to avoid this ambiguity – although it applies only to causing the death of, rather than harm to, a child or vulnerable adult. It provides that the offender’s unlawful act must have caused the victim’s death or that each of the following requirements are satisfied:

- the offender ought to have known of the significant risk of serious physical harm being caused to the victim by the unlawful act
- the offender failed to take such steps as he could reasonably have been expected to take to protect the victim from the risk
- the act occurred in circumstances of the kind that the offender foresaw or ought to have foreseen.

The ambiguity is also avoided in the South Australian offence of criminal neglect under section 14(1) of the *Criminal Law Consolidation Act 1935* (SA), which we discuss in section 17.3 and which was also cited by the Victorian Royal Commission into Family Violence. The other offence cited by the Victorian Royal Commission into Family Violence – section 124A of the *Domestic and Family Violence Act 2007* (NT) – relates to reporting rather than protecting.

In relation to the offence in section 493 of the *Children, Youth and Families Act 2005* (Vic), the Victorian Royal Commission into Family Violence stated:

There have only been 13 incidents recorded against this offence by Victoria Police since 2000 and the Commission is not aware of any prosecutions to date.¹⁰⁰⁶
[Reference omitted.]

After comparing elements of the reporting offence under section 327 of the *Crimes Act 1958* (Vic) and the offence under section 493 of the *Children, Youth and Families Act 2005* (Vic), the Victorian Royal Commission into Family Violence stated:

It has been argued that failure to protect laws should be drafted clearly to lessen their potentially negative effect.¹⁰⁰⁷ This may require defining when the duty of care to protect children exists, delineating the steps a person must take when they become aware of the abuse and adopting an affirmative defence to excuse persons who fear for their safety or the safety of abused children.¹⁰⁰⁸ Arguably, the section 327 offence has been drafted to meet some of these suggested criteria.¹⁰⁰⁹

Given the ambiguity in the drafting of the offence in section 493 of the *Children, Youth and Families Act 2005* (Vic), it does not appear to us to offer a viable alternative to section 49C of the *Crimes Act 1958* (Vic) (or indeed to section 327 of the *Crimes Act 1958* (Vic)).

17.3 South Australian offence of criminal neglect

In South Australia, there is an offence of criminal liability for neglect where death or serious harm results from an unlawful act. Section 14(1) of the *Criminal Law Consolidation Act 1935* (SA) provides:

- (1) A person (the defendant) is guilty of the offence of criminal neglect if –
 - (a) a child or a vulnerable adult (the victim) dies or suffers serious harm as a result of an unlawful act; and
 - (b) the defendant had, at the time of the act, a duty of care to the victim; and
 - (c) the defendant was, or ought to have been, aware that there was an appreciable risk that serious harm would be caused to the victim by the unlawful act; and
 - (d) the defendant failed to take steps that he or she could reasonably be expected to have taken in the circumstances to protect the victim from harm and the defendant's failure to do so was, in the circumstances, so serious that a criminal penalty is warranted.

Under section 14(3), the defendant has a duty of care to the victim 'if the defendant is a parent or guardian of the victim or has assumed responsibility for the victim's care'.

We understand that this offence is not charged in relation to child sexual abuse or institutional child sexual abuse; rather, it is charged where the police cannot determine, as between two or more persons such as parents or carers, who committed the unlawful act against the child or vulnerable adult.

17.4 Discussion in the Consultation Paper

In the Consultation Paper, we suggested that, unlike a duty to report, a duty to protect is primarily designed to *prevent* child sexual abuse rather than to bring abuse that has occurred to the attention of the police. We also suggested that a failure to protect offence could apply to action taken or not taken before it is known that an offence has been committed.

We stated that, while reporting to police might be one of the steps that could be taken to protect a child, it might not be sufficient to reduce or remove the risk of child sexual abuse. In some circumstances, it might be criminally negligent not to take other available steps, particularly if the risk is immediate and other steps are available that will allow an intervention to occur more quickly.

We stated that any offence should not be unfairly onerous in terms of who it applies to and what it requires of them. It should not be so onerous that it prevents institutions from continuing to provide services to children or requires institutions to distort how they provide services by adopting unnecessarily expensive or risk-averse behaviour. We suggested that the Victorian offence is targeted quite narrowly.

We invited submissions on an offence for failure to protect. We particularly sought submissions from institutions in relation to whether the Victorian offence is appropriately targeted or whether it might have any unintended adverse consequences for institutions' ability to provide children's services.

17.5 What we were told in submissions and Case Study 46

17.5.1 Survivor advocacy and support groups

In their submissions in response to the Consultation Paper, a number of survivor advocacy and support groups expressed general support for failure to protect offences.¹⁰¹⁰

The South Eastern Centre Against Sexual Assault & Family Violence (SECASA) expressed support for offences targeting senior people who fail to intervene or act.¹⁰¹¹ The National Association of Services Against Sexual Violence (NASASV) referred to the Victorian offence and submitted that it is '[e]specially relevant and should be applicable in any institutions where children are involved, including clubs and sporting groups'.¹⁰¹²

A number of survivors also expressed general support for failure to protect offences.¹⁰¹³ Mr Dennis Dodt discussed his experience of abuse and submitted that senior people in an institution should be accountable for failing to intervene. He said that the perpetrator in his

case continued to have access to more than 75 children within the orphanage and that, had the people in charge acted in the best interests of the children, they would have prevented abuse from happening to many other children.¹⁰¹⁴

Mr Peter Gogarty told the public hearing in Case Study 46 that he supported offences for failing to protect a child. He said:

going forward, it ought to be a crime not to protect a child. But, again, I find it inconceivable that we can have come all of this way and a lot of people in this country will have had some public humiliation but effectively go forward with their careers and their lives, and there are thousands of people like me who struggle with ours every day.¹⁰¹⁵

People with Disability Australia expressed its support for a failure to protect offence, submitting that:

Criminalising the failure to protect is a remarkable innovation in a field where workplace health and safety requirements may result in more significant or substantial penalties than the sexual abuse of a child. It also meaningfully shifts accountability to ensure adequate recognition of the significance of failing to protect, contributing to a greater community awareness of the importance of children's safety, especially in institutions.¹⁰¹⁶

Sisters Inside submitted that a consideration of 'failure to protect' should be broadened to prevent future child sexual abuse by preventing institutionalisation of children, whether as a result of young people being in custody on remand or being institutionalised because their mothers are imprisoned.¹⁰¹⁷ It submitted:

The most effective means to reduce the risk of harm to children is to reduce the number of mothers in prison. We know that most women prisoners have committed minor, non-violent offences. We know that the majority are either on remand or in breach of parole, rather than serving substantive sentences. A focus on diversionary sentencing could both save the state \$millions and reduce children's exposure to the risk of institutional child sexual abuse.¹⁰¹⁸

Ballarat Centre Against Sexual Assault (CASA) Men's Support Group submitted that, if responsible people in institutions are aware of abuse and fail to report or intervene to protect a child, 'they should be held accountable due to the nature and responsibility of their positions'.¹⁰¹⁹ It submitted:

These failures have been clearly highlighted in the many Royal Commission case studies, particularly in the Ballarat Case Study as there were key figures in the Catholic hierarchy that were aware of the child abuse occurring but moved personnel around, rather than report to police.¹⁰²⁰

Ms Shireen Gunn, representing the Ballarat CASA Men's Support Group, told the public hearing in Case Study 46 that, while the men's group understood it would be very difficult, they believed that institutional staff should be accountable for not keeping a child safe.¹⁰²¹

The Victorian CASA Forum expressed support for the failure to protect offence in Victoria. It submitted that it believed it was appropriately targeted and that it is not aware of any unintended adverse consequences on the capacity of institutions to provide children's services, although it noted that it is not sure whether this has been tested.¹⁰²² It submitted:

Since the Betrayal of Trust Inquiry and Report and the new legislation, there has definitely been an increased focus on child sexual abuse and the risks of institutional abuse in Victoria. For example, in 2016, the Victorian Government introduced Child Safe Standards, compulsory minimum standards which all organisations that provide services to children are required to meet. The Child Safe Standards form part of the Victorian Government's response to the Betrayal of Trust Inquiry. Education, awareness raising and helping organisations to create and maintain child safe environments will be the initial focus of the Child Safe Standards.

Anecdotally, organisations in Victoria do seem more aware of their responsibilities and are establishing policies and procedures to protect children and ensure the safety of children.¹⁰²³

The North Queensland Catholic Clergy Abuse Reference Group expressed support for national implementation of the Victorian failure to protect offence, and that it should be extended to include abuse of vulnerable adults.¹⁰²⁴

The Victims of Crime Commissioner for the Australian Capital Territory expressed support for a failure to protect offence and for the Victorian offence in particular.¹⁰²⁵ He submitted that the requirement that there be a 'substantial' risk 'would override any concern about any adverse consequences to provide children's services assuming the interpretation of "substantial" is that the risk is real and tangible'.¹⁰²⁶

The South Australian Commissioner for Victims' Rights submitted that:

Institutions should be criminally and civilly liable for their failure to protect. The inter-relationship might be likened to liquor licensing law where the staff, the duty manager, the licensee and the directors can be prosecuted. It seems to me that the wellbeing and safety of children and other vulnerable people are more important than regulatory liquor licensing matter[s].¹⁰²⁷

17.5.2 Institutions

The Association of Heads of Independent Schools of Australia (AHISA) focused its submission in response to the Consultation Paper on the failure to protect offence. It sought to highlight:

implementation and practice issues for schools and their leaders that may arise in relation to the third party offences. To this end, AHISA draws on results of a survey of its Victorian members in relation to the introduction of section 49C of the *Crimes Act 1958* (Vic) and new Child Safe Standards which came into effect for Victorian schools on 1 August 2016. We also refer to advice commissioned from Russell Kennedy Lawyers on section 49C of the *Crimes Act 1958* (Vic) in relation to the role of the principal.¹⁰²⁸ [Reference omitted.]

AHISA provided Russell Kennedy Lawyers' advice and it is published with AHISA's submission on the Royal Commission's website. AHISA summarised the advice in its submission as follows:

- Section 49C(2) of the *Crimes Act 1958* (Vic) should not be used as an exact template for any national offence. While the offence requires that three tests be satisfied, which will generally be difficult for a prosecution to achieve except in compelling cases, the requirement that there must be 'substantial risk' is so imprecise that it provides little guidance for principals wishing to avoid engaging in criminal behaviour.
- Given that the Royal Commission has already recommended civil liability for schools that fail to take steps to protect children from the risk of child sexual abuse, there appears to be no specific need for a similar criminal offence to be created that is aimed at schools. Tying civil liability to an institution's accreditation is likely to have a greater deterrent effect than the introduction of a criminal offence.
- If a 'failure to protect' offence is introduced nationally for schools, then any national offence for individuals should be narrower than section 49C(2) of the *Crimes Act 1958* (Vic) and reserved for only the most egregious of decisions by individuals.¹⁰²⁹

The 'three tests' in section 49C described by Russell Kennedy Lawyers are:

- the substantial risk test, which requires that any risk must be *substantial*
- the knowledge test, which requires that the principal has *knowledge* that there is a substantial risk
- the negligence test, which requires that the principal must *negligently* fail to reduce or remove the risk.¹⁰³⁰

In relation to the meaning of 'substantial risk' in the Victorian offence, Russell Kennedy Lawyers stated:

By failing to provide clarity about what exactly a substantial risk is, principals are being left to guess what they need to do to avoid committing a criminal offence, and this may have significant unintended consequences.

An illustration of this is useful. An obvious way to deal with a risk that a sexual offence will occur is to remove the individual creating that risk from a school. If a sexual abuse allegation is made against a teacher, it is easy for a school to stand that teacher down for the time being. If the teacher then admits to the allegations, or the allegations are proven in a court of law, the school will then typically have reasonable grounds for terminating the teacher's employment. It may therefore be justifiable for it to be a criminal offence for a principal not to do these obvious things.

However, what happens if allegations are made, the teacher denies those allegations, but there is no determination by a court about whether or not the allegations are substantiated? Many schools will be able to describe a situation in which allegations were raised about a teacher by a student, and the allegations were reported to the police who decided there was insufficient evidence to press charges. Just because the police have decided not to charge the teacher, does not necessarily mean that the allegations are untrue. Is there a substantial risk at that point? What happens if the school then investigates the allegations, but is unable to either discount or substantiate the allegations on the balance of probabilities (which is a typical problem where allegations rest on a child's verbal complaint, and a teacher's verbal denial)? Is there a substantial risk or not?

This uncertainty about whether or not there is a substantial risk could make it difficult for a principal to decide what to do next. Principals and their schools have to take into account a number of considerations when deciding whether to dismiss an employee. The school must consider the terms on which the employee was engaged, including any written contract of employment or enterprise agreement, and whether those terms permit the dismissal. The school must also consider an employee's prospects of making an unfair dismissal claim, which will generally require the employer to prove to the Fair Work Commission that the employee engaged in misconduct warranting dismissal.

By introducing an offence that is predicated on an amorphous concept such as substantial risk, there are likely to be a number of circumstances – particularly where allegations of grooming are involved – where a principal may be unreasonably forced to decide between:

- (a) dismissing an employee in potential breach of a school's workplace obligations; or
- (b) allowing an employee to continue working at a school, and potentially committing a criminal offence.¹⁰³¹

AHISA also referred to the Victorian Child Safe Standards and the Royal Commission's recommendations in relation to a non-delegable duty. AHISA suggested that, if there is a non-delegable duty and that is tied to a school's accreditation, there are not compelling grounds for also introducing a criminal offence.¹⁰³²

In relation to enforcing standards such as the Victorian Child Safe Standards, Ms Beth Blackwood, representing AHISA, told the public hearing that:

an approach that's likely to be the most effective in protecting children is through regulation being linked with school registration or school accreditation, and that is now the case in all States. I think it would be true to say almost 10 years ago those regulations – it was more compliance, so you ticked the box that you had the various policies and practices in place, but today you actually have to demonstrate that not only do you have those policies and practices in place, but that they are implemented and that there is regular ongoing education of staff and the broader community about child safety procedures. ...

Each state has different procedures, but registration or accreditation is usually on a five-year rotational basis, and that not only requires a submission of the glossy brochures and paperwork, but it also entails a visit from a team and it entails demonstrating that those policies and practices have been implemented and embedded in the culture of the school.¹⁰³³

In response to a question as to whether loss of accreditation is such a drastic outcome that regulators might be hesitant to enforce it, Ms Blackwood said:

I would like to think that the work of the Royal Commission has ensured that that wouldn't be the scenario any longer and that schools are given a certain period of time to address anything that may not have been addressed to the satisfaction of the guidelines or of the standards that are in place. ...

That is, I concede, a possibility. ... But I think that the awareness – I mean, ultimately, schools are about children and ultimately heads in schools want to do the right things by those students.

To me, if we can give them more clarity, more guidelines, more education, more information, then the child safe cultures in schools are likely to be more effective.¹⁰³⁴

AHISA reported on its survey of its members as to section 49C and the Child Safe Standards as follows:

In response to the question, 'What have you done differently – or scaled up – in your school to manage the risk of committing the "failure to protect" offence?', all principals engaging with the survey reported their school met the Child Safe Standards.

Responses indicate that the 'failure to protect' offence, allied to the introduction of Child Safe Standards which make expectations of schools explicit, has instigated prompt and thorough action in schools to support better practice in child protection. Key areas where schools had taken action to meet or exceed the new Standards include:

- Revision of staff induction programs
- Ensuring that all adults within the school community are aware of their child protection obligations, including reporting obligations
- Provision of professional development for staff
- Provision of support for staff in undertaking their responsibilities in child protection
- Revision of induction programs for relief or temporary staff
- Revision of training programs for volunteers
- Introduction or revision of recordkeeping policies and procedures in relation to child protection.

Nearly half of those surveyed had made reporting on child protection policies and procedures a standard item on school Board meeting agendas, while nearly two-thirds of schools have added child protection to the list of items monitored by the school Board's risk committee. One respondent to the survey noted that their school's Board has instigated a sub-committee with a specific focus on child protection.

Whether as a standard item on Board agendas, or a focus of Board committees, child protection is now clearly a governance – not just a management – issue in independent schools in Victoria. This is an important support for developing and sustaining child safe school cultures.¹⁰³⁵

Ms Blackwood told the public hearing that she believes it was the Child Safe Standards, rather than the offence in section 49C, that brought about these changes.¹⁰³⁶

In response to the survey question about barriers to principals having knowledge of substantial risk, AHISA reported that, in addition to parents not notifying the school of risks at home:

Principals noted that while failure of staff to report suspicious behaviour by another adult associated with the school would be a barrier to the principal's knowledge of substantial risk, they expected child protection policies and procedures, including ongoing staff training, and school culture to mitigate this.

Principals reported they were also more likely to be unaware of substantial risk if schools did not have in place adequate recordkeeping practices, such as would alert the principal to a pattern of grooming behaviour.¹⁰³⁷

AHISA reported that principals agreed that the failure to protect offence 'should apply to school students up to the age of 18 or for as long as the school has a duty of care for the student'.¹⁰³⁸

AHISA reported that principals identified the following as areas of difficulty or concern for schools:

- The ability of schools to control risk during students' work experience placements and school-related overseas travel
- The capacity of smaller schools to manage the increasing administrative and compliance burden on schools
- A negative impact on the number of staff members volunteering for extra duties or activities out of fear of exposure to the risk of false allegations.¹⁰³⁹

AHISA also submitted that there is still uncertainty or concern among some principals about the level of suspicion that is required before they are required to report to an external authority; and the extent to which the school can investigate a suspicion before reporting it.¹⁰⁴⁰

AHISA summarised the implications of the survey of its members as follows:

AHISA's survey of members affirms the readiness of schools to meet and surpass regulated obligations in regard to child protection. It is clear, however, that human uncertainty over reporting must be addressed, by first making those obligations explicit, followed by ongoing education about how those obligations are to be executed. It is uncertainty about what should be done in specific circumstances – either on the part of staff, or on the part of the principal in managing sometimes competing legal or regulatory obligations – that appears to concern principals most as posing the greatest risk of school officers committing a 'failure to protect' offence.¹⁰⁴¹

Overall, AHISA submitted that:

criminal offence responses are important weapons in the child protection armoury, but equally important are community-based prevention efforts – and particularly prevention education: without adequate education, staff in institutions cannot make the reports and provide the evidence that will lead to the successful prosecution of offences.¹⁰⁴²

The Anglican Church of Australia (ACA) Royal Commission Working Group submitted that the Victorian failure to protect offence 'acknowledges the responsibility of institutions in these areas'.¹⁰⁴³ It submitted:

The ACA acknowledges that the introduction of this type of offence would strengthen the responsibility of institutional representatives to comply with the institution's policies and the laws of the jurisdiction in which they operate relating to reporting abuse and otherwise protecting children.

This type of offence would focus decision making around the initiating of investigative processes and the removal of a churchworker from office while matters are determined.¹⁰⁴⁴

The Truth Justice and Healing Council submitted that we should recommend that governments consider introducing a failure to protect offence similar to that in Victoria, 'subject to examination of whether the provision has had adverse practical effects in Victoria'.¹⁰⁴⁵ It stated:

A danger of a provision such as this is that it may cause institutions which deal with children to adopt risk-averse behaviours that are so onerous they restrict the capacity of the institutions to provide services to children. Because the provision is so new, it is too early to form a view on whether it is having this effect in Victoria.¹⁰⁴⁶

Mr Francis Sullivan, representing the Truth Justice and Healing Council at the public hearing in Case Study 46, explained the Council's concerns about risk-averse behaviours, referring to the earlier evidence and discussion with Ms Blackwood and continuing:

It's about how some organisations in the community, particularly those that are more volunteer run, may be well dissuaded from getting involved in children's services if this is the type of onus that would be not only on the organisation but on individuals within it.

Now, in that conversation earlier, I think the landscape of the issues was well mapped, but in the end you need to come to some sort of balanced position, and that's why we came to saying that ultimately we support the way the Victorian Parliament has gone, but mindful of those problems, and therefore there needs to be a watching brief. That's basically it.¹⁰⁴⁷

17.5.3 Governments and government agencies

The New South Wales Government referred to the offence under section 227 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) to intentionally take action that results, or appears likely to result, in a child suffering significant harm as a result of physical injury or sexual abuse, or emotional or psychological harm. It submitted that consideration will be given to whether New South Wales should introduce an offence of failure to protect, including any possible defences, and whether the offence should apply only in an institutional context as part of its current Child Sexual Offences Review.¹⁰⁴⁸

In its submission, the Victorian Government briefly outlined the offence in section 49C. It stated that, as at 30 June 2016, no incidents of the failure to protect offence had been recorded by Victoria Police.¹⁰⁴⁹

It also outlined the improved structure and the amendments being made to the offence in section 49C by the *Crimes Amendment (Sexual Offences) Act 2016* (Vic) as follows:

- It provides that the offence applies if the accused occupies a position within or in relation to a relevant organisation. The addition of 'in relation to' will ensure that this element is appropriately broad (e.g. to include a person on a board of management).

- The definition of ‘person associated with a relevant organisation’ no longer includes ‘office holder’, as that term is adequately covered by the other positions listed in the (non-exhaustive) definition.
- The definition of ‘sexual offence’ no longer includes historical offences, as this offence is not intended to have retrospective effect, or an offence against the section itself.¹⁰⁵⁰

As the Royal Commission has noted, section 49C is targeted quite narrowly. Confining the offence to those with the requisite ‘power or responsibility’, the requirement that the person ‘know’ of the ‘substantial risk’ and the criminal negligence standard all assist to limit the scope of the offence.¹⁰⁵¹

Mr Greg Byrne, Special Counsel, Criminal Law Review in the Victorian Department of Justice and Regulation, representing the Victorian Government, outlined the failure to protect offence in the public hearing in Case study 46.¹⁰⁵² In answer to a question as to whether there was significant controversy or discussion among institutions about the provision, Mr Byrne said:

there was certainly some discussion about it, about whether it should be and exactly how it should be targeted. In some ways, as you can see, the offence is targeted fairly narrowly and applies in relation to quite serious conduct. Some of the discussion I think was around how will it change culture in an organisation to have this kind of an offence and will it change it in positive or negative ways.

In a positive sense, it makes it clear to somebody that if they know of a risk, then they need to take action because they’re subject to a criminal liability, and in a sense that gives them further coverage in their own organisation.

But then the counter argument has been that depending on how you pitch the offence, it might make organisations become overly focused on this in a way that’s detrimental to their general activities and the services they provide, and perhaps becoming too ... defensive.¹⁰⁵³

Mr Byrne told the public hearing that he was not aware of any prosecutions under section 49C.¹⁰⁵⁴

As with failure to report offences, the Victorian Commission for Children and Young People expressed its in principle support for failure to protect offences, including offences in relation to all forms of child abuse rather than child sexual abuse.¹⁰⁵⁵

The Queensland Family & Child Commission (QFCC) expressed its support for consideration of the option of offences along the lines of Victoria’s failure to protect offence. However, similarly to its position in relation to failure to report offences, it submitted that the offence should be specific and targeted to avoid burdening child protection systems with high numbers of unsubstantiated reports.¹⁰⁵⁶ It expressed support for Victoria’s failure to protect offence being a targeted offence and stated that it would welcome more information about its effectiveness and its applicability to other jurisdictions.¹⁰⁵⁷

17.5.4 Directors of Public Prosecutions

The New South Wales Office of the Director of Public Prosecutions (ODPP) expressed support for a failure to protect offence such as section 49C of the *Crimes Act 1958* (Vic). It submitted:

Such a measure has the real potential to prevent abuse from occurring or continuing in an institutional context. There have been too many cases of wilful blindness to ongoing employee offending by persons in positions of institutional authority. A failure to protect law would mean that those in positions of authority would no longer be able to defer or avoid acting to remove a known potential offender from having access to children.¹⁰⁵⁸

Similarly to his response on the failure to report offence, the Victorian DPP expressed his agreement with the policy intention behind the failure to protect offence in section 49C of the *Crimes Act 1958* (Vic) but said that he could not meaningfully comment further because the Victorian Office of Public Prosecutions (OPP) has not yet prosecuted or been asked to advise on this offence.¹⁰⁵⁹

17.5.5 Legal bodies and representative groups

The Law Society of New South Wales Young Lawyers Criminal Law Committee expressed its support for a failure to protect offence such as section 49C in the *Crimes Act 1958* (Vic). The Criminal Law Committee stated it was of the view that senior management within organisations 'should have a duty to take positive steps to protect against a substantial risk of harm' and that 'reporting would be a necessary but perhaps not sufficient condition'.¹⁰⁶⁰

In relation to the interaction between failure to report and failure to protect offences, the Criminal Law Committee submitted that if a failure to protect offence was adopted:

a proposed 'failure to report' offence would still have work to do. The latter would apply to those who have a reasonable suspicion, who are not necessarily in a position to take action (beyond reporting). The Committee notes that the failure to protect offence could potentially encompass a wide range of behaviour, and so it may be appropriate to draft graduated offences reflecting increasingly serious criminality or, alternatively, leave a wide sentencing discretion to the Court.¹⁰⁶¹

Mr Liam Cavell, representing the Criminal Law Committee, told the public hearing in Case Study 46:

If I turn to the failure to protect offences, we say that it's important to encourage a change in culture within institutions, and encouraging a change in culture can sometimes involve compelling people to put in place standards that help protect children. That's what we think is important in those sorts of reforms, that we extend an obligation to those who

have the ability to protect, to implement change, but also to the institution itself, to avoid a situation where, for instance, somebody becomes a scapegoat once they leave an organisation. It's important to achieve a broad cultural change within institutions.¹⁰⁶²

knowmore expressed its support for the introduction of failure to protect offences similar to the Victorian offence in section 49C of the *Crimes Act 1958* (Vic).¹⁰⁶³ It submitted that such an offence 'will encourage organisations to implement effective systems to prevent and respond to allegations of institutional child sexual abuse' and that it will place 'additional responsibility on staff with leadership roles to foster an effective organisational culture'.¹⁰⁶⁴ It agreed that the offence should not be so onerous that it hinders or prevents institutions from continuing programs and services for children and suggested that it should be targeted at senior people and at negligent failures, similarly to the Victorian offence.¹⁰⁶⁵ The Federation of Community Legal Centres in Victoria stated its support for a consistent, nationwide failure to protect offence for the reasons outlined in knowmore's submission.¹⁰⁶⁶

Legal Aid NSW expressed its opposition to an offence of criminal neglect based on the South Australian provision.¹⁰⁶⁷ It referred to a number of existing criminal sanctions for child neglect in the *Children and Young Persons (Care and Protection) Act 1998* (NSW) and the *Crimes Act 1900* (NSW), which relate to intentional injury or harm and failure to provide the necessities of life.¹⁰⁶⁸

17.6 Discussion and conclusions

We are satisfied that all states and territories should introduce legislation to enact a failure to protect offence. The Victorian offence in section 49C of the *Crimes Act 1958* (Vic), including the amendments commencing in 2017, provides a useful precedent.

Many of our case studies, including the examples discussed in section 15.2, reveal circumstances where steps were not taken to protect children in institutions. These include examples where persons were allowed to continue to work with a particular child after concerns were raised, and they continued to abuse the particular child. They also include examples where persons who had allegations made against them were allowed to continue to work with many other children and they went on to abuse other children.

In some cases, perpetrators were moved between schools or other sites operated by the same institution. Moving an adult known to pose a substantial risk from one location to another where they still have contact with children is one of the examples the Victorian Government's fact sheet provides of when the offence might be committed.

The failure to report offence that we recommend in Chapter 16, if implemented, is likely to require reporting of institutional child sexual abuse in a considerably greater number of circumstances than would be covered by the offences in section 316(1) of the *Crimes Act 1900*

(NSW) and section 327 of the *Crimes Act 1958* (Vic). This is primarily because it would require reporting where the person knows, suspects, or should have suspected, that a child is being or has been sexually abused.

However, even with a broader failure to report offence, we consider that there is still a need for a failure to protect offence.

Unlike a duty to report, a duty to protect is primarily designed to *prevent* child sexual abuse rather than to bring abuse that has occurred to the attention of the police. A failure to protect offence can apply to action taken or not taken before it is suspected that child sexual abuse is being or has been committed. For example, the Victorian offence applies where there is 'knowledge' of a 'substantial risk' that an adult associated with the institution will commit a sexual offence against a child in the institutional context.

While reporting to police might be one of the steps that could be taken to protect a child, it might not be sufficient to reduce or remove the risk. In some circumstances, it might be criminally negligent not to take other available steps, particularly if the risk is immediate and other steps are available that will allow an intervention to occur more quickly. It is not and should not be thought to be sufficient to wait until abuse occurs and then inform the police.

We also consider that a failure to protect offence gives appropriate emphasis to the obligation of those in responsible positions in institutions to protect children in their care from sexual abuse. We agree that prevention of institutional child sexual abuse is the goal, but we consider that the failure to protect offence reinforces the importance of prevention and attaches appropriate criminal consequences to serious failures to take available steps to prevent abuse. That is, the criminal offence complements, rather than competes with, regulatory and other measures to improve prevention.

We are satisfied that a criminal offence targeting responsible persons within the institution is necessary and appropriate to focus on the individual's responsibility to act to protect children from known substantial risks. Other possible steps, such as revoking an institution's registration, might be considered too drastic or unfair to be implemented for a failure to protect. For example, if the failure to protect is identified some years after a child was sexually abused, there may be no good reason to deregister an institution, particularly if it is under new management and has improved policies. Further, it might be quite unfair to penalise children and other staff of the institution who were not responsible for the failure to protect by deregistering the institution.

Similarly, civil liability does not focus on the individual's responsibility to act to protect children from sexual abuse. By imposing the costs of the harm caused by child sexual abuse on the institution, civil liability should encourage institutions to adopt measures to prevent child sexual abuse. However, the costs are borne by the institution as a whole, and civil liability does not necessarily have any adverse consequences for the individual who could and should have taken steps to protect the child.

We accept that the failure to protect offence should not be unfairly onerous in terms of who it applies to and what it requires of them. It should not be so onerous that it prevents institutions from continuing to provide services to children or requires institutions to distort how they provide services by adopting unnecessarily expensive or risk-averse behaviour.

We consider that the Victorian offence is targeted in an appropriately narrow manner. In particular, it:

- applies only to those within institutions who have the required knowledge and the ability to take action
- requires knowledge of a ‘substantial risk’ from an adult associated with the institution – theoretically, any adult associated with the institution could be thought to pose some level of risk to children in the institution
- punishes failures to act that are criminally negligent – it must involve a great falling short of the standard of care that a reasonable person would exercise in the same circumstances.

We do not accept that the actions available to institutions – sacking the person if allegations are admitted or proved or doing nothing otherwise – are as limited as those suggested in the legal advice to AHISA. The guidance provided in the Victorian Government’s fact sheet suggests that removing the person from unsupervised contact with children might be required together with reporting to the appropriate authorities.

An additional option might be to reinforce and insist on compliance with relevant requirements of the code of conduct. Depending on the circumstances in which the risk of sexual abuse has arisen, this might include requirements such as:

- not contacting children outside of the institution’s formal programs, including online
- not being alone with a child on institutional premises out of sight of other staff or volunteers
- not giving gifts to any child or children
- not taking photographs of the child or children.

In some circumstances, a warning and increased supervision might be sufficient to reduce or remove the risk. In section 13.4, we discussed a number of cases involving teachers or former teachers in relation to position of authority offences. In circumstances involving older children and the risk of apparently ‘consensual’ sex, options might include seeking to counsel the child and involve the child’s family, as well as reporting to police.

What the relevant person with power or responsibility within the institution should do to reduce or remove the substantial risk will depend on the person's knowledge of the risk and the circumstances in which the risk has arisen. The criminal offence will punish only those failures to reduce or remove the risk that are criminally negligent. We are satisfied that this approach is not unreasonably onerous for institutions and their relevant staff and volunteers. It will reinforce rather than compete with regulatory and other measures designed to require institutions to be safe for children.

There are two ways in which we consider the Victorian offence in section 49C of the *Crimes Act 1958* (Vic) should be limited:

- We consider that the failure to protect offence should only apply to adults within institutions who have the required knowledge and the power or responsibility to take action. We recognise that people under 18 years of age are given positions involving elements of leadership and responsibility in some institutions that operate facilities and provide services to children. However, we consider that the failure to protect offence should only be capable of being committed by adults.
- We consider that it should be made clear that the offence cannot be committed by individual foster carers or kinship carers. While the offence should apply to those with the required knowledge and the power or responsibility to take action in the services that arrange or supervise foster care and kinship care, we do not consider that individual foster carers or kinship carers should be caught by the offence. Their position is not comparable to those who work within the services and including them would effectively extend the offence to domestic carers in a family setting.

There is also one extension that we consider should be made to the Victorian offence in section 49C of the *Crimes Act 1958* (Vic). We do not consider that the offence should be limited to the risk of sexual abuse of children under 16 years of age in circumstances where the adult who is presenting the risk is in a position of authority in relation to the child. Our recommendations in Chapter 13 were generally designed to strengthen position of authority offences. We consider that these offences are important for protecting older children who, despite being old enough to consent to sex, remain vulnerable to sexual abuse by those who hold positions of authority in relation to them. As a consequence, we consider that the duty to protect children from institutional child sexual abuse should extend to protecting children of 16 or 17 years of age from sexual abuse by those who hold positions of authority in relation to the children.

Recommendation

36. State and territory governments should introduce legislation to create a criminal offence of failure to protect a child within a relevant institution from a substantial risk of sexual abuse by an adult associated with the institution as follows:

- a. The offence should apply where:
 - i. an adult person knows that there is a substantial risk that another adult person associated with the institution will commit a sexual offence against:
 - a child under 16
 - a child of 16 or 17 years of age if the person associated with the institution is in a position of authority in relation to the child
 - ii. the person has the power or responsibility to reduce or remove the risk
 - iii. the person negligently fails to reduce or remove the risk.
- b. The offence should not be able to be committed by individual foster carers or kinship carers.
- c. Relevant institutions should be defined to include institutions that operate facilities or provide services to children in circumstances where the children are in the care, supervision or control of the institution. Foster care and kinship care services should be included, but individual foster carers and kinship carers should not be included. Facilities and services provided by religious institutions, and any service or functions performed by persons in religious ministry, should be included.
- d. State and territory governments should consider the Victorian offence in section 49C of the *Crimes Act 1958* (Vic) as a useful precedent, with an extension to include children of 16 or 17 years of age if the person associated with the institution is in a position of authority in relation to the child.

18 Offences by institutions

18.1 Introduction

In July 2015, the Royal Commission published research it commissioned in relation to sentencing for institutional child sexual abuse. In *Sentencing for child sexual abuse in institutional contexts* (Sentencing Research), the researchers suggested that organisations – and not merely the individuals in them – should be held criminally responsible for the creation, management and response to risk when it has materialised in harm to a child.¹⁰⁶⁹ They noted that the Victorian offence in section 49C of the *Crimes Act 1958* (Vic) – discussed in Chapter 17 – applies only to individuals, not to the organisation itself.¹⁰⁷⁰

Chapter 7 of the Sentencing Research contains a detailed discussion of institutional offences, including why organisational responsibility for child sexual abuse might be appropriate and how organisational offences might be framed.

In the Consultation Paper, we suggested that there may be good reasons of principle why offences targeting institutions should be introduced. As the Sentencing Research stated:

focusing primarily, if not exclusively on individuals minimises the collective dimensions of organisational or institutional action, not only in relation to corporate intention or corporate policy but, more relevantly, to the extent of collective negligence, namely a ‘failure to meet the standard of care expected of an organisation in the same type of situation’ ...¹⁰⁷¹

Institutions themselves may be ‘criminogenic’, in that they are likely to cause or produce criminal behaviour, or they may contribute to offending indirectly.¹⁰⁷² The Sentencing Research also suggested that criminal law is more appropriate than civil law for punishing and deterring wrongdoing because conviction carries with it serious consequences and social stigma,¹⁰⁷³ which raises similar considerations to those we discussed in Chapter 2.

The Sentencing Research also pointed to the factors the Royal Commission identified in its *Interim report* as encouraging or influencing criminal behaviours by opportunistic perpetrators of abuse.¹⁰⁷⁴

In the *Interim report*, we described two key theories about environmental factors as follows:

- Situations allow criminal behaviour:
 - Situations can provide the opportunity that allows a criminal response to occur. For example, a lack of supervision could provide this opportunity.
 - Opportunistic perpetrators are unlikely to actively create opportunities but are likely to recognise and take any that arise.
 - Situational perpetrators are unlikely to create or identify opportunities.

- Situations influence criminal behaviour:
 - Situations present behavioural cues, social pressures and environmental stressors that trigger a criminal response. For example, a sense of emotional congruence with a child might turn into a sexual incident.
 - Situational perpetrators are most likely to be influenced by these triggers to commit abuse.

We stated:

These theories support the need to focus on creating safe institutional environments rather than focusing on the perpetrators or victims. This approach has a promising track record: it has been successful in reducing assaults on adults (physical and sexual), car thefts, robbery and shoplifting.

Opportunistic perpetrators are less likely to commit abuse where organisational controls are in place to prevent and deter abuse. For example, rules may state that a staff member should not be alone with a single child.

Situational perpetrators commit relatively isolated incidents of abuse that are often a reaction to cues. Reducing these cues or environmental triggers can significantly prevent abusive motivations arising. For example, codes of conduct should clearly identify types of unacceptable behaviour and be effectively enforced.¹⁰⁷⁵ [Reference omitted.]

However, in the Consultation Paper, we also identified that there is an issue as to whether the criminal law is the best way to address these issues or whether civil law and regulation might be more effective.

The Sentencing Research acknowledged that:

The criminal law has encountered significant difficulties in applying principles of corporate criminal responsibility in other contexts, such as occupational health and safety and environmental law, let alone in relation to [child sexual abuse].¹⁰⁷⁶

In the Consultation Paper, we suggested that, in considering institutional offences, it is relevant to consider whether civil liability of the kind we recommended in the *Redress and civil litigation report*,¹⁰⁷⁷ if implemented, would be sufficient to encourage the desired behaviour from institutions and to discourage the undesired behaviour or whether criminal liability might also be required.

In Chapter 15 of the *Redress and civil litigation report*, we discussed the civil liability of institutions for institutional child sexual abuse.¹⁰⁷⁸ We made the following recommendations:

89. State and territory governments should introduce legislation to impose a non-delegable duty on certain institutions for institutional child sexual abuse despite it being the deliberate criminal act of a person associated with the institution.
90. The non-delegable duty should apply to institutions that operate the following facilities or provide the following services and be owed to children who are in the care, supervision or control of the institution in relation to the relevant facility or service:
- a. residential facilities for children, including residential out-of-home care facilities and juvenile detention centres but not including foster care or kinship care
 - b. day and boarding schools and early childhood education and care services, including long day care, family day care, outside school hours services and preschool programs
 - c. disability services for children
 - d. health services for children
 - e. any other facility operated for profit which provides services for children that involve the facility having the care, supervision or control of children for a period of time but not including foster care or kinship care
 - f. any facilities or services operated or provided by religious organisations, including activities or services provided by religious leaders, officers or personnel of religious organisations but not including foster care or kinship care.
91. Irrespective of whether state and territory parliaments legislate to impose a non-delegable duty upon institutions, state and territory governments should introduce legislation to make institutions liable for institutional child sexual abuse by persons associated with the institution unless the institution proves it took reasonable steps to prevent the abuse. The 'reverse onus' should be imposed on all institutions, including those institutions in respect of which we do not recommend a non-delegable duty be imposed.
92. For the purposes of both the non-delegable duty and the imposition of liability with a reverse onus of proof, the persons associated with the institution should include the institution's officers, office holders, employees, agents, volunteers and contractors. For religious organisations, persons associated with the institution also include religious leaders, officers and personnel of the religious organisation.
93. State and territory governments should ensure that the non-delegable duty and the imposition of liability with a reverse onus of proof apply prospectively and not retrospectively.¹⁰⁷⁹

We stated:

To our minds it is time that Australian parliaments moved to impose liability on some types of institutions for the deliberate criminal acts of members or employees of the institution as well as for the negligence of those members or employees.¹⁰⁸⁰

We expressed the purpose of the strict liability we recommended as follows:

It would ensure that compensation is available for harm and provide a capacity for institutions to spread their loss through mechanisms such as insurance. The deterrent effect of the imposition of liability and the discipline it would impose on the management of institutions would be the most effective means by which a community could endeavor to ensure the safety of children in the care of another.¹⁰⁸¹

We also explained why we recommended limiting the strict liability to certain categories of institutions and did not recommend extending the liability to not-for-profit or volunteer institutions generally.¹⁰⁸²

In the Consultation Paper, we sought submissions on possible institutional offences, including:

- whether institutional offences are necessary in addition to offences for failure to protect (which we discuss and recommend in Chapter 17)
- if so, what conduct or omissions, and whose conduct or omissions, should constitute the offence(s)
- whether civil liability of the kind we recommended in the *Redress and civil litigation report*, if implemented, would be sufficient.

We outline the possible institutional offences proposed by the Sentencing Research in section 18.2.

In section 18.3, we outline what we were told in submissions and in evidence in the public hearing in Case Study 46.

In section 18.4, we discuss why we have decided not to recommend institutional offences.

18.2 Possible institutional offences

The Sentencing Research first discusses preliminary issues in defining the organisations to be subject to the offences and defining the persons for whom the organisation may be responsible.¹⁰⁸³ We addressed similar issues in relation to civil liability¹⁰⁸⁴ and we also note the precedents available, particularly in the Victorian failure to protect offence.

18.2.1 Being negligently responsible for the commission of child sexual abuse

The Sentencing Research proposes a possible new offence which would hold the organisation responsible for the commission of a child sexual abuse offence committed by a person associated with the organisation.

The institutional offence would require that the person associated with the organisation has been convicted of an offence of child sexual abuse and the organisation has either:

- provided inadequate corporate management, control or supervision of the conduct of persons associated with the organisation
- failed to provide adequate systems for conveying relevant information to persons associated with the organisation.¹⁰⁸⁵

The offence would be committed if there had been a great falling short of the standard of care expected of a reasonable organisation in the circumstances.

The researchers also suggest an alternative formulation of the offence:

An organisation commits an offence if:

- a) a person associated with the organisation is convicted of an offence of child sexual assault; and
- b) the organisation was negligent as to whether that person would commit an offence of child sexual assault against a child; and
- c) the commission of the offence mentioned in paragraph (a) was substantially attributable to the negligent conduct covered by paragraph (b).¹⁰⁸⁶
[References omitted.]

18.2.2 Negligently failing to remove a risk of child sexual assault

The Sentencing Research also proposes a new offence, based on Victoria's failure to protect offence but applying to organisations:

An organisation commits an offence if:

- (a) it exercises care, supervision or authority over children; and
- (b) a person associated with the organisation commits a sexual offence against a child over which it exercises care, supervision or authority; and
- (c) the organisation is negligent as to whether that person would commit a sexual offence against such a child.

An organisation negligently fails to reduce or remove a risk if that failure involves a great falling short of the standard of care that a reasonable organisation would exercise in the circumstances.¹⁰⁸⁷ [References omitted.]

18.2.3 Reactive organisational fault

The Sentencing Research discusses the possibility of framing an offence to target inadequate responses by the organisation once it becomes aware of offending conduct by its staff – the concept of reactive corporate fault.¹⁰⁸⁸ The researchers state:

An offence based upon organisational reactive fault would be difficult to frame, but it would require proof of:

- (a) the commission of an offence by a person associated with the organisation (though not necessarily that the person had been convicted of an offence);
- (b) knowledge or recklessness as to the commission of the offence by the organisation or high managerial agent; and
- (c) unreasonable organisational failure to devise and undertake satisfactory preventive or corrective measures in response to the commission of the offence by the person associated with the organisation.¹⁰⁸⁹

It is not clear how this offence would work if it was a ‘high managerial agent’ who committed the child sexual abuse offence. Perhaps knowledge or recklessness could be assessed excluding the knowledge or recklessness of persons who directly participated in the child sexual abuse offence. Otherwise, institutional criminal liability would appear to follow individual criminal liability automatically.

18.2.4 Institutional child sexual abuse

The Sentencing Research also discusses an offence of institutional child sexual abuse:

An organisation commits an offence if:

1. A person associated with the organisation is convicted of an offence of child sexual assault; and
 - a) the organisation, or a high managerial agent of the organisation, recklessly authorised or permitted the commission of that offence by that person.
2. The means by which such authorisation or permission may be established include proving that the managing body of the institution or a high managerial agent:

- a) expressly, tacitly, or impliedly authorised or permitted the commission of the offence; or
- b) a corporate culture existed that tolerated or led to the commission of the CSA [child sexual abuse] offence; or
- c) failed to create and maintain a corporate culture that would not tolerate or lead to the commission of the CSA offence.

It is a defence to such an offence for the organisation to show that it had adequate corporate management, control or supervision of the conduct of one or more of the persons associated with the organisation; or provided corporate management, control or supervision of the conduct of one or more of the persons associated with the organisation.¹⁰⁹⁰ [References omitted.]

Again, it is not clear how this offence would work if it was a 'high managerial agent' who committed the child sexual abuse offence itself. Perhaps authorisation or permission could be assessed excluding any authorisation by or permission from persons who directly participated in the child sexual abuse offence. It is not clear if their behaviour could be excluded from consideration of the 'corporate culture'. If it could not, institutional criminal liability would appear to follow individual criminal liability automatically.

18.2.5 Penalties and enforcement

The Sentencing Research also discusses the need for different sanctions to be considered in relation to institutional offences, particularly sanctions that might bring about organisational change.¹⁰⁹¹ The researchers discuss existing sanctions that involve some form of court or government supervision, organisational change or reparation to the community, including probation orders, supervisory intervention orders, community service orders and enforceable undertakings.¹⁰⁹² They discuss how compliance programs could be designed to address organisational failures.¹⁰⁹³

18.3 What we were told in submissions and Case Study 46

18.3.1 Survivor advocacy and support groups

In their submissions in response to the Consultation Paper, a number of survivor advocacy and support groups expressed support for offences targeting institutions,¹⁰⁹⁴ as did a number of survivors.¹⁰⁹⁵

The Centre Against Sexual Violence Queensland (CASV) expressed support for institutional offences and submitted:

After an institution is made aware of allegations of child sexual abuse, institutional criminal liability should be warranted when the alleged abuser is:

- Allowed to continue to work with the particular child involved in the allegations,
- Allowed to continue to work with other children not directly involved,
- Or, relocated to other venues operated by the same institution and allowed to work with children at these alternative venues.¹⁰⁹⁶

The South Australian Commissioner for Victims Rights, Mr Michael O’Connell APM, expressed support for offences by institutions and submitted that, if an institution is found guilty, the court should be able to order that the institution pay monetary compensation to the victim (as an option alongside civil liability and redress).¹⁰⁹⁷

Some survivor advocacy and support groups expressed some doubt about or opposition to institutional offences.

The Ballarat CASA Men’s Support Group submitted that it was difficult to say whether there should be offences that target the institution ‘as the group members felt that although the institution has responsibility to keep children safe and intervene to prevent further child abuse, there was an understanding that it would be difficult to prosecute an actual institution’.¹⁰⁹⁸

The In Good Faith Foundation referred to the Victorian Wrongs Amendment (Organisational Child Abuse) Bill 2016, which proposes amendments to the *Wrongs Act 1958* (Vic) in relation to organisational duties of care,¹⁰⁹⁹ which relates to the civil liability of institutions.

The Jannawi Family Centre’s submission expressed doubt about the use of a criminal offence to induce action and suggested that civil liability might be preferable to a criminal offence.¹¹⁰⁰ Ms Biljana Milosevic, representing the Jannawi Family Centre, told the public hearing in Case Study 46 that that was a challenging position for them to hold, but their concern was that current government processes are not responding to children being harmed and that it was punitive to hold people in institutions to account when the systems around them prevent them from protecting children.¹¹⁰¹

The National Association of Services Against Sexual Violence (NASASV) submitted:

Existing civil process may be sufficient in these cases following successful criminal prosecution of senior individuals. If individuals are found to have condoned or ignored institutionalised abuse against appropriate policies/procedures of an institution, then criminal offences may be undeserved.¹¹⁰²

Mr Norm Tink, representing NASASV, told the public hearing in Case Study 46 that civil liability should be sufficient, although he agreed that criminal liability might be appropriate if the institution did not have procedures and regulations in place.¹¹⁰³

18.3.2 Institutions

The Association of Heads of Independent Schools of Australia (AHISA) raised a number of general concerns about offences by institutions, including:

- the need for schools to be given explicit notice of what constitutes ‘the standard of care expected of an organisation in the same type of situation’ – otherwise they may be left vulnerable to prosecution without good purpose
- the importance of prevention and the need for unambiguous obligations on schools and their officers, supported by education and training or ideally reportable conduct schemes that offer advice and support – which should be the necessary foundation for a criminal offence
- the importance of ‘expected standards’ and ‘best practice’ being specified by regulatory authorities.¹¹⁰⁴

AHISA submitted:

It is AHISA’s view that, should an institutional offence be introduced, to be effective it must be linked to a recognised and explicit standard set by a regulatory authority, in the same way that a failure to report offence should be linked to mandatory reporting laws and explicit obligations of what should be reported, when, and to whom.¹¹⁰⁵

AHISA also submitted that civil litigation already offers an avenue for justice where schools have failed.¹¹⁰⁶

The Truth Justice and Healing Council expressed its opposition to institutional offences. It submitted that:

The Council sees no merit in this approach for the following reasons:

- Criminal conduct is generally more properly targeted at the individual rather than the organisation in which the individual is engaged. The difficulties that have been shown to exist in applying principles of corporate criminal responsibility for work health and safety and environmental breaches are instructive;
- The corporate model is inapt for Church institutions which are largely unincorporated associations and where priests and religious are not employees;
- Institutional child sexual abuse often does not come to attention for years after its occurrence, by which time the institution and its management are likely to have substantially changed.¹¹⁰⁷

It also submitted that the Royal Commission should not recommend institutional offences on the basis that they might have symbolic benefit even if they are not prosecuted.¹¹⁰⁸

18.3.3 Governments

The New South Wales Government submitted:

There is currently no offence in NSW which holds institutions criminally responsible for the commission of child sexual abuse. This is primarily because the criminal law in NSW is mainly concerned with the actions of individuals.

The NSW Child Sexual Offence [sic] Review will consider whether institutions should be liable in child sexual abuse matters, noting the complexity and variety of institutional contexts and challenges in applying criminal sanctions to institutions.¹¹⁰⁹

The Tasmanian Government expressed reservations about institutional offences. It submitted that:

An analysis of the capacity for criminal law reform in this area should be considered with regard to the capacity of the crime to encourage reporting and the intersection with the Royal Commission's Redress and Civil Litigation Report recommendation in relation to the introduction of a statutory duty on institutions.¹¹¹⁰

18.3.4 Directors of Public Prosecutions

Of the Directors of Public Prosecutions who made submissions in response to the Consultation Paper, only the New South Wales Office of the Director of Public Prosecutions commented on institutional offences. It expressed reservations as follows:

There are numerous difficulties associated with the proposals to introduce corporate criminal liability, some of which are identified at page 250 of the Consultation Paper. We believe that more in-depth research and policy consideration is needed before a final position supporting the introduction of such offences could be taken. The number and variety of different legislative frameworks proposed, and the legal complexities which attach to each proposal, require further careful consideration to be given to this issue before a final view can be reached.¹¹¹¹

18.3.5 Legal bodies and representative groups

The Law Society of New South Wales Young Lawyers Criminal Law Committee expressed support for the introduction of criminal liability for institutions.¹¹¹²

knowmore submitted that the value in imposing criminal liability on institutions, particularly in terms of reputational consequences and the resulting encouragement to adopt appropriate protocols and procedures, has to be balanced against the complexity in framing the offence and identifying appropriate criminal sanctions.¹¹¹³ knowmore submitted:

In our view, given the complexity of imposing criminal liability on organisations, we consider that the adoption of failure to report and protect laws above, coupled with implementation of the Royal Commission’s recommendations on civil liability, is likely to be sufficient in driving cultural change to prevent child sexual abuse and in enhancing institutional accountability. However, imposing institutional criminal liability would, as noted above, be a powerful symbolic statement and prosecutions may be appropriate in some cases, where institutional responsibility is clear (such as where there has been a prolonged and high-level organisational covering-up of child sexual abuse). Accordingly, we agree that failure to protect offences attaching liability to both the institution and relevant individuals/officers would be an appropriate reform.¹¹¹⁴

18.3.6 Academics

Associate Professor Penny Crofts made two submissions in response to the Consultation Paper and gave evidence in Case Study 46. The main issue she addressed in her submissions and evidence was institutional offences.

In summary, Associate Professor Crofts argued that:

organisations should have some criminal liability for the creation, management and response to risk when it has materialised in harm to a child and endorses the creation of a new offence criminalising institutional child sexual abuse.¹¹¹⁵

Associate Professor Crofts told the public hearing in Case Study 46 that ‘in order to adequately respond to and improve the treatment of children in institutions, we actually need to take into account the responsibility of institutions’.¹¹¹⁶

Associate Professor Crofts submitted that there is ‘a yawning chasm between the moral condemnation of organisational failures articulated in the Royal Commission Reports [of case studies] and law’s response to these failures’.¹¹¹⁷ She argued that the condemnation and opprobrium that flows from a criminal conviction is significant and should extend to organisational failures¹¹¹⁸ and that the structure of the criminal law ‘has prevented any inquiry whatsoever into the ways in which the corporate organisation is at fault for facilitating, tolerating, or failing to prevent child sex offending’.¹¹¹⁹

In explaining the need to focus on the institution rather than the individuals in it, Associate Professor Crofts told the public hearing:

in the bulk of the examples that I’m looking at, particularly the recent examples, you have situations where individuals working don’t know, don’t recognise grooming behaviours, for example; don’t know how to report them, or don’t report them, don’t take them higher up. There’s a lack of what we would call subjective culpability from a criminal law

perspective. So focusing on individuals, you are actually not getting at the systemic reasons why they don't know – why they don't know how to report. And I would say that those are institutional reasons as opposed to nefarious individual reasons.

So the usefulness of imposing institutional responsibility – there is a couple of responses there. One, criminal law is quite a nasty, blunt instrument to focus the mind, and it would force institutions to prioritise child safety, which I think would be completely appropriate if they are providing care for children.

But another reason is the symbolic or expressive aspect of criminal law. Criminal law tells us right from wrong. It has sanctions to back that up. There are lots of different discourses that communicate right and wrong but criminal law is an incredibly powerful instrument to communicate right from wrong, good or bad.

What is actually interesting, I think, when you read the reports and listen to the stories from the Royal Commission is people are outraged, and there is a lot of blame going towards institutions, but there is nowhere to take it. And the way that different people have expressed this symbolic aspect of the criminal law is that if we fail to hold institutions responsible, if we focus, for example, just on civil liability, then it's almost like we're providing a menu of harms where the institution goes, 'Well, it is worth the civil pay-out here, rather than changing our procedures, changing our policies'.

The criminal law communicates that this is not an accident, that this is not a tragedy, but that that institution or organisation is responsible for the child abuse that went on underneath them.¹¹²⁰

Associate Professor Crofts expressed disappointment that the Consultation Paper focused on individual rather than collective responsibility for crimes.¹¹²¹ Associate Professor Crofts argued that the Royal Commission's hearings demonstrate that 'a collective model of culpability must be developed in order to adequately respond to institutional child sexual abuse'.¹¹²² She submitted that 'organisations are most likely to cause systemic harms, and yet the more complex an organisation, the less likely it is to be held criminally responsible'.¹¹²³

Associate Professor Crofts argued that mandatory reporting offences require a subjective element of knowledge, suspicion or belief, but in many of the Royal Commission case studies the issue was that individuals had not recognised the grooming or offending behaviour.¹¹²⁴ For example, referring to Case Study 12 in relation to the response of an independent school in Perth to concerns raised about the conduct of a teacher between 1999 and 2009,¹¹²⁵ Associate Professor Crofts stated that:

despite eight separate complainants across time about an offending teacher's behaviour, the former heads of preparatory school and headmasters did not place sufficient or correct significance on the concerns raised with them about the offending teacher. All of them gave evidence that they did not receive any guidance or training in detecting or reporting child sexual abuse or grooming behaviour.¹¹²⁶ [Reference omitted.]

Associate Professor Crofts quoted the findings in the report of Case Study 12 in relation to deficiencies in the school's child protection policies and stated:

The masters at the school would probably not have been prosecuted for failure to report because they lacked knowledge or belief that child sexual abuse was occurring. But it is this very lack of knowledge or belief that is the problem. Their failure to attach sufficient and correct significance to the reports of inappropriate behaviour was due to an organisational failure to adequately train staff to recognise and report grooming behaviours. The absence of any knowledge or belief was a systemic problem – and the current criminal justice focus on individual, subjective blameworthiness is accordingly inappropriate and misguided.¹¹²⁷

In her evidence in Case Study 46, Associate Professor Crofts illustrated her argument by reference to Case Study 2, in relation to YMCA NSW's response to the conduct of Jonathan Lord.¹¹²⁸ She referred to:

- confusing and complex policies
- the policies not being communicated to staff as important or something they should follow
- middle management not following the policies, including in relation to babysitting
- failing to follow employment procedures
- middle management blaming junior staff for not recognising or reporting grooming behaviours.¹¹²⁹

Associate Professor Crofts said that:

[Case Study 2 provided] a systemic example that staff did not recognise grooming behaviours; even if they had recognised it and reported it, there was no clear person to report it to; and even if they had reported it, there was no kind of clear avenue in terms of where those reports would actually go. I think that that's a really good example of a systemic failure.¹¹³⁰

Associate Professor Crofts also provided a copy of an article she wrote analysing the ways in which the criminal justice system is 'complicit in organising irresponsibility for systemic failures', in the sense that it deflects responsibility for systemic failures, by reference to Case Study 6 in relation to the responses of a primary school and the Toowoomba Catholic Education Office to the conduct of Gerard Byrnes.¹¹³¹

Associate Professor Crofts submitted that:

The focus on individual personnel in the Royal Commission Reports does not adequately reflect the presence or absence of corporate fault. The problem that the Reports highlight, is that it is not what the upper management knew or intended, but what they did not

know or turn their mind to. Upper management failed to prioritise the safety of children and to develop and enforce appropriate child safety policies. The higher up in the corporate hierarchy, the less likely was a person to know of (suspected) grooming or child sex offending.¹¹³²

Associate Professor Crofts outlined approaches for attributing blame to corporations and submitted that corporate responsibility should not depend only on the acts of the individuals in the corporation. She submitted:

Vicarious principles and identification theory reflect a nominalist theory of corporations, which views corporations as nothing more than a collectivity of individuals. That is, the idea that corporations can only act through individuals. On this account, the corporation is simply a name for the collectivity and the idea that the corporation itself can act and be blameworthy is a fiction. These accounts regard corporate responsibility as derivative – it must be located through the responsibility of an individual actor. In contrast, realist theories assert that corporations have an existence that is, to some extent, independent of the existence of their members ... Corporations can act and be at fault in ways that are different from the ways in which their members can act and be at fault ... The details of the Royal Commission hearings demonstrate that a realist approach is vital. The criminal legal system needs to develop an account where the responsibility of the corporation is primary – what [the] corporation the [sic] did or did not do; what it knew or ought to have known about its conduct; and what it did or ought to have done to prevent harm from being caused.¹¹³³ [References omitted.]

Associate Professor Crofts discussed the offences outlined in the Sentencing Research, particularly the ‘most innovative and challenging offence’ of institutional child sexual abuse.¹¹³⁴ Associate Professor Crofts referred to some of the criticisms made of corporate culture and its limited use in the *Criminal Code 1995* (Cth).¹¹³⁵ However, she submitted that:

The idea of corporate culture is that it allows corporate criminal responsibility to mirror, as closely as possible, the fault element of criminal responsibility. It reflects increasing recognition in academic literature of the notion of corporations as criminogenic – that is, corporations by their nature can produce crime ...¹¹³⁶ [References omitted.]

In response to a question about the criticism of corporate culture in the *Criminal Code 1995* (Cth), Associate Professor Crofts told the public hearing:

In relation to that possible offence, a criminal negligence offence I think would be the safest bet, and I think it would be at an absolute minimum what I would hope for and expect from the Royal Commission, to develop an institutional criminal negligence offence.

However, just because something is hard doesn't mean that we shouldn't do it. So corporate culture has been recognised – the idea of corporate culture has been celebrated as this really, kind of, cutting-edge idea. Unfortunately – and this was recently – I had a review on an article recently where the person pointed out, you know, it just hasn't been tested, it hasn't been prosecuted. But I think the Royal Commission provides examples of corporate culture where the institution could be held liable.¹¹³⁷

Associate Professor Crofts argued that, in spite of the novelty and broad reach of corporate culture, and the resistance of corporations and governments to its use in criminal law, the Royal Commission 'provides an example of why developing the idea of corporate culture as a means for attributing collective blameworthiness is essential'.¹¹³⁸ She illustrated this argument by reference to Case Study 12, submitting that it revealed:

- a lack of training for staff to recognise grooming behaviour
- a culture of bullying so that staff were afraid to report their suspicions
- a grossly inadequate response by the school to clear reports by multiple teachers of consistently inappropriate behaviour by the offending teacher, including a failure to report concerns to the police, child protection or anyone who had experience in the protection of children.¹¹³⁹

Associate Professor Crofts also outlined systemic problems identified in Case Study 12 beyond the school itself and extending to the regulation of the school and enforcement of regulatory standards.¹¹⁴⁰ She submitted:

This absence of adequate and appropriate regulatory standards may reflect and reinforce the difficulties of imposing organizational liability. The systemic, cultural problems go beyond the school, to the state and national levels of regulation and enforcement. However, the Royal Commission has consistently articulated and clarified the standards that should be required of individuals and organisations involved in the care of children. Based on the Royal Commission findings it should not be that hard to develop a national standard of care that is applicable and enforced across states.¹¹⁴¹

Associate Professor Crofts submitted that parameters for prosecution and punishment can be developed from the idea of corporate culture, citing the example of the *Bribery Act 2010* (UK) as follows:

the *Bribery Act 2010* (UK) specifies that an organisation will be guilty of corporate failure to prevent offences of bribery unless it can prove that it had adequate procedures to prevent the conduct ... The Act then details six principles based on the Organisation for Economic Co-operation and Development guidelines on compliance ... that comprise proportionate procedures, top-level commitment, risk assessment, due diligence, communication (and training), and monitoring and review.¹¹⁴² [References omitted.]

Associate Professor Crofts argued that compliance principles could be developed to determine whether an institution was committed to a culture of prevention of child sexual abuse. She also argued that this approach would prevent concerns about prosecuting an organisation for past failures when it had reformed its practices.¹¹⁴³ She also referred to the use of ‘deferred prosecutions’, compliance programs and enforceable undertakings that will use the threat of prosecutions or sanctions to compel corporations to comply with existing regulatory standards.¹¹⁴⁴

In relation to whether imposing criminal offences on the institution might discourage people from volunteering in institutions and might therefore have a significant negative impact on institutions that are dependent on volunteers, Associate Professor Crofts told the public hearing that the criminal law would communicate what volunteers have to do, and it would not necessarily lead to a ‘huge number’ of prosecutions. She expressed a preference for not exempting volunteer institutions from criminal liability.¹¹⁴⁵

18.4 Discussion and conclusions

In the course of this Royal Commission, we have identified many shortcomings in the policies and procedures of institutions and their implementation. Some of these shortcomings have continued for years, and some have either facilitated or contributed to the failure to prevent the sexual abuse of children.

In spite of this, we are satisfied that we should not recommend the introduction of criminal offences targeted at institutions.

We consider that the primary effort of governments and institutions at this time should be to develop and improve regulatory standards and practices and oversight mechanisms. We will address these issues in detail in our final report.

We consider that governments, regulatory and oversight agencies and institutions should be given an opportunity to do this as well as to improve their expertise and practices. There has been, and continues to be, a significant amount of change in relation to the regulation of children’s services.

We note, for example, the submission of AHISA and the evidence of Ms Beth Blackwood in Case Study 46 about the changes introduced by independent schools in Victoria in relation to child protection practices and governance following the introduction of the Child Safe Standards and the failure to protect offence, which we outlined in section 17.5.2.

We also appreciate that our work, particularly through our public hearings, has already prompted some change in particular institutions and more broadly. The recommendations we make in our various reports, if implemented, will lead to further changes.

We are not satisfied that the introduction at this stage of one or more criminal offences targeting institutions will assist governments, regulatory and oversight agencies or institutions to implement these significant changes.

We are also not satisfied that the regulatory expertise currently exists, at least in respect of some types of institutions, to identify systemic failures, exercise appropriate discretion in relation to prosecutions, or design and oversee the implementation of appropriate sanctions.

Prosecution discretion would need to take account of the following difficulties, which we identified in the Consultation Paper:

- One of the particular difficulties in relation to institutional child sexual abuse is that the abuse may not come to the attention of authorities for years, by which time any circumstances that allowed the abuse to occur – and any senior management – may have long changed. In these circumstances, it is not clear that a criminal conviction or sanctions directed at organisational change would be necessary or of assistance. Even the stigma may be inappropriate if the institution, in the way it currently cares for children, operates very differently from the institution as it operated years, or even decades, earlier.
- There may also be an issue as to whose actions or inactions should be included in considering institutional responsibility or culture. We know that perpetrators can be found at any level of an institution, including in the most senior leadership positions. It is not clear what adding corporate criminal liability to individual criminal liability would achieve if the former effectively was based on exactly the same conduct as the latter.
- We have also heard of cases where what might be considered the ‘corporate culture’ was divided. There may have been internal whistleblowers who reported concerns and sought action against a person the subject of allegations or concerns and advisers who urged action, while an individual senior manager did not act. In these circumstances, it is not clear what should be treated as the ‘corporate culture’. Criminal conduct may be more properly targeted if consideration is given to prosecuting the individual rather than prosecuting the institution.

We do not suggest that these difficulties could not be addressed. However, it would probably be important for all stakeholders – including regulators, institutions and victims or survivors – to have a clear understanding of how they might affect the exercise of a discretion to prosecute before any offences were introduced.

We also note that, apart from the *Victorian Wrongs Amendment (Organisational Child Abuse) Act 2017* (Vic), the extent to which our recommendations in relation to the civil liability of institutions for child sexual abuse will be implemented, and their impact, are currently unknown.

PART V PROSECUTION RESPONSES

19 Introduction

In private sessions, many survivors have told us of their experiences in interacting with prosecutors. In a number of our public hearings we also heard evidence about decisions made by prosecutors and their interactions with complainants and witnesses. 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.

We have heard accounts of both positive and negative experiences from these sources.

Some survivors have told us:

- they were satisfied with the prosecution service and witness assistance staff
- they were well supported and well prepared for court
- they were kept informed.

Other survivors have told us of:

- their dissatisfaction with the prosecution service
- the lack of support and preparation for court
- the lack of information or adequate consultation
- their remaining uncertainty and lack of understanding about the outcome of the proceedings in the absence of an adequate explanation or feedback from the prosecution service.

We have also heard evidence from many Directors of Public Prosecutions (DPPs), a number of Crown prosecutors and a witness assistance officer about prosecution responses and some of the challenges prosecutors face in prosecuting institutional child sexual abuse cases.

In recent decades, there have been many changes in how prosecution services respond to victims and survivors of institutional child sexual abuse. Many of these changes have been designed to improve prosecution responses for victims and survivors. For example, the increasing recognition of victims' rights, discussed in Chapter 3, has led to an increased focus on victims in prosecution responses. This has also been reflected in prosecution guidelines.

Further, changes in criminal offences and criminal procedure and evidence legislation have enabled prosecutors to respond more effectively to victims and survivors. For example:

- In Case Study 11 in relation to four Christian Brothers institutions in Western Australia, we heard evidence about the then DPP's 1993 decision not to prosecute a small group of Christian Brothers for alleged child sexual and physical abuse 40 years earlier. Mr Bruno Fiannaca SC, Deputy DPP for Western Australia, gave evidence that similar allegations would be more likely to be prosecuted today because of amendments to legislation – including in relation to conducting joint trials – and changes to the directions required to be given to juries.¹¹⁴⁶

- In Case Study 33 in relation to The Salvation Army (Southern Territory), we heard evidence from Mr Adam Kimber SC, the South Australian DPP, about how the offence of ‘persistent sexual exploitation’ made it possible to proceed with matters that might not have been prosecuted before the offence was introduced because of a complainant’s inability to provide sufficient particularisation of the alleged abuse.¹¹⁴⁷

After we published the Consultation Paper, the Victorian Law Reform Commission (VLRC) published its report *The role of victims of crime in the criminal trial process*. As discussed in section 3.3.2, the VLRC identified five ‘overarching rights and entitlements’ of victims arising from their inherent interest in the criminal proceedings. Victims are entitled to be:

- treated with respect and dignity
- provided with information and support
- able to participate in processes and decision-making without carrying the burden of prosecutorial decision-making
- protected from trauma, intimidation and unjustified interference with privacy during the criminal trial process
- able to seek reparation.¹¹⁴⁸

All of these ‘overarching rights and entitlements’, other than in relation to seeking reparation, are reflected to some extent in current prosecution guidelines and in the services currently provided to support victims as witnesses.

In Chapter 20, we outline current key provisions in prosecution guidelines relating to victims and the Witness Assistance Services (WAS) that states and territories currently provide to assist witnesses, particularly victims, in the prosecution process.

In the Consultation Paper, we identified some possible principles which focus on general aspects of prosecution responses that are of particular importance or concern to victims and survivors and which might help to inform prosecution responses. We also outlined the current prosecution guidelines in relation to decisions to charge and discussed the importance to victims and survivors of charging and plea decisions and how they might be made in a manner that encourages an effective prosecution response for victims and survivors.

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 these issues in prosecution responses.

We had not anticipated finding significant problems in decision-making processes within the Offices of the Director of Public Prosecutions (ODPPs) in any of our case studies. However, two case studies revealed such problems. In addition to the issues that arose in these two case studies, many survivors have told us in private sessions and in submissions to Issues Paper 8 that they have not agreed with or have not understood prosecution decisions in matters in which they were complainants, witnesses or close family members. Some survivors remain dissatisfied years after the decisions.

This is not to say that the prosecution decisions in question were necessarily unjustified or that they were not explained, at least to some extent, to the complainants. They may even have been accepted at the time. However, it is not surprising that, for many complainants, witnesses or close family members, the criminal justice process is very difficult to understand and its outcomes for them may be very difficult to accept, particularly where prosecutions are discontinued or guilty pleas to lesser charges are accepted.

In Chapter 21, we discuss the two case studies that revealed particular problems; and possible complaints and oversight mechanisms that might be applied to ODPPs.

In the Consultation Paper, we discussed some possible reforms, and some interested parties addressed these issues in their submissions in response to the Consultation Paper. We discuss what we were told in submissions; and our conclusions in relation to ODPP complaints and oversight mechanisms.

20 Issues in prosecution responses

20.1 Introduction

Prosecutors do not represent the complainant in the prosecution. As we noted in Chapter 2, although the complainant's participation in the prosecution is likely to be vital, it is not 'their' prosecution.

A prosecutor is a minister of justice who represents the Director of Public Prosecutions (DPP). The DPP represents the Crown (effectively, the community). The DPP acts in the public interest, independently of the government and political influence as well as inappropriate individual or sectional interests in the community and the media.¹¹⁴⁹ The public interest in the prosecutorial context is for the guilty to be brought to justice and for the innocent not to be wrongly convicted.¹¹⁵⁰

It was not that long ago that, in England and Wales, prosecuting barristers were forbidden by the *Code of Conduct for Barristers* to have any contact with complainants before the trial. Even during the mid-1990s, after those rules were relaxed, apparently few prosecuting barristers routinely introduced themselves to complainants before the trial.¹¹⁵¹

However, with the increasing recognition of the role and rights of victims in the criminal justice system, prosecution services have adopted policies and procedures that require them to take greater account of the needs and interests of victims. They have also undertaken the provision of victims' support services in connection with prosecutions.

In Australian jurisdictions, some of the policies and procedures arise under or implement elements of victims' charters, which we discussed in Chapter 3. In this chapter, we outline current key provisions in prosecution guidelines relating to victims – in particular:

- providing victims with information
- consulting victims
- preparing victims for court
- giving reasons for prosecutors' decisions.

We also outline the Witness Assistance Services (WAS) that states and territories currently provide to assist witnesses, particularly victims, in the prosecution process.

In the Consultation Paper, we identified a number of possible principles which focus on general aspects of prosecution responses that are of particular importance or concern to victims and survivors and which might help to inform prosecution responses. The possible principles concerned:

- training for all prosecution staff on the nature and impact of child sexual abuse
- facilitating, to the extent possible, continuity in staffing of the prosecution team involved in a prosecution

- maintaining regular communication with victims (and their families) to keep them informed of the status of the prosecution
- ensuring WAS are funded and staffed to ensure they can keep victims (and their families) informed and put in contact with relevant support services
- particularly in relation to historical allegations of institutional child sexual abuse, prosecution staff should be trained to be non-judgmental and to focus on the credibility of the complaint or allegation rather than the credibility of the complainant.

An additional issue emerged from submissions and in Case Study 46 in relation to the provision of information to victims. A number of submissions and witnesses identified that complainants would benefit from having more information about what to expect in court in relation to giving evidence and particularly in relation to cross-examination. We also discuss this issue in this chapter.

The most significant decisions that prosecutors make for victims and survivors – and for the accused – are decisions:

- whether to commence a prosecution
- to discontinue a prosecution
- to reduce the charges against an accused
- to accept a plea of guilty to a lesser charge.

In the Consultation Paper, we identified a number of possible principles to guide prosecution charging and plea decisions. The possible principles concerned:

- getting the charges right early
- confirming the appropriateness of the charges as early as possible
- the importance of the charges for which a guilty plea is accepted reasonably reflecting the true criminality of the abuse
- allowing adequate time to consult the complainant and the police in relation to any proposal to downgrade or withdraw charges or to accept a negotiated plea.

A number of interested parties commented on the possible principles. In this chapter 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.

As we noted in section 8.1, police conduct some prosecutions of child sexual abuse matters, usually in magistrates' courts or children's courts. In relation to police prosecutions, regard should be had to the principles that we recommend in this chapter in relation to prosecution responses, to the extent they are relevant to police prosecutions.

20.2 Prosecution guidelines in relation to victims

20.2.1 Introduction

As discussed in Chapter 3, the United Nations *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* led to the adoption of victims' rights charters or similar instruments throughout Australia. All Australian states and territories now have in place a charter or declaration of principles which reflects the key principles of the United Nations Declaration. In all jurisdictions except Tasmania and the Northern Territory, these are provided for by legislation.¹¹⁵²

In Chapter 3, we outlined a number of common elements in these victims' charters, including the following:

- Victims are to be treated with courtesy and respect.
- Victims are to be provided with information about support that may be provided to them and about the investigation and prosecution.
- Victims are to be protected from:
 - intrusions on privacy, particularly the release of details that would identify them
 - unnecessary contact with the accused
 - unnecessary requirements to attend hearings.

The elements are also reflected in prosecution agencies' policies and guidelines.

Prosecution agencies in all Australian jurisdictions have guidelines in place which assist prosecutors in their decision-making and also serve to inform the legal profession in general and the community about the principles that lie behind prosecutorial decisions.

Most of these guidelines are available online to the public.¹¹⁵³ The Tasmanian DPP adopted a new *Prosecution policy and guidelines* in October 2016 which is available online to the public.¹¹⁵⁴ We understand that the guidelines of the Northern Territory's DPP are currently under review; we refer to their current guidelines below, but we note that they may be amended shortly.

Prosecution guidelines in most Australian jurisdictions also provide specific guidance on the treatment of victims.

The guidelines in Victoria, Queensland and Western Australia include similar statements of overarching principles that should be followed in dealings with victims.¹¹⁵⁵ These capture the need to treat victims with courtesy, respect and dignity and to take into account and be responsive to the particular needs of victims, such as age; sex or gender identity; race or Indigenous background; cultural or linguistic diversity; sexuality; disability; and religious belief.

The guidelines in New South Wales, South Australia and the Australian Capital Territory incorporate similar considerations by reference to the *Charter of Victims Rights, Victims of Crime Act 2001* (SA) and *Victims of Crime Act 1994* (ACT) respectively.¹¹⁵⁶

20.2.2 Providing victims with information

The guidelines in each jurisdiction require prosecutors to provide specified information to victims. The information requirements are outlined below.

New South Wales

In New South Wales, Office of the Director of Public Prosecutions (ODPP) lawyers and Crown prosecutors (where appropriate) are required to make contact with the victim and provide ongoing information about the progress of the case. In particular, the following information is to be provided in a timely manner, regardless of whether the victim has requested it:

- charges laid or reasons for not laying charges
- any decision to change, modify or not proceed with charges laid and any decision to accept a plea to a less serious charge
- the date and place of hearing of any charge laid
- the outcome of proceedings, including appeal proceedings, and sentence imposed.¹¹⁵⁷

Victoria

When communicating with a victim, the Office of Public Prosecutions (OPP) is to have regard to the following:

- whether the victim wishes to be kept informed about the progress of the prosecution
- the victim's preferred method of contact
- the particular circumstances of the victim (for example, age, capacity to understand English, disability or cognitive impairment)
- the sensitivity and complexity of the case
- the urgency of the information to be communicated.¹¹⁵⁸

The OPP is to provide information to victims where:

- any new charges are filed
- charges are substantially modified or withdrawn
- a plea of guilty is accepted to a lesser charge.¹¹⁵⁹

Information is to be given to victims about the following hearing outcomes:

- committal mention
- contested committal
- initial directions hearing
- trial
- plea
- sentence.¹¹⁶⁰

Queensland

General information requirements in advance of the trial include providing access to information about services such as victim–offender conferencing as well as welfare, medical, counselling and legal services. Victims are also to be informed of Queensland legislative provisions that may be of relevance to them, such as the *Victims of Crime Assistance Act 2009* (Qld).¹¹⁶¹

Where the victim is a complainant of a sexual offence, they are also to be told that the court will be closed during their testimony and that there is a general prohibition against publicly identifying the complainant.¹¹⁶²

Once a case lawyer has been allocated to the case, victims must be advised of:

- the identity of the person charged (except where that person is a juvenile)
- the charges that police have made against a person or, as appropriate, the charges upon which the person has been committed for trial or for sentence
- the identity and contact details of the case lawyer
- the circumstances in which the charges against the defendant may be varied or dropped.¹¹⁶³

In addition, the case lawyer must give the victim the following information about the progress of the case if the victim requests it:

- details about relevant court processes, and when the victim may attend a relevant court proceeding, subject to any court order
- details of the availability of diversionary programs in relation to the crime
- notice of a decision to substantially change a charge, or not to continue with a charge, or accept a plea of guilty to a lesser charge
- notice of the outcome of a proceeding relating to the crime, including any sentence imposed and the outcome of any appeal.¹¹⁶⁴

Information which the victim is entitled to receive must be provided within a reasonable time after the obligation to give the information arises.¹¹⁶⁵

Western Australia

Prosecutors are required to make contact with the victim and provide ongoing information about the progress of the case. In particular, victims should be given information in a timely way about:

- charges laid or reasons for not laying charges
- any decision to discontinue or make substantial change to the charges laid and any decision to accept a plea to a lesser or alternative charge or charges
- the date and place of hearing of any charge laid
- the outcome of proceedings, including appeal proceedings, and any sentence imposed.¹¹⁶⁶

South Australia

The guidelines state that victims have a right to information, including about the progress of the prosecution and particular circumstances of the offender:

Information as to the proceedings and the victim's role must be given at an early stage and there is a continuing obligation to keep the victim informed. Where possible, information about the proceedings and the legal implications should be given by the prosecutor. An effort must be made to minimise the number of staff members with responsibility for contacting the victim and handling the file.¹¹⁶⁷

Victims must be informed of the outcome of finalised court proceedings in a timely way.¹¹⁶⁸

Tasmania

Under the Tasmanian guidelines, a victim who is to be a witness for the prosecution is to be informed about the trial process and their rights and responsibilities as a prosecution witness. They are also to be informed of the progress of the prosecution.¹¹⁶⁹ Where it is determined that an indictment should not be filed or a prosecution discontinued, the complainant is to be informed of that decision as early as possible.¹¹⁷⁰

In relation to victims of sexual offences, the guidelines state:

It is recognised that complainants in sexual offence crimes are particularly vulnerable to the criminal justice system process. The Office recognises the importance of keeping the complainant informed of the decision to prosecute or to discharge.

The complainant, where possible, is to be kept informed of developments in the progress of the matter.¹¹⁷¹

Australian Capital Territory

Under the guidelines, victims have a right to information about the progress of investigations and the prosecution of the offender, including the charges and any modifications to the charges. A victim should be told about any decision not to proceed with a charge against the accused. Victims should also be given an explanation of the outcome of criminal proceedings, including of any sentence and its implications. Victims must be informed of the outcome of finalised court proceedings in a timely way.¹¹⁷²

Northern Territory

The guidelines state that victims of crime should be given information in a timely way about:

- charges laid against any offender for the crime and any changes to these charges
- reasons for not laying charges or for not proceeding with charges
- where and when the matter is to come before court
- the trial process and the rights and responsibilities of witnesses
- whether or not bail has been granted and any bail conditions relating to protecting witnesses from the offender
- reasons for accepting a plea of guilty to a lesser charge
- the outcome of criminal proceedings (including any appeal) and the sentence imposed (if any).¹¹⁷³

20.2.3 Consulting victims

In addition to requirements to provide specified information, guidelines in some jurisdictions require victims to be consulted and their views taken into account before certain decisions are made.

In New South Wales, there is a general requirement for the views of victims to be sought and recorded on the ODPP file. These views are to be taken into account in making decisions about prosecutions.¹¹⁷⁴ Similarly, the Northern Territory guidelines state that, in all cases involving indictable offences, it will be appropriate to seek and take account of the views of victims when making decisions about prosecutions.¹¹⁷⁵

In South Australia, parents of child victims must be given adequate information about the legal system and the impact upon children so that they can make informed decisions. The prosecutor must give these views appropriate consideration and, where possible, accord them significant weight. However, the public interest must at all times be the paramount consideration.¹¹⁷⁶

In most jurisdictions, particular emphasis is placed on consulting victims before making a decision to change, modify or not proceed with charges laid and before making any decision to accept a plea of guilty to a lesser charge. These requirements are discussed in section 20.5.3.

20.2.4 Preparing victims for court

Guidelines in most jurisdictions also require prosecutors to be involved in preparing victims for the prosecution process.

In Victoria, the solicitor with conduct of the prosecution must ensure that all victims are informed about the court process and their entitlement to attend any relevant court proceedings, unless the court otherwise orders. If a victim is to appear as a witness for the prosecution, the solicitor must ensure that the victim is informed about the trial process and the victim's role as a witness. They must also be offered the opportunity to attend a WAS conference, in which the court process and their role as a witness is explained, before they give evidence.¹¹⁷⁷

The Victorian guidelines also require the solicitor with conduct of the prosecution, as far as is reasonably practicable, to minimise a victim's exposure to unnecessary contact with, and to protect them from intimidation by, the accused, defence witnesses and family members and supporters of the accused. This might include steps such as ensuring that victims are not waiting unsupported in areas of the court that place them at risk of unnecessary contact with the accused and showing them rooms in the court where they can wait in private.¹¹⁷⁸ The Australian Capital Territory guidelines include similar guidance to prosecutors. The guidelines direct them to have concern for the safety and wellbeing of victims, which includes protecting them from unnecessary contact with the accused and defence witnesses during the course of a trial or hearing.¹¹⁷⁹

The New South Wales guidelines state that victims 'should appropriately and at an early stage of proceedings have explained to them the prosecution process and their role in it'.¹¹⁸⁰ Similar requirements to inform victims of the trial process and their role in the prosecution exist in the Queensland, Australian Capital Territory and Western Australian guidelines.¹¹⁸¹

In Queensland there is an additional requirement for a pre-trial conference to be held. Where a victim is to be called as a witness, the case lawyer or prosecutor is to hold a conference with the victim beforehand and, if reasonably practicable, the witness should be taken to preview proceedings in a court that is of the same status as the court in which they will give evidence.¹¹⁸²

20.2.5 Giving reasons for prosecutors' decisions

Many of the DPP guidelines provide for information about certain prosecutorial decisions to be given to some persons. With minor differences, under the New South Wales, Victorian, and Queensland guidelines, reasons for decisions made in the course of prosecutions may be disclosed to persons or agencies who have a legitimate interest in the matter and where it is appropriate in the circumstances to do so. A legitimate interest includes media interest in reporting the open dispensing of justice where previous proceedings have been public.¹¹⁸³

In New South Wales the discretion to give reasons applies to decisions made in the course of prosecutions or of giving advice.¹¹⁸⁴

In Victoria it applies where the OPP has made a discretionary prosecutorial decision. The policy provides guidance on what criteria might make it appropriate in the circumstances to provide reasons, including:

- the nature and importance of the decision
- the competing rights and interests of the parties affected by the decision
- whether the provision of reasons would tend to inform rather than harm affected parties
- whether information can be provided to certain parties without the risk of further harmful dissemination
- whether the interests of justice are served by the giving of reasons.¹¹⁸⁵

The Victorian guidelines specify that a person or agency will have a legitimate interest where:

- they have a direct interest as a party
- they have a statutory entitlement to the information
- the public interest dictates that the information should be provided.¹¹⁸⁶

It also specifies that a balance is to be maintained between the rights of certain persons to be informed of the reasons and the rights of all parties involved in the matter to expect that information which would not otherwise be in the public domain will not be disseminated unnecessarily.¹¹⁸⁷

The Western Australian guidelines provide only that reasons for discontinuance of a prosecution will be given to a person who has a legitimate interest in proceedings.¹¹⁸⁸ Similarly, the Australian Capital Territory guidelines provide that, where the DPP exercises the power to decline to proceed further with a prosecution, reasons may be given to any person with a legitimate interest in the matter.¹¹⁸⁹

The *Victims of Crime Act 2001 (SA)* provides that a victim, on request, should be informed of the reasons for the prosecutor's decision if the prosecutor decides not to proceed with the charge, to amend the charge or to accept a plea to a lesser charge or agrees with the defendant to make or support a recommendation for leniency.¹¹⁹⁰ The South Australian guidelines do not otherwise include provisions for providing interested parties with decisions.

The Tasmanian guidelines do not include a general requirement for providing those with a legitimate interest with the reasons for a prosecutor's decision. However, they provide that, where there is a proposed discharge or reduction of charges, the complainant should be informed of the reasons in person.¹¹⁹¹ For sexual offences, the guidelines also state that, where the ODPP decides that an indictment should not be filed after police have laid charges, the complainant should be informed of the reasons in person and with a witness assistance officer present if possible.¹¹⁹²

The Northern Territory guidelines do not make specific provision for the DPP to give reasons for decisions. The guidelines state that reasons for discontinuance will not normally given. The DPP's consent is required before reasons are disclosed.¹¹⁹³

The policies that provide for the publication of reasons generally also provide that reasons will not be given where to do so could either:

- cause serious undue harm to a victim, a witness or an accused person
- significantly prejudice the administration of justice.¹¹⁹⁴

20.3 Witness Assistance Services

Each Australian jurisdiction has a WAS or equivalent unit to assist victims of crime and vulnerable prosecution witnesses.

In most jurisdictions, the WAS is part of the prosecution agency. In Victoria and Western Australia, the WAS is provided by government agencies outside the prosecution agency. In Queensland, the WAS is provided by non-government agencies. The names of units providing witness and victim support services vary between jurisdictions.

The services that WAS or equivalent units provide to victims and witnesses vary between jurisdictions, but common services include:

- providing information about legal processes and court proceedings
- providing information about the rights of victims and witnesses
- providing counselling and support or referring victims and witnesses to other service providers
- identifying special needs of victims and witnesses
- preparing victims and witnesses for court and giving evidence, including court familiarisation tours
- assisting victims to prepare victim impact statements.

Most jurisdictions require witness assistance officers to have relevant tertiary qualifications in fields such as social work, psychology, counselling and the law. In some jurisdictions there are a number of Aboriginal officer positions.

In addition to the services listed above, a key responsibility of witness assistance officers is to liaise between the victim and prosecutors as well as other agencies involved in the prosecution, such as the police, counsellors and victim support services.

Most prosecution guidelines provide specific guidance on prosecution interactions with victims and witnesses and referrals to the WAS. The following outline of services provided by the WAS or equivalent unit in each jurisdiction is based on publicly available information.

New South Wales

The New South Wales guidelines state that ODPP lawyers and Crown prosecutors should ensure that they are familiar with the legislative provisions available for children to give evidence at court, such as giving evidence in chief wholly or partly in the form of a recording that an investigating official has made of an interview with a child. In the case of a child witness, the ODPP lawyer is to ensure that the child is appropriately prepared for and supported in his or her appearance in court.¹¹⁹⁵

In general, child witnesses are to be treated consistently with the provisions of the United Nations *Convention on the Rights of the Child*, and ODPP lawyers should comply with the NSW Interagency Guidelines for Child Protection Intervention in cases involving the physical or sexual assault of children. All child victims and witnesses should be referred to the New South Wales WAS at the earliest opportunity.¹¹⁹⁶

The guidelines advise prosecutors that referrals should be made to New South Wales WAS in every case of substance, including a case of sexual assault.¹¹⁹⁷ In particular, for witnesses with a disability (for example, intellectual disability, physical disability, sensory disability or psychiatric disability) there is a presumption in favour of giving evidence via closed circuit television (CCTV), and witnesses with a disability should be referred to the WAS to assess their support needs and

to determine any barriers to communication and/or access that may require some planning. Similarly, prosecutors are encouraged to consult with an Aboriginal witness assistance officer about Aboriginal victims and witnesses who may require assistance.¹¹⁹⁸

The key aims of the New South Wales WAS are to minimise stress and trauma that can result from being involved in the legal process and to enable witnesses to give their evidence in court to the best of their ability.¹¹⁹⁹ The New South Wales WAS assists victims and witnesses by:

- providing information about the legal process
- discussing with people their needs and requirements
- giving information about other services that might be able to help
- communicating with the lawyer handling the case
- organising and attending meetings with lawyers when necessary
- providing information about victims' rights and special provisions for giving evidence
- supporting victims and witnesses throughout the prosecution.

WAS officers can help witnesses get ready for court by:

- preparing witnesses, including children, for giving evidence in court
- helping witnesses to understand their role and what to expect at court
- liaising with prosecution lawyers about witnesses' needs
- arranging a visit to a court and other facilities so that the witness can become familiar with the environment
- finding ways of helping the witness to cope with coming to court and with being a witness
- arranging support for victims who are giving evidence in court
- preparing people for court outcomes, such as a verdict of not guilty.

After the trial or hearing, witness assistance officers can provide an opportunity to talk about the experience of the court process and the final outcome.¹²⁰⁰

The New South Wales WAS gives priority to people with particular vulnerabilities, including victims of sexual assault and domestic and family violence, people under the age of 18 years, those with a history of mental health concerns or those who are experiencing particular trauma difficulties about coming to court.¹²⁰¹

Sexual assault matters (child and adult) have increased as a proportion of the New South Wales WAS's work. In 2012, 56 per cent (1,256) of WAS matters were sexual assault matters, compared with 64 per cent (1,753) in 2015–16.¹²⁰²

Since 2003, the New South Wales WAS has maintained three identified Aboriginal positions, with each officer covering approximately one-third of the state. Generalist witness assistance officers also assist Aboriginal victims and witnesses where appropriate or where the Aboriginal officers are not available to assist.¹²⁰³

The New South Wales ODPP recently created four new full-time WAS officer positions, bringing the total to 35 positions in 2016–2017. In its 2015–2016 Annual Report, the New South Wales ODPP stated that it anticipates that, with these additional resources, the New South Wales WAS will be better equipped to manage the increase in workload, court sitting weeks and delays currently affecting the District Court.¹²⁰⁴

In its submission in response to the Consultation Paper, the New South Wales ODPP stated that the WAS is now in its 23rd year of operation and that:

The WAS has become an invaluable part of the prosecution process in NSW. WAS officers have a psychological or social work background and a counselling background and significant experience in these fields before coming to the ODPP. WAS officers act as case managers, facilitating communication and ensuring that victims and vulnerable witnesses have support throughout the prosecution process.¹²⁰⁵

Victoria

The Victorian guidelines draw attention to special arrangements that can be made for vulnerable witnesses, such as children, persons with a cognitive impairment and adults, who will give evidence in sexual offence cases. These special arrangements may include giving evidence by CCTV, putting screens in the courtroom to remove the accused from the direct line of vision of the witness, ensuring a support person is present, and giving evidence in a closed courtroom.¹²⁰⁶

The guidelines state that, if appropriate, the OPP must refer persons adversely affected by crime to relevant support services and to entities that may provide access to entitlements and legal assistance. In all matters, the OPP is to inform all victims and witnesses that they may contact the Victorian WAS for information, support and assistance.¹²⁰⁷

Also, where a matter involves a sexual offence, or a victim who is a child or has a disability or cognitive impairment, the OPP solicitor with conduct of the prosecution should refer the matter to the Victorian WAS as early as possible in the prosecution process.¹²⁰⁸ Child witnesses under 16, complainants in sexual offence matters and victims and witnesses with a disability or cognitive impairment who are required to give evidence for the prosecution are also to be offered a pre-committal and a pre-trial Victorian WAS conference.¹²⁰⁹

In Victoria, there is a separate Child Witness Service (Victorian CWS), which operates as a separate business unit from the Victorian WAS within the Community Operations and Strategy Division of the Victim Support Agency, a part of the Department of Justice and Regulation.¹²¹⁰ The Victorian WAS supports victims and witnesses of serious crime through the court process, and the Victorian CWS is a specialist service for children and young people who are victims or witnesses in criminal proceedings. Where a matter involves child and adult witnesses, Victorian WAS and the Victorian CWS may share the care of those witnesses.

The Victorian WAS provides witnesses with information on the court process and giving evidence, including what they can expect, their rights and entitlements and the status of a matter. They also provide information about completing a victim impact statement and about other agencies that may be able to assist victims, such as the Victims of Crime Assistance Tribunal.

In addition to providing information, the Victorian WAS provides assistance to victims and witnesses as required, such as support before major court hearings, providing court tours and explaining the role of court staff, and debriefing with witnesses after hearings.¹²¹¹

The Victorian CWS is staffed by social workers and psychologists who assist child witnesses to negotiate the court system, and it aims to reduce the trauma and stress experienced by a child witness by:

- preparing them for the role of being a witness
- familiarising them with the court process and personnel
- supporting them and their family throughout the criminal proceedings and court
- providing post-trial debriefings
- referring them to relevant community agencies.¹²¹²

In his submission in response to the Consultation Paper, the Victorian DPP provided the following data from a survey about victim satisfaction with the services provided by the Victorian WAS:

- 98 per cent of victims strongly agreed and 2 per cent agreed that WAS staff treated them with courtesy, dignity and respect
- 76 per cent strongly agreed and 19 per cent agreed that WAS staff provided them with information about their rights and entitlements as a victim of crime (5 per cent neither agreed nor disagreed)
- 62 per cent strongly agreed and 27 per cent agreed that WAS staff made them aware of other services for victims of crime and how to access them (11 per cent neither agreed nor disagreed)
- 84 per cent strongly agreed and 15 per cent agreed that WAS staff helped them understand the process (1 per cent neither agreed nor disagreed)
- 85 per cent of victims strongly agreed and 12 per cent agreed that WAS staff supported them to give evidence to the best of their ability (3 per cent neither agreed nor disagreed)

- 85 per cent of victims strongly agreed and 13 per cent agreed that WAS staff helped them to feel less distressed and/or more confident about going through the court process (1 per cent neither agreed nor disagreed and 1 per cent disagreed)
- 86 per cent of victims strongly agreed and 14 per cent agreed that WAS took their needs and concerns into account
- 89 per cent of victims strongly agreed and 11 per cent agreed that they were satisfied with the services they received from WAS staff
- 84 per cent of victims strongly agreed and 14 per cent agreed that they were satisfied that WAS staff spent enough time with them (2 per cent neither agreed nor disagreed).¹²¹³

Queensland

The Queensland guidelines include guidance relating to special witnesses under section 21A of the *Evidence Act 1977* (Qld). Under section 21A, children under the age of 16 are classified as special witnesses. In addition, section 21A captures people who, if required to give evidence in accordance with the usual practice, are:

- likely to be disadvantaged as a witness due to mental, intellectual or physical impairments or another relevant matter
- likely to suffer severe emotional trauma
- likely to be so intimidated as to be disadvantaged as a witness.¹²¹⁴

The Queensland guidelines require prosecutors to acquaint themselves with the needs of the special witness before the proceedings begin so that they can make an application to the court for appropriate orders about the way the evidence is to be given. The guidelines specify that, in all cases where the witness is under 16 years of age and is to testify about violent or sexual offences, orders should be sought under section 21A for the witness to give evidence via CCTV unless the witness would prefer to give evidence in the courtroom.¹²¹⁵

In addition, the *Criminal Law (Sexual Offences) Act 1978* (Qld) requires all evidence of a complainant in a sex offence matter to be heard in a closed court,¹²¹⁶ and the guidelines require prosecutors to be vigilant to ensure this occurs. Also, in the pre-hearing conference, the victim of a sexual offence must be asked whether he or she wants a support person. A 'support person' includes external support persons. If the victim is a child, the victim should also be asked whether they want their parents or guardians to be present unless that person is being called as a witness in the proceeding. If the victim does not want a support person present then their reasons for making this decision should be obtained and noted in the file.¹²¹⁷

The Queensland guidelines also make provision for improper questions. Prosecutors have a responsibility to protect witnesses, particularly young witnesses, against threatening, unfair or unduly repetitive cross-examination by making proper objection.¹²¹⁸

In Queensland, witness assistance services are provided by non-government organisations, including Protect All Children Today (PACT) and Court Network.

PACT's services are available to all children and young people between three and 17 years of age who have to give evidence in criminal court proceedings as victims or witnesses.¹²¹⁹ Services provided include court preparation, education, emotional support and referral to counselling and other support services. These services are provided by trained Child Witness Support Volunteers. If PACT has an established relationship with a young person, the volunteer will continue to provide support in court after they turn 18.

Court Network provides support and information about going to court, provides in-court support and information on how the courts and legal systems operate, conducts court familiarisation tours, and makes referrals to other community services.¹²²⁰

Western Australia

As in Victoria, child and adult victims and witnesses are supported by two separate units: the Victim Support Service (WA VSS) and the Child Witness Service (WA CWS). Both services are part of the Department of the Attorney General. The WA VSS provides services to adult victims of crime, some of whom have suffered sexual abuse, including historical child sexual abuse. The WA CWS provides emotional support and practical preparation for people under the age of 18 who are to give evidence in court so that the trauma they may experience during their involvement in the prosecution process is reduced.¹²²¹

The Western Australian guidelines require prosecutors to have regard to the fact that a victim of crime may need to relive the emotional and physical distress suffered from the offence when called to testify. The ODPP recognises that victims and witnesses need to be informed about court processes and often require professional support, and prosecutors are to refer victims and witnesses to the WA VSS and WA CWS in order for that support to be provided.¹²²²

The WA VSS provides:

- information on the status of police investigations
- information about court proceedings
- assistance in preparing victim impact statements
- counselling and support, including during court proceedings
- information and referrals for other services

- assistance in understanding a witness's rights within the criminal justice system
- assistance with enquiries about criminal injuries compensation claims
- information on the status of convicted offenders in Western Australia through the Victim Notification Register.¹²²³

The aims of the WA CWS are to:

- keep the child witness and their family fully informed about the progress of a case
- assist child witnesses to prepare a victim impact statement even if the child is not required to give evidence
- liaise with counsellors
- provide consultation/advocacy on behalf of a child witness with government agencies
- research the needs of child witnesses
- heighten the awareness of professionals to the issues, needs and problems that child witnesses face.¹²²⁴

South Australia

The South Australian guidelines state that, in accordance with the principles governing the treatment of victims set out in the *Victims of Crime Act 2001 (SA)*, a victim who is to be a witness for the prosecution is to be informed about the trial process and of his or her rights and responsibilities as a prosecution witness.¹²²⁵

When dealing with witnesses under 16 years of age, a person who suffers from an intellectual disability, a victim of an alleged sexual offence or a person who is at some special disadvantage, the guidelines require that consideration be given to the provisions of section 13A of the *Evidence Act 1929 (SA)*. In cases where the section might apply, a witness should be advised of the options that are available under the Evidence Act, including use of a screen, CCTV, a court companion and a closed court. If the section applies to a witness, an application should be made after consulting with the witness where possible before the commencement of the trial.¹²²⁶

The guidelines require that, in the early stages of contact with the victim, consideration must be given to involving the South Australian WAS in the case. In all appropriate cases the victim is to be advised of the service provided by the South Australian WAS. Where necessary the victim will be referred to the WAS. A witness assistance officer will then make direct contact with the victim.¹²²⁷

The ODPP established the South Australian WAS to ensure that all victims, witnesses and their immediate family members have access to information and support services and are aware of their rights and responsibilities when dealing with the criminal justice system.¹²²⁸ It provides specialised information and support to victims and witnesses who are vulnerable due to the nature of the alleged offences or the nature of their personal circumstances.

It provides a range of services, including:

- providing information about the court process and outcomes, victim rights and responsibilities, and avenues for complaints
- acting as a key point of liaison and communication between legal staff and victims as well as external agencies attending pre-trial and post-trial meetings between the office and victims and witnesses
- undertaking assessments of the impact of crime on individuals, noting mental health concerns and support structures that individuals may have
- providing crisis support and referral information
- providing court familiarisation and court preparation services
- assessing vulnerable witness provisions
- assisting with the preparation of victim impact statements
- providing limited court companion services, primarily to child victims and witnesses
- advocating for victims' needs within the ODPP and criminal justice system
- providing education and training to ODPP staff, external agencies, other professionals and members of the community.¹²²⁹

Tasmania

The Tasmanian guidelines state that, upon being given conduct of a matter, a prosecutor should immediately consider whether a matter should be referred to the WAS. They also state that the WAS will have automatic involvement in sexual assault matters without the need for a referral from a prosecutor; in a sexual assault matter, the police will notify the WAS manager, who will allocate the matter to a WAS officer.¹²³⁰

The Tasmanian WAS should be involved as early as possible in matters where witnesses are likely to require support. Such cases are most likely to be sexual offences, offences against children, offences against people with disability and offences involving death. This will ensure that the Tasmanian WAS builds the necessary relationship with the witnesses to enable its officers to properly support witnesses through the prosecution process.

The Tasmanian WAS assists witnesses giving evidence for the prosecution. Witness assistance officers also offer support to victims and their families. The Tasmanian WAS provides:

- information about court procedures and legal processes
- crisis counselling
- debriefing from court
- referral to services in the community
- liaison between witnesses and ODPP staff
- court familiarisation tours
- support by attending meetings with witnesses and victims
- assistance in preparing victim impact statements.¹²³¹

Australian Capital Territory

The guidelines in the Australian Capital Territory state that, in the early stages of contact with the victim, and/or their families, consideration must be given to involving the Australian Capital Territory WAS in the case. In all appropriate cases, victims should be advised of the service and, where necessary, referred to it.¹²³²

The Australian Capital Territory WAS:

- organises initial ‘meets and greets’ between witnesses, prosecutors and the WAS
- schedules further appointments and teleconferences
- attends pre-trial proofings
- facilitates court familiarisation tours
- accompanies witnesses to court and sits with witnesses in remote witness rooms when they are required to give evidence.

After finalisation of matters before the court, witness assistance officers often attend debriefing sessions with witnesses and prosecutors. Australian Capital Territory witness assistance officers also assist victims in the preparation of victim impact statements.¹²³³

Northern Territory

The Northern Territory guidelines state that, in trials for sexual offences, certain vulnerable witnesses are entitled to prerecord either their evidence in chief or all of their evidence. Particularly where there is potential for delay in having a matter determined by a court, prosecutors should elect to apply these provisions.¹²³⁴ There are also legislative provisions applicable to the calling of evidence from children (Part II of the *Evidence Act (NT)*). Prosecutors must be familiar with these provisions, which are designed to assist children to give their evidence without delay and in a manner that minimises trauma and distress to the child.¹²³⁵

In the Northern Territory, witness assistance resources are allocated according to need, with priority being given to special needs witnesses. Special needs witnesses include children under the age of 18, victims of sexual offences and those with intellectual or physical disabilities.¹²³⁶

The Northern Territory WAS:

- assists victims and witnesses to understand the court and legal process
- provides court familiarisation tours
- supports victims and witnesses during proofing sessions with the prosecutor, when giving evidence in court and while waiting to give their evidence
- liaises with prosecutors, police and court staff about any special needs of the victim or witness
- refers victims to counselling and other services
- provides information about applying for financial assistance
- arranges interpreters
- assists victims with the preparation of victim impact statements.¹²³⁷

Commonwealth

The Commonwealth WAS:

- provides information about court procedures and legal processes and the victim's role as a witness
- can accompany witnesses at case conferences and court
- provides referral to support services
- acts as a liaison between referred victims and witnesses and ODPP lawyers in relation to information and support related issues
- provides court familiarisation tours
- assesses the need for any special measures
- provides support before, during and after participation in judicial proceedings
- provides assistance and information on victim impact statements.¹²³⁸

In its submission in response to the Consultation Paper, the Commonwealth DPP submitted that the services and information provided to a vulnerable victim referred to the Commonwealth WAS will be based on their individual needs and circumstances.¹²³⁹

The Commonwealth DPP stated:

The CDPP commenced a Witness Assistance Service (WAS) Pilot Project in November 2008 with the employment of one social worker in the role of Witness Assistance Officer (WAO). There are currently two WAOs based in the Sydney Office with nationwide responsibility for providing assistance to complainant witnesses in CDPP prosecuted matters.

This reflects the CDPP's commitment to meeting its policy obligations as set out in the CDPP Victims of Crime Policy. The WAS is attached to the Human Exploitation and Border Protection Practice Group.

... The CDPP Victims of Crime Policy identifies the types of information that victims of crime are entitled to receive upon request and this guides the work of the WAOs, together with prosecutors in this area. The Policy recognises, in accordance with the suggestions of the Consultation Paper at 7.4.2, the importance to victims and their families of maintaining regular communication with them of the status of the prosecution unless they have been asked not to be informed. Where a child victim is involved communication with the child will occur through a parent or legal guardian.¹²⁴⁰

20.4 Principles for prosecution responses

20.4.1 Possible principles suggested in the Consultation Paper

In the Consultation Paper, we suggested that there may be value in identifying principles which focus on general aspects of prosecution responses that are of particular importance or concern to victims and survivors and which might help to inform prosecution responses.

We recognised that prosecution services may consider that they already act, or aim to act, in accordance with such principles. However, we suggested that there may be benefit in stating them so that they continue to receive priority in prosecution responses.

In the Consultation Paper, we identified the following general aspects of prosecution responses as being of particular importance to victims and survivors:

- training in child sexual abuse issues
- continuity in staffing
- regular communication
- WAS assistance
- issues concerning credibility of the complainant.

We suggested the following possible principles for these aspects of prosecution responses:

- All prosecution staff who may come into contact with victims of institutional child sexual abuse should be trained to have a basic understanding of the nature and impact of child sexual abuse – and institutional child sexual abuse in particular – and how it can affect people who are involved in a prosecution process, including those who may have difficulties dealing with institutions or person in positions of authority.
- While recognising the complexity of prosecution staffing and court timetables, prosecution agencies should recognise the benefit to victims (and their families) and survivors of continuity in prosecution team staffing and should take reasonable steps to facilitate, to the extent possible, continuity in staffing of the prosecution team involved in a prosecution.
- Prosecution agencies should continue to recognise the importance to victims (and their families) and survivors of the prosecution agency maintaining regular communication with them to keep them informed of the status of the prosecution, unless they have asked not to be kept informed.
- WAS assistance is particularly important in keeping victims (and their families) and survivors informed and ensuring that they are put in contact with relevant support services. WAS should be funded and staffed to ensure that they can perform this task, including with staff trained to provide a culturally appropriate service for Aboriginal and Torres Strait Islander victims and survivors. Specialist services for children should also be considered.
- Particularly in relation to historical allegations of institutional child sexual abuse, prosecution staff who are involved in giving early charge advice or in prosecuting child sexual abuse matters should be trained to:
 - be non-judgmental and recognise that many victims of child sexual abuse will go on to develop substance abuse and mental health problems, and some may have a criminal record
 - focus on the credibility of the complaint or allegation rather than the credibility of the complainant.

We sought submissions on these possible principles. We also sought submissions in relation to whether it is sufficient to address these issues by setting out general principles or whether we should consider making more specific recommendations – and, if we should consider making more specific recommendations, what should they be.

Submissions generally expressed support for these principles, with some submissions expressing very strong support. For example, the Centre Against Sexual Violence Queensland (CASV) stated that these principles for prosecution responses were fundamental.¹²⁴¹

People with Disability Australia (PWDA) suggested additional principles or guidance in relation to prosecution responses and charging and plea decisions in cases where a person with disability is a victim.¹²⁴² We discuss this suggestion in section 20.4.7.

20.4.2 Training in child sexual abuse issues

In section 8.2, we discussed the importance for police responses of all those who may come into contact with victims and survivors receiving some basic training about the nature and impact of child sexual abuse and institutional child sexual abuse in particular.

Many of the considerations that apply to police also apply to prosecutors.

Participating in a prosecution process is likely to be daunting for many victims and survivors. The prosecution is focused on an event or events which are likely to have caused them trauma and they may be at risk of being re-traumatised in the prosecution process.

Also, many victims and survivors will have had limited or no prior experience of the criminal justice system. They may have no understanding of the legal process or legal language. Some survivors may have had experience of the criminal justice system but as offenders rather than as victims, and they may have an even greater uncertainty about or distrust of 'the system' as a result.

Many of those who have suffered institutional child sexual abuse may also have difficulties dealing with institutions, including prosecution services; and people in authority, including prosecutors. They may have difficulty asking questions or giving their opinions without appropriate support. Ms Shireen Gunn, representing the Ballarat Centre Against Sexual Assault (CASA) Men's Support Group, told the public hearing in Case Study 46, that:

we're talking about people who are traumatised, often in their adult life they will have issues with homelessness, employment, relationships and schooling, so they will present right across the system, and if there is no awareness that trauma can present certain symptoms in adults, well, then, they just get further traumatised.¹²⁴³

In their submissions in response to the Consultation Paper, the New South Wales ODPP and the Victorian DPP provided information about training.

The New South Wales ODPP stated:

We recognise the need to ensure that all lawyers briefed in child sexual abuse cases are highly skilled in the area, and to this end we are developing a new curriculum of relevant training in areas such as advocacy, communication and conferencing skills and the dynamics of child abuse and legal issues. The completion of the modules of training will ensure practitioners as suitable to perform this type of work.¹²⁴⁴

The Victorian DPP detailed the steps taken by his office to provide prosecution staff with relevant training, which included training focused on sex offences and victims of trauma; recorded presentations on sex offences, including historical sex offences; written resources on sex offences; and skill-based workshops on complainant conferencing and historical sexual offences.¹²⁴⁵

Throughout our consultations there has been widespread support for increased training in child sexual abuse for all participants in the criminal justice system.

For example, CASV submitted:

we also strongly advocate for prosecution staff who come into contact with survivors of sexual abuse to have training in complex trauma, the impacts of sexual abuse, the myths and misconceptions about sexual assaults and how to respond appropriately to sexual assaults.¹²⁴⁶

Similarly, Jannawi Family Centre stated:

it is our belief that all professionals coming into contact with victims of child sexual abuse receive adequate and appropriate training in the dynamics of child sexual abuse and the significant trauma it creates for victims, survivors and their families and communities.¹²⁴⁷

Submissions noted the importance to victims of professional participants in the criminal justice system receiving such training. Micah Projects observed that it was important to victims to know that they were being guided through the stressful process of a prosecution by people who had a basic understanding of the impacts of trauma, noting that traumatic experiences could result in people's moods shifting from 'anger to distress and detachment in very short spaces of time'.¹²⁴⁸

The Victorian Victims of Crime Commissioner noted that such training would have benefits for both the victim and the prosecutor, as it would increase the confidence of the victim and make them a better witness, whilst prosecutors would be better placed to navigate legislative provisions relating to the improper questioning of vulnerable witnesses.¹²⁴⁹

Other submissions made similar observations that relevant training would assist prosecutors by giving them a full understanding of the offending when speaking to juries¹²⁵⁰ and enabling them to understand the emotional issues victims were facing.¹²⁵¹ Ms Robyn Knight, a survivor, submitted: 'A basic understanding of complex trauma is essential in dealing with victims and in presenting a complete case. How can the full effect of the crime be argued without this knowledge?'¹²⁵²

The South Eastern Centre Against Sexual Assault & Family Violence submitted that training may also be important for supporting the wellbeing of prosecutors, stating:

There have been instances in the past where prosecution staff have found the constant victims stories wearing for themselves. Training in an understanding of complex trauma would help them understand their reactions. Also it would help them understand their clients/witness and their responses better.¹²⁵³

The Commonwealth DPP submitted that:

The Commonwealth DPP does not generally prosecute cases involving institutional child sexual abuse however, I am open to expanding our training to cover the nature and impact of child sexual abuse and how it can affect people who are involved in a prosecution process.¹²⁵⁴

The Victorian Aboriginal Child Care Agency submitted that, in addition to training relating to the impacts of child sexual abuse, prosecution staff should also receive training that would enable them to provide culturally appropriate responses to Aboriginal and Torres Strait Islander communities.¹²⁵⁵ CASV also expressed support for prosecution staff completing Aboriginal and Torres Strait Islander Cultural Capability training so that they can provide a culturally appropriate response to survivors.¹²⁵⁶

We are satisfied that all those involved in prosecution responses who may come into contact with victims and survivors should have received some basic training about the nature and impact of child sexual abuse and institutional child sexual abuse in particular.

For those who have more detailed involvement, including prosecutors, more will be required.

In Chapter 31 we discuss measures to improve information for judges and legal practitioners. We note there that 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 discuss the benefits of providing feedback to judges and lawyers from children involved in child sexual abuse trials, as provided by Protect All Children Today (PACT) in Queensland, and material to assist the judiciary and lawyers to keep up to date with current social science research that is relevant to understanding child sexual abuse.

20.4.3 Continuity in staffing

We have heard from many survivors about the importance of continuity in the prosecution staffing on their matter. Some survivors have told us of positive experiences, where they were dealing with the same prosecution team throughout the matter, and how they had confidence in the prosecution team's understanding of their evidence and handling of the prosecution.

Other survivors have told us of negative experiences, where there were frequent staffing changes, they felt they needed to repeat the same material on a number of occasions, and they lacked confidence in the prosecution team's understanding of their evidence and handling of the prosecution. One personal submission to *Issues Paper No 8 – Experiences of police and prosecution responses* (Issues Paper 8) referred to the prosecution lawyer with carriage of the file changing a number of times, and another stated that her matter was assigned a new prosecutor only days before the trial began.

In the public hearing in Case Study 46, we heard evidence from a survivor, FAA, who was one of a number of complainants in prosecutions of a Catholic priest, FAD. The prosecutions of FAD occurred over a number of years, involving a number of trials, an interlocutory appeal and an appeal against convictions. Ultimately, in a number of trials in 2015 and 2016 FAD was convicted of 44 offences committed against six boys from the mid-1980s to the early 1990s. He was sentenced for these offences in August 2016. The trial of the counts relating to FAA was separated from the trial of other counts, and the trial in which FAA was the complainant was delayed until the other trial was completed. FAA gave evidence that:

I met with the prosecutor on the first day of the trial. It was a different prosecutor to the prosecutor that appeared at the committal hearing and who had met with me beforehand to prepare.

On this occasion, the new prosecutor only met with me in the morning before the court and at lunchtime. I didn't get a lot of time with the new prosecutor and I prepared myself by reading my statement.¹²⁵⁷

In its submission to Issues Paper 8, the South Australian Victim Support Service described the relationship between victim and prosecutor as being beneficial to both, as the victim's trust will make them a better witness and also the improve victim's experience.¹²⁵⁸ Similarly, the submission of the CREATE Foundation highlighted that young people who choose to participate in court processes stress the importance of trust and developing a relationship with their caseworker.¹²⁵⁹

The South Australian Victim Support Service's submission to Issues Paper 8 also stated that victims often report that the first time they meet the prosecutor is as late as the day before they give evidence or, in some cases, the day they give evidence, particularly in regional courts. They submitted that this does not give sufficient time for a victim to develop a relationship with and trust in the prosecutor.¹²⁶⁰

In its submission in response to the Consultation Paper, the New South Wales ODPP stated that it recognises the importance of maintaining continuity in prosecution staffing. It submitted:

This Office has long recognised that best practice in sexual assault prosecutions includes continuity of representation and early briefing of a Crown Prosecutor/Trial Advocate who will run the trial and be available for early conferencing and provision of information ... without early allocation of the trial prosecutor, the victim might justifiably feel that the case is not being handled professionally or with the care and attention they are entitled to expect. That is not to say that an effective and professional prosecution cannot be run if a matter is briefed later, but understandably, a victim's confidence in the process may be lower if this happens.¹²⁶¹

In his submission in response to the Consultation Paper, the Victorian DPP stated that:

The Victorian OPP's practice is to allocate [the] prosecution file to a specific solicitor, with the intention that the same solicitor will maintain carriage of the file until it is completed. If the matter subsequently goes to appeal, an Appeals solicitor, who has a degree of specialist knowledge relating to the appeal process, will be allocated the file for the appeal, but will liaise closely with the original prosecution solicitor.

While several prosecution solicitors may look at the file during its life, the same solicitor will keep the file wherever possible.

Prosecution files are also linked to a specific WAS staff member, with the intention that the same WAS worker will also remain engaged as the relevant WAS contact during the life of the file.

In this way, victims and persons adversely affected by crime may be assured that although the prosecutor may change during the life of a prosecution, the solicitor and prosecution team will usually remain unchanged throughout the process.¹²⁶²

A number of submissions in response to the Consultation Paper agreed that prosecution agencies should recognise the benefit to victims of continuity in prosecution staffing.¹²⁶³

In their joint submission, the Survivors & Mates Network (SAMSN) and Sydney Law School stated:

While clearly there are practical difficulties involved in providing continuity of police and prosecutors, this is likely to have a significant effect on the efficiency and effectiveness of prosecutions process since it overcomes one problem with prosecutors being allocated matters and transferred to the case very late in the process, allowing very little time for preparation and undermining the confidence of the witnesses.¹²⁶⁴

Several submissions noted that frequent changes in prosecution staff can be confusing and distressing for victims, particularly as such changes are rarely explained.¹²⁶⁵ Ms Knight, a survivor, submitted:

One of the most difficult factors I found was the change in ODPP prosecutors with most of the 6 adjournments. While each of them were very approachable and happy to provide briefing before and after each appearance, I felt I had to establish a new rapport and understanding with each new person. It was also clear that very little time is available to become fully conversant with the case. While I understand the logistics of having one prosecutor assigned to stay with a case is very difficult particularly in regional areas, this would have reduced a significant amount of anxiety for me. There is nothing more reassuring than a familiar face in the setting of the courts.¹²⁶⁶

A number of submissions referred to the re-traumatising effect on a victim of having to repeat their experiences to new prosecution staff.

Mr Daryl Higgins, a survivor, submitted that there ‘is nothing wors[e] than having a victim repeat their experiences over and over again. The original prosecutor should be the person to follow the procedure to the end’.¹²⁶⁷

The Victorian Aboriginal Child Care Agency (VACCA) submitted:

It is import [sic – important] to have the same prosecution staff involved throughout the prosecution to acknowledge the distress and re-traumatising that can occur when survivors are required to retell their stories. It is also important so that victims and survivors do not have to engage with changing prosecution staff.¹²⁶⁸

SAMSN and Sydney Law School quoted one survivor’s experience as follows:

I was forced to retell and relive my experiences time and time again and the psychological and physical damage that has been perpetuated on me by both the offender and equally by [sic – the] system leaves deep scars that may never be healed.¹²⁶⁹

Ms Alexandra Cahill, representing the CREATE Foundation, told the public hearing in Case Study 46:

our young people are saying that if they have to tell their story over and over and over it traumatises them each time they tell that story, only to see that person walk away, change jobs, change positions, the program be defunded, et cetera, et cetera, and how do we actually, you know, effect change and effect appropriateness for children and young people within that framework?¹²⁷⁰

The Victorian Aboriginal Legal Service submitted that legal procedures such as repeating stories of abuse, cross-examination, and the initial disclosure to investigators, can be as traumatic as the abuse itself.¹²⁷¹

In the Consultation Paper, we recognised the prosecution staffing, resources, and court timetables may make continuity in staffing very difficult. It may not always be possible to maintain the same prosecution team throughout a prosecution, which can sometimes last for years given the time taken to reach the trial, deal with any interlocutory and other appeals and then complete any retrial.

The Jannawi Family Centre recognised this difficulty in its submission as follows:

Continuity of relationships are important, however we also acknowledge that maintaining the same prosecution staff may be difficult to achieve over the many years required for a criminal matter to be finalised. Either the court process must proceed more efficiently, or a system of support services be implemented to maintain continuity of care.¹²⁷²

However, in spite of the difficulties, we are satisfied that the substantial benefits for victims and survivors of consistency in prosecution team staffing should be recognised. Prosecution agencies should try to facilitate consistency of staff involved in prosecuting child sexual abuse

matters. While some team members might change during a prosecution, steps should be taken to ensure that at least one key person on the legal side of the prosecution team – prosecutor or solicitor – remains to maintain continuity throughout the prosecution.

20.4.4 Regular communication

In the Consultation Paper, we outlined the importance to survivors of regular communication and the provision of information during the prosecution process. Again, some survivors have told us of positive experiences, where they were kept up to date about what was happening and felt they were given sufficient information to be prepared for and understand their part in the process.

Other survivors have told us of negative experiences, where they felt they were not kept informed, they had to initiate contact themselves to obtain updates and they did not feel well prepared for the prosecution process.

Some personal submissions in response to Issues Paper 8 gave accounts of survivors:

- not being informed of the sentence following a guilty plea
- being told only at the last minute that they needed to prepare a victim impact statement
- not being told that disclosure requirements meant that their communications with the ODPP would be disclosed to the defence and could be used in cross-examination.

Some survivors raised concerns about the quality of the information provided. For example, one submission to Issues Paper 8 gave an account of a survivor being informed via a telephone call that his matter was being discontinued, but he was not given any explanation as to why it was being discontinued.¹²⁷³

It is important to complainants that they are kept informed. In his submission to Issues Paper 8, the South Australian Commissioner for Victims' Rights referred to a number of previous surveys of victims' experiences of the prosecution process. One of these identified common themes in the views of dissatisfied victims, focusing on a lack of consultation and the inadequate provision of information before, during and after proceedings.¹²⁷⁴

The South Australian Commissioner for Victims' Rights also referred to a 2013–2014 survey that staff of the South Australian ODPP's WAS conducted. The survey asked respondents to rank the importance of services that the ODPP provided. The survey found a very high level of satisfaction with the ODPP amongst respondents and identified 'being updated' and 'legal process explained' as being of greatest importance to victim witnesses, other witnesses and family members of victims.¹²⁷⁵

The content of the prosecution guidelines discussed above suggests that prosecution agencies are aware of the importance of keeping complainants informed about the progress of prosecutions and preparing them for the court process. However, it appears that the guidelines are not always being followed.

In his 2012 report on child sexual assault in Aboriginal communities, the NSW Ombudsman conducted a review of contact between ODPP solicitors and victims recorded on 27 case files. He found significant variation in the level of contact and the practices of individual solicitors:

In many instances, the correspondence records on file were incomplete, and it was not possible to determine how much contact occurred between the solicitor and the victim. In just over half of the cases that we reviewed (14 cases, 52%), there appeared to be complete records of the contact between the solicitor and the victim or the victim's family ... In approximately one third of the cases that we reviewed, it was apparent that full details of correspondence were not recorded on file; and in the remaining three cases, it was unclear whether the records kept were an accurate representation of the contact between the solicitor and the complainant. In some instances, there was no evidence of critical communication having occurred with the victim; for example, in one third of the cases we reviewed where there were charge negotiations between the ODPP and the defence, the complainants' views about these negotiations were not recorded on file.¹²⁷⁶

In their submissions in response to the Consultation Paper, both the New South Wales ODPP and the Victorian DPP agreed that effective, regular and timely communication with victims is important.¹²⁷⁷ The New South Wales ODPP stated:

We have listened with interest to victims' accounts of the criminal justice process, both positive and negative. Clearly there is a noticeable disparity between the individual experiences of survivors of the process that is independent of the prosecution outcome. However, there appears to have been some improvement in the support and information this Office has provided over time. We are keen to make the best of this feedback and use it to train our staff to be better communicators.¹²⁷⁸

The Victorian DPP referred to a policy he issued in 2014 which consolidates and simplifies pre-existing victim-related policies first issued nearly 20 years ago and instructs all Victorian Public Prosecution Service (VPPS) staff on how to deal with victims and persons adversely affected by crime.¹²⁷⁹ Among other things:

[The policy] sets out what needs to be taken into account before communicating with victims. This includes the particular needs of the victim, the victim's preferred method of contact and the urgency of the information being communicated.¹²⁸⁰

A number of submissions in response to the Consultation Paper noted the importance of communication, and some gave examples of circumstances where survivors felt the communication was insufficient.

The Alliance for Forgotten Australians (AFA) submitted:

AFA is aware of cases where survivors have been informed at the door of the court that a number of charges have been dropped and/or downgraded. This behaviour simply serves to reinforce the foreign nature of the legal process and that the survivor is simply a pawn in a complex process.¹²⁸¹

PACT submitted that it consistently receives feedback from child victims about the lack of communication between them and their prosecutor or victim liaison officer and that adequate resourcing needed to be allocated to enable this to occur.¹²⁸²

CASV noted that they often hear from survivors that they do not know what is going on with their case or who to contact:

For one of our clients whose case had proceeded through the criminal justice process, she was not informed that her case had reached the trial stage and therefore was not given adequate time to provide a victim impact statement. For this client, she was also not informed when her case was adjourned until the following year as the detective in charge of the case was on leave. The CASV counsellor supporting this client, had to make several phone calls to ascertain this information while the client was left practicing her statement for several days until she was informed. For another CASV client, her case was prolonged over 5 years. This client reported that she felt like she did not have any ownership of her case and that communication by the criminal justice staff during this 5 year ordeal was poor.¹²⁸³

Dr Robyn Holder and Ms Susan Whiting submitted:

Surveys of victims conducted internationally and within Australia consistently show that victims rank the provision of information as their most important requirement of criminal justice agencies. It is insufficient that information is only of a general nature. People need to know the specifics that apply to their case. The criminal justice process is recognised as a source of secondary victimisation and most victims have little or no knowledge or experience of it. Victims who are kept informed about what is happening in their case and what to expect from the trial process are better able to cope with the process and to give their best evidence.¹²⁸⁴

They also suggested that systems within prosecution agencies were not robust in the routine provision of information and that prosecution agencies may respond to 'those who shout loudest or who have a strong advocate'.¹²⁸⁵

SAMSN and Sydney Law School expressed similar views in their submission, noting that:

The survivors in this workshop [conducted by SAMSN and Sydney Law School] emphasised the need for complainants to be very persistent with both police and prosecutors in seeking information about the progress of their matter and gaining some understanding of the charges and what was expected of them as a witness.

‘Unless you’re constantly chasing them up, you get nothing, except for one prosecutor and witness support liaison officer who had been fantastic.’¹²⁸⁶

However, Ms Margaret Campbell, a survivor, submitted that prosecution staff can view persistence as a negative, stating:

From my experience particularly when staff don’t call you back or keep you in the loop regularly, I would call and call and call – and as a result be seen as difficult. They wouldn’t return my calls in the end. They didn’t realise that it was my anxiety around the situation and the not knowing. It is re-traumatising when they don’t reply in a timely fashion – it plays on your mind, you can’t sleep, eat etc. You can’t function.¹²⁸⁷

Taking appropriate steps to maintain communications is not only important to the victim but it can also be critical for police and prosecutors. Keeping a complainant informed may help reduce complainant attrition and help prosecutors to be aware of any changes in the circumstances of the victim and other witnesses that may impact on their capacity to give evidence.¹²⁸⁸

As we discussed in Chapter 2, the complainant’s evidence is often the only direct evidence of the abuse in institutional child sexual abuse cases, and supporting the complainant so that they remain willing to proceed with the prosecution is vital.

We are satisfied that it is worth restating the importance of maintaining regular communication and keeping victims and survivors informed even though these matters are addressed in current prosecution guidelines. Compliance with these aspects of the guidelines could be a worthwhile focus for the DPP oversight mechanisms we discuss in Chapter 21.

An additional issue emerged from submissions and evidence in Case Study 46 in relation to the provision of information to victims. A number of submissions and witnesses identified that complainants would benefit from having more information about what to expect in court in relation to giving evidence and particularly in relation to cross-examination. We discuss this issue in section 20.4.8.

20.4.5 Witness Assistance Services

We have heard accounts from many survivors of their experiences with WAS. Generally, these experiences were very positive for survivors. Those survivors who gave accounts of negative experiences mainly told us of the absence of support and preparation for court – effectively identifying the difficulties and dissatisfaction that is likely to arise when WAS assistance is not provided to a survivor.

In its submission to Issues Paper 8, the CREATE Foundation stated that young people emphasise the need to know what will happen, and when, and what support is available, when they are required to go to court.¹²⁸⁹

In Case Study 12 on the response of an independent school in Perth, we heard evidence from WP, who was one of the complainants in the initial trial of the offender and in the retrial following the offender's successful appeal. WP was invited to comment on positive and negative aspects of the support available to him in the trial process. WP gave evidence that:

There was a system or a resource of introducing me to the courtroom and the system prior to going into the courtroom and giving my evidence, which at the time I thought, 'Oh, I don't really need to do this', but I appreciate now. I say that because it made it less intimidating and daunting knowing of how the process works in a certain way and where I would be sitting, for example, and that there were resources and support people there to help me if I wished to seek that.¹²⁹⁰

WP also referred to the support he received from very good counselling services.¹²⁹¹

Witness assistance officers are very important to successful prosecutions in child sex assault matters. In matters calling for comprehensive level of support, the involvement of a WAS may be essential in obtaining a conviction.¹²⁹² In his 2012 report on child sexual assault in Aboriginal communities, the NSW Ombudsman gave an example of a case in which a witness assistance officer gave significant support to a 15-year-old complainant.¹²⁹³ The Ombudsman expressed the view that, given the victim's complex circumstances, there was a high likelihood that the matter would not have proceeded to conviction without the involvement of the WAS.¹²⁹⁴

WAS can contribute to a number of the aspects of prosecution responses that are of particular importance to victims, including by:

- contributing to the prosecution response a professional understanding of the nature and impact of child sexual abuse
- contributing to continuity in the non-legal part of the prosecution team if a single witness assistance officer can be allocated to support the victim or survivor throughout the prosecution
- helping to maintain regular communication with and providing information to victims and survivors.

However, the contribution of the WAS should not relieve the prosecutors and solicitors of the obligation to provide an effective prosecution response, including by having a basic level of understanding of the nature and impact of child sexual abuse and maintaining regular communication and providing information to victims and survivors.

It seems likely that the key challenge for WAS will be resourcing and maintaining an ability to meet demand. We understand that WAS currently give priority to child sexual abuse matters. Even so, they may struggle to meet demand.

In his 2012 report on child sexual assault in Aboriginal communities, the NSW Ombudsman considered case load information for each witness assistance officer in New South Wales. He found that more than half of the witness assistance officers were carrying case loads which exceeded the maximum agreed workload and that a substantial number of cases were unallocated, meaning that demand for the service was at more than 120 per cent of the service's overall capacity.¹²⁹⁵

It is also important that witness assistance staff can provide culturally appropriate support to Aboriginal and Torres Strait Islander victims, survivors and other witnesses. Consultations leading up to the NSW Ombudsman's 2012 report found almost unanimous support within Aboriginal communities in New South Wales for the provision of the services that the WAS delivers and significant positive feedback about the way in which the Aboriginal witness assistance officers provided these services.¹²⁹⁶

Providing culturally appropriate services to Aboriginal and Torres Strait Islander victims, survivors and witnesses is particularly important. In addition to the support needs all victims and survivors are likely to share, Aboriginal and Torres Strait Islander victims, survivors and witnesses may face additional language barriers in communicating with prosecution services and in understanding the court process and giving evidence. There may be cultural restrictions on discussing certain topics with certain people or in public. There may also be geographical barriers for remote communities.

A number of submissions in response to the Consultation Paper commented on the importance of WAS to victims.

Ms Knight, a survivor, submitted:

Witness assistance provided me immense comfort and guidance throughout the court process. Again having that familiar friendly face that understood the emotions and reactions I was experiencing and was able to reassure me and explain that my reactions were expected and normal reduced the stress considerably.¹²⁹⁷

Micah Projects also identified the contribution WAS staff can make to continuity of staffing:

Witness services are critical in keeping victims and their families informed. Some victims have worked closely with a support service and these people are a crucial element of helping victims feel supported and maintain a sense of continuity in the long process of reporting through to the stage of prosecution and court.¹²⁹⁸

Dr Holder and Ms Whiting stated that victims have said they would not have survived the prosecution process without the support of WAS¹²⁹⁹ and described the role WAS officers can play in facilitating communications between prosecutors and victims as follows:

In general, WAS social workers adopt a trauma-informed, non-judgemental approach to supporting victims and their families and are pivotal in ensuring that they are kept informed about the prosecution case. They maintain direct communication with the victim and importantly, also facilitate conferences and debriefings with the prosecution team. Legal practitioners often struggle to communicate with victims and one of the roles that WAS perform is to assist prosecutors to communicate more effectively with victims.¹³⁰⁰

The Victorian DPP expressed his agreement with the principle suggested in the Consultation Paper.¹³⁰¹ He submitted:

I agree with the suggestion by the Commission with respect to the training and funding of WAS, and while acknowledging that further resourcing would always be welcome, note that the very high degree of satisfaction by the clients of WAS indicates that at present, a very effective and efficient WAS service is being provided.¹³⁰²

Some submissions raised concerns about the resourcing of WAS units. The Victorian Victims of Crime Commissioner stated that he had previously advocated the implementation of a network of victim support coordinators and increased resourcing for existing witness support services. He recommended that the Royal Commission consider methods and strategies to assist existing victim service providers, including WAS services, to better manage caseloads and demand.¹³⁰³ knowmore's submission also referred to the workload and resourcing pressures facing some WAS officers and services.¹³⁰⁴

knowmore noted that, while many clients had been grateful for the assistance that WAS officers provided to them, some survivors had observed that much of the information that WAS officers provided was general rather than case specific.¹³⁰⁵

We discuss in section 20.4.8 the need for victims to be given more information about giving evidence. As noted above, we consider that the contribution of the WAS should not relieve prosecutors and solicitors of the obligation to provide an effective prosecution response. The Victorian Victims of Crime Commissioner expressed support for this approach.¹³⁰⁶ The Commonwealth DPP submitted that there may be situations where it is more appropriate for a lawyer, rather than a WAS officer, to provide certain information – for example, where complex legal issues need to be explained.¹³⁰⁷

knowmore also submitted that some victims were concerned that WAS officers were not independent of the ODPP and therefore would not 'take the side' of the complainant; or that they did not have the legal skills to help the complainant to effectively raise their concerns about a prosecutor's intended course of action. WAS officers are not intended to be legal advisers or advocates for victims, and they are not intended to replace direct communication between the prosecutor or prosecution solicitor and the victim, particularly on legal issues or other issues related to the conduct of the prosecution.

VACCA and knowmore submitted that it is important to provide culturally appropriate services for Aboriginal and Torres Strait Islander victims and survivors.¹³⁰⁸

The Victorian Aboriginal Legal Service submitted that culturally appropriate support services were drastically lacking and that, if such services were available, Aboriginal and Torres Strait Islander victims and survivors of institutional child abuse would seek, and have equitable access to, the criminal justice system.¹³⁰⁹

The Aboriginal Legal Service (NSW/ACT) also expressed concerns about the ability of the existing Aboriginal WAS officers in New South Wales to service the entire state:

At present, WAS employs three Aboriginal WAS Officers (although one position is vacant). The Aboriginal WAS Officers are based in Sydney, Newcastle and Dubbo but are required to service the entire state. The ALS submits that the current number of Aboriginal WAS Officers is not sufficient to support the 'range of complex needs' of Aboriginal and Torres Strait Islander victims and survivors of institutional child sexual abuse, as well as Aboriginal and Torres Strait Islander victims and survivors of other offences. The ALS supports the recommendation to increase the number of WAS Officers in NSW, and submits that an expanded and continuous support service, accessible from reporting to trial, will improve the ability of prosecution departments to communicate with victims and survivors.¹³¹⁰

The submission from the New South Wales ODPP acknowledged the importance of providing a culturally appropriate service to Aboriginal and Torres Strait Islander victims and witnesses. It also noted the role that Aboriginal WAS officers can play in consulting with generalist WAS officers to ensure culturally appropriate referrals to services and information for victims and witnesses.¹³¹¹

The Commonwealth DPP stated that, in practice, its WAS officers had not worked with victims who identify as being Aboriginal or Torres Strait Islander, although they work with some victims who come from diverse cultural backgrounds. The Commonwealth DPP submitted that it is committed to ensuring its WAS officers are appropriately trained and stated that it would make available specific training in relation to Aboriginal or Torres Strait Islander victims.¹³¹²

In relation to specialist services for children, PACT's Child Witness Support Program provides support for children and young people who are required to give evidence in criminal court matters, either as victims of, or witnesses to, a crime. In its submission, PACT stated that it 'supports between 1,500–1,600 children and young people each year, of which 65–70% are victims of sexual assault, and approximately 70% of our clients are female'.¹³¹³ PACT submitted that WAS services such as PACT 'provide an important level of focussed support to adequately prepare children for the daunting court process'.¹³¹⁴

A number of submissions in response to the Consultation Paper also commented on the availability of support services outside of the criminal justice system. The Victorian Aboriginal Legal Service expressed an interest in seeing some of the support mechanisms that the Royal Commission and other health and wellbeing support services have adopted being more widely implemented.¹³¹⁵ Sisters Inside and the Jannawi Family Centre also noted the importance of community-based support services.¹³¹⁶

The Royal Commission is conducting a separate project to investigate how adequate support services are in meeting survivors' needs. We are not now making any recommendations about support services other than those that are specifically established to provide support in the criminal justice response – that is, WAS services. Broader support services will be considered further in our separate project.

20.4.6 Credibility of the complaint

As with other cases of sexual assault, the evidence of the complainant is often the only direct evidence of abuse in institutional child sexual abuse cases. In these circumstances, the defence will inevitably concentrate its efforts in the trial on damaging the complainant's credibility.

We know from our work that the sexual abuse of a child may have many damaging outcomes for the victim. These can be, and often are, used to discredit the victim. Many experience:

- social isolation and homelessness
- lower earning and socio-economic status, and difficulty maintaining employment
- imprisonment.¹³¹⁷

Many victims also experience addiction and mental health problems. Some survivors may have prison records by the time they are able to report the abuse they suffered as children to police. Each of these circumstances may allow a cross-examination to discredit a victim in the eyes of a jury.

A focus on the credibility of the complainant, particularly when deciding whether to commence a prosecution, may deny survivors access to criminal justice.

There is a cruel irony in the circumstance that a survivor's complaint may not be prosecuted because of their personal circumstances – for example, a concern that the jury will not believe someone who has a criminal record or who 'went off the rails' as a teenager and young adult – when it is the abuse which was the cause of their antisocial behaviour.

In some cases, the fact that a victim or survivor was in out-of-home care may be considered to count against them, even though it is this circumstance that forced them into the institution in which they were abused.

In the course of discussing this issue with Ms Alison Saunders CB, the DPP for England and Wales, she told us of the approach now taken in England and Wales:

Well, our guidance is very clear, that we look at the credibility of the allegation – and I think this is very clear. We're having quite a debate in England and Wales at the moment about[:] is this all about the credibility of the victim, or is it about the credibility of the sort of allegation. So in some ways, because our guidance is very

clear, we look at the whole allegation, because what we found was that prosecutors historically – and this was sort of pre some of the sort of cases that have made us look at this, so like Jimmy Savile and other cases – but before that people were looking at the victims themselves.

So a very good example is we've had quite an issue with cases of men grooming young girls and then passing them around to be sexually abused. And what you found was that the girls in that case were quite often from troubled backgrounds, they may have been in care homes, they were susceptible to somebody apparently showing them affection, and then asking them to do things, you know, supplying them with drugs or drink and, ordinarily, you would have looked at those, or we would have looked at those victims and said their credibility was not good enough so that we could put them before a jury.

We were very clear now in our policies that it's not about the credibility of the victim – she can be incredibly troubled, she can have drink/drug problems, she may have previous convictions, she may have convictions, you know, for offences that she's committed at the behest of the people who have been grooming her. But you've got to look at the allegation in the round, because it's not just about the credibility of the victim, because by looking at that, we found that we were not prosecuting cases that we should have been, and we have successfully now prosecuted many of these grooming cases where, you know, 10 years ago we wouldn't have even entertained a prosecution.¹³¹⁸

In the public roundtable discussion, there was general agreement that a similar shift in approach is occurring in Australian jurisdictions. Mr Michael Byrne QC, the Queensland DPP, noted that they have been employing a process that is comparable to the approach in England and Wales for some time.¹³¹⁹ Similarly, Mr Joseph McGrath SC, then the Western Australian DPP, told the roundtable that they consider the credibility of the entire case and that cases where the evidence amounted to the word of the complainant against the word of the alleged offender would be run as a matter of course unless there were significant negative factors that made a conviction unlikely.¹³²⁰

Comments were made suggesting that, in some jurisdictions, police prosecutors handling summary offences still gave undue weight to the credibility of complainants. The South Australian Commissioner for Victims' Rights, Mr Michael O'Connell APM, told the roundtable:

I still think there are some prosecution authorities outside the DPP who don't understand that shift in mentality as well as the DPP people do and given that we are dealing with sex offences now that can be prosecuted in summary jurisdictions and in some places they are done by the police then that's an important consideration.¹³²¹

However, we heard from representatives of Victoria and Queensland that police prosecutors in those jurisdictions now consider the credibility of the complaint.¹³²²

In her submission in response to the Consultation Paper, Dr Linda Steele provided data on the over-representation of people with experiences of childhood sexual and other abuse in prison populations:

research on child sexual abuse of female prisoners ‘indicates prevalence figures of between 57% and 90%’. In the New South Wales context, the 2009 survey of detainees in juvenile justice custody reported that 60% of young people experienced at least one form of childhood abuse or neglect and that 9.9% of all respondents had experienced sexual abuse. In the 2001 NSW Inmate Health Survey it is reported that: ‘Overall 85 (60%) women and 250 (37%) men had been sexually abused before the age of sixteen.’¹³²³ [References omitted.]

In submitting that, as victims of crime, survivors might be affected by their contact with the criminal justice system as offenders, Dr Steele stated:

Inappropriate stereotypes about offenders as deviant, dishonest, violent and even subhuman might limit the extent to which survivors are seen by police and the community as legitimate victims and as undeserving of their victimisation. When this is further compounded by contact with police under civil mental health legislation, notably in relation to recurrent instances of self-harm or attempted suicide, calls to emergency services, or failure of public mental health services to admit the individuals under civil mental health legislation, survivor offenders might be unjustly and incorrectly perceived by police as ‘attention seekers’ or ‘resource drains’ and their genuine but recurrent expressions of distress and reports of victimisation might be dismissed as illegitimate and, at worse, read as nuisance criminal conduct requiring charge and punishment.¹³²⁴ [Reference omitted.]

Sisters Inside expressed its strong support for the proposal in the Consultation Paper that prosecution staff be non-judgmental and focus on the complaint rather than the complainant. It stated that:

Up to 98% of women prisoners are, themselves, victims of crime and this has often contributed to their offending. Most have a history in the child ‘protection’ and/or juvenile ‘justice’ systems, and many have reported experiences of abuse, including sexual abuse, in associated institutions including foster care and residential care. The limited studies available indicate that over 40% of women prisoners have experienced childhood sexual assault, generally in either institutional or familial settings.¹³²⁵

In relation to people with disability, the Victorian Victims of Crime Commissioner referred to findings of the Australian Human Rights Commission that negative attitudes, assumptions and erroneous assessments about people with disability often resulted in them being viewed as unreliable, not credible or incapable of giving evidence or participating in legal proceedings. In the Commissioner’s view, such findings are also relevant to victims and survivors of sexual abuse who may face similar barriers to justice because of their experience of abuse.¹³²⁶

However, the Victorian Victims of Crime Commissioner also noted that prosecutors need to consider factors such as the availability, competence and compellability of a witness, the credibility and reliability of a witness, and how witnesses are likely to stand up to giving evidence in court in determining whether to proceed with charges.¹³²⁷

Many of those abused in institutions are already vulnerable as children, particularly if they have been in out-of-home care or in juvenile detention or similar facilities. Similarly, some of those abused in institutions will engage in behaviour that might be seen as damaging their credibility as a complainant even though the behaviour is likely to be a consequence of the abuse they suffered. The circumstances that exposed survivors to the risk of institutional child sexual abuse, and the impact of the abuse, should not prevent survivors from seeking criminal justice through a prosecution.

In our view, consideration of the justification for a prosecution by focusing on the credibility of the complaint rather than focusing only on the credibility of the complainant is essential if appropriate cases are to be prosecuted. It is so often the case that, because of their personal history, a complainant will have faced personal difficulties that, without considering the strengths of the entire case, may impact on their apparent credibility and inappropriately influence the decision as to whether to bring a prosecution.

20.4.7 Principles in relation to people with disability

In its submission in response to the Consultation Paper, PWDA expressed concern that legislative changes designed to encourage prosecutions where a person with disability is a victim do not appear to have been particularly effective.¹³²⁸

PWDA submitted:

In this context, we suggest that principles for prosecution responses and charging and plea decisions, be positively phrased regarding people with disability; that is, that there are positive obligations on prosecutors to fully consider all of the possible means to achieve conviction where a person with disability is a victim. This should include some positive direction to make use of available evidence legislation, given that during the public hearing for Case Study 38, there were suggestions from various DPPs and Crown Prosecutors that they had never made use of s.31 of the uniform Evidence Act 2008. This section allows people with disability access to the supports they may need in court. As highlighted in the opening to this submission, Australian law has international obligations in relation to people with disability which our justice system does not currently reflect.

*PWDA recommends very specific guidance for prosecutors in considering prosecution responses, charging and plea decisions, to help address the barriers that people with disability face as a result of these decisions.*¹³²⁹ [Emphasis original.]

Prosecution guidelines provide that, along with other considerations, the mental health or special disability or infirmity of a victim is a relevant factor when considering whether a prosecution is in the public interest. We discuss these guidelines in section 20.5.3. Some prosecution guidelines also make express provision for taking into account the needs of victims with disability in matters such as how prosecutors communicate with victims and how victims might wish to give evidence. We discuss these provisions in sections 20.2 and 20.3.

We noted in section 20.4.6 the Victorian Victims of Crime Commissioner's reference to negative attitudes, assumptions and erroneous assessments about people with disability often resulting in them being viewed as unreliable, not credible or incapable of giving evidence or participating in legal proceedings.¹³³⁰ However, he also noted that, in determining whether to proceed with charges, prosecutors need to consider factors such as the availability, competence and compellability of a witness, the credibility and reliability of a witness, and how witnesses are likely to stand up to giving evidence in court.

As we stated in the Consultation Paper, 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.

We referred to research that 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.¹³³¹ We have also heard how, as a result of specialised care and support needs, children with disability are often segregated from mainstream society. This segregation can create isolation and additional vulnerability.

Whether people with disability who experience child sexual abuse, including institutional child sexual abuse, report as children or as adults, we acknowledge that they may face significant challenges in the criminal justice system as complainants of child sexual abuse.

We are not satisfied that we should recommend principles that require prosecutors to apply different tests or standards in prosecutions for child sexual abuse offences where a victim is a person with disability.

However, we consider that a more generally stated principle may help to ensure that prosecution responses take account of the particular vulnerabilities of children with disability to child sexual abuse offences.

We consider that the principle can be stated in the following terms:

Prosecution agencies should recognise that children with disability are at a significantly increased risk of abuse, including child sexual abuse. Prosecutors should take this increased risk into account in any decisions they make in relation to prosecuting child sexual abuse offences.

We intend this principle to encourage prosecutors to commence and continue prosecutions, where the complainant is a person with disability who wants the prosecution to proceed, if other factors relevant to the decision to commence or continue the prosecution do not preclude the prosecution proceeding.

We consider that other reforms we recommend, particularly the recommendations in relation to the evidence of victims and survivors in Chapter 30, if implemented, will improve the opportunity for people with disability to give their best evidence as victims of child sexual abuse. This should also influence prosecution decisions by improving the ability of people with disability to give evidence in a prosecution and increasing the likelihood that the jury will accept their evidence as credible and reliable.

These reforms, if implemented, in combination with a heightened awareness of the significantly increased risk of abuse that children with disability face, should encourage prosecutors to proceed with child sexual abuse prosecutions in which the complainant is a person with disability in as many cases as the evidence and other relevant considerations allow.

20.4.8 Informing the complainant about giving evidence

An additional issue emerged from submissions and in Case Study 46 in relation to the provision of information to victims. A number of submissions and witnesses identified that complainants would benefit from having more information about what to expect in court in relation to giving evidence and particularly in relation to cross-examination.

In Chapter 2, we quoted the following evidence given by Mr Craig Hughes-Cashmore, who appeared with Professor Judy Cashmore to speak to the joint submission by SAMSN and Sydney Law School, in the public hearing in Case Study 46:

I think a lot of our members feel very let down by the justice system, and most refer to it as the legal system. I can recall one of the guys who I was talking to about his experience at court described it as not an adversarial system but a conspiratorial system, because he felt that, along with the jury, he was the only person in that courtroom that did not have a copy of the script. He didn't know and understand the well-honed tactics and strategies that are commonly employed by defence lawyers, and he felt completely out of his depth, having no training as a lawyer, no experience in a court. He felt very much alone and basically that the Crown didn't really intervene, that the judge even less so, and so he felt very burnt. That's, unfortunately, quite a common experience that has been shared with us.¹³³²

Mr Hughes-Cashmore gave the following evidence about his own experiences as a complainant:

I had two criminal trials. They were a month apart and I learned a lot, because my two experiences were completely different. In the second trial, what I did differently was represent myself. So despite all the best efforts of the defence to try and shut me down

and ensure that my story did not get heard in court, I fought like crazy and I would turn to the judge and say, ‘Your Honour, I haven’t finished speaking’, and that enabled me to give context and to tell my full story, unlike my first trial.

I don’t blame the jury in my first trial for acquitting my first perpetrator, because they didn’t hear my story.

But I think when the defence are allowed to just harangue, harass, belittle and insult victims without anyone stopping them from doing that, it creates a situation where – you know, that kind of questioning is not about finding the truth, it’s actually just about obfuscation; it’s about intimidating witnesses, and I think it’s wrong.¹³³³

A number of the submissions and evidence in the public hearing discussed in section 2.5.4 in relation to the adversarial nature of the criminal justice system are relevant to this issue.

The concern that knowmore raised in relation to WAS officers providing only general information and not case-specific information is also relevant.¹³³⁴ When discussing separate legal representation for victims, knowmore submitted:

A common issue reported by some of our clients who have appeared in proceedings as complainants was the difficulty in being able to participate meaningfully in prosecution decisions or even discussions around procedural issues (such as raising procedural questions; for example, about whether certain evidence could be given or not).¹³³⁵

The unfamiliar nature of criminal proceedings can be alienating for victims. Where they do not receive adequate information about the process of giving evidence, this can contribute to a feeling of loss of control and re-traumatisation. Professor Cashmore told the public hearing in Case Study 46 that:

The issue is that those who are the complainants often feel as though, as Craig [Hughes-Cashmore] said, they don’t have the script. They don’t have the knowledge. They don’t know the rules of the game. They are in a non-familiar environment. They are at a power imbalance. They don’t understand the language. And on top of all that, they are incredibly stressed by having to talk about those very sensitive events in a lot of detail, that they often don’t understand the reason for in terms of the particularisation that is required.¹³³⁶

Reporting on the workshop they conducted with survivors, the joint submission from SAMSUN and Sydney Law School stated:

A number of issues were raised concerning the adequacy of preparation for the court process and in particular, for their role as a witness. Reflecting on their experience, adequate preparation should include information about strategies to increase the chances of being able to tell their story as a coherent whole and in its proper context. For witnesses, this means knowing how to ask for clarification of legal terms and how to prevent being cut-off

by the defence. Survivors generally preferred face-to-face meetings because of their trust issues and needing to know who they are talking to. For legal professionals and support staff, it also means being clear about the boundary between preparation and coaching – and the question was raised about what DPP witness assistance staff constitutes ‘coaching’, and also ‘contamination’ when there is more than one complainant witness?¹³³⁷

We examined the prosecution of Brother Rafferty in Case Study 46, and we discuss this in detail in section 11.2. We heard evidence from FAB about the abuse and its impact on him.¹³³⁸ FAB gave the following evidence about his experiences in giving evidence in the trial:

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.¹³³⁹

As we discussed in Chapter 2, the complainant remains, in essence, a witness for the prosecution, and their experience of the trial can leave them feeling incidental to proceedings, that they have no control over the situation and that they were removed from the experience of their own trial.¹³⁴⁰

The Victorian Law Reform Commission (VLRC) addressed this issue:

Many victims give evidence at a committal or trial. The prospect of appearing in court, giving evidence and being cross-examined can be terrifying. Disability, youth, and cultural and language issues can create additional challenges when giving evidence because of the justice system’s traditions, the adversarial approach and the emphasis on oral evidence.

Information and support can help victims give their best evidence and reduce the potential for trauma by:

- helping victims understand their role as a witness and prepare themselves emotionally
- ensuring that victims are able to give their evidence without preventable disadvantage
- addressing their wellbeing before, during and after giving evidence.

Providing tailored information to victims who are witnesses can create challenges for prosecution lawyers for two main reasons. First, the prosecution has broad and ongoing disclosure obligations towards the defence throughout the trial process. All relevant, and possibly relevant, material must be disclosed to ensure a fair and impartial trial for the accused.

Secondly, like all lawyers, prosecution lawyers are prohibited from rehearsing or coaching a witness's evidence. However, coaching refers to the provision of advice about what answers a witness should give. A lawyer will not breach the prohibition against coaching by 'expressing a general admonition to tell the truth', 'questioning or testing in conference the version of evidence to be given' or drawing 'attention to inconsistencies or other difficulties with the evidence', so long as they do not encourage the witness to give evidence different to what the witness believes to be true. *Prosecutors can assist witnesses to prepare for giving evidence 'by providing the witness with information about the issues in the case and suggesting that the witness read their statement prior to giving evidence'*.¹³⁴¹
[Emphasis added. References omitted.]

The VLRC referred to a number of policy obligations applying to the Victorian OPP and continued:

The Commission was told that victims are not always given enough information or guidance, or time to ask questions about giving evidence. This appears to be a more acute problem for trials held in regional areas because prosecution lawyers have less time to meet with victims.

Victims also need an opportunity to meet with prosecution lawyers at the conclusion of a committal or trial or after giving evidence, to ask questions and gain a better understanding of what has taken place in court. There is no express requirement in law or policy for prosecution lawyers to do this. Some victims leave court feeling shaken and distressed after giving evidence.¹³⁴² [References omitted.]

When discussing whether victims should be given independent legal representation, the VLRC stated:

Uncertainty about the nature and content of cross-examination is a significant concern for victims. It is also an inherent aspect of cross-examination and there are limits on the extent to which this uncertainty can be addressed – all lawyers, prosecution or otherwise, are prohibited from coaching witnesses about their evidence.

While there will always be some uncertainty for those who have to give evidence, this does not mean a victim cannot be prepared for the experience. However, an independent lawyer is not necessarily in a better position to do this than a prosecution lawyer. An independent lawyer would be less informed than the prosecution about the issues in the case. Prosecution lawyers on the other hand can prepare victims for giving evidence with knowledge of the issues in the case and potentially with a support worker present.¹³⁴³
[References omitted.]

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 criminal justice system is an adversarial system. However, it 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'.¹³⁴⁴

In Chapter 30, we make a number of recommendations designed to ensure that victims and survivors are able to give their 'best evidence' in child sexual abuse matters.

We are satisfied that many victims and survivors will be unable to give their best evidence because of the unfamiliarity of the trial and their lack of understanding of and preparation for the process of giving evidence and being cross-examined.

We do not consider that 'providing the witness with information about the issues in the case and suggesting that the witness read their statement prior to giving evidence', as suggested by the VLRC, is likely to provide adequate assistance to complainants – and possibly other witnesses – in child sexual abuse trials.

We agree that independent legal advice is not required. We also acknowledge the very real difficulties that prosecution staff face in ensuring that they do not risk in any way the rehearsing or coaching of a witness's evidence.

We consider that many survivors would be assisted by being given an explanation of various matters such as:

- the purpose of giving evidence in chief and the purpose of cross-examination
- the detail in which they are likely to be required to give their evidence in chief if a recorded police investigative interview is not being used

- the obligation on defence counsel to challenge their evidence on some or all grounds
- particularly difficult forms of questions that might be used in cross-examination, which we discuss in Chapter 30
- what they can say if they do not understand a question or if they have not finished an answer or need to clarify an answer.

Lawyers with any experience in criminal law would understand these matters, yet it would not be suggested that, for this reason, a lawyer giving evidence as a complainant in a criminal trial has been rehearsed or coached. We understand that some prosecutors and WAS officers already discuss these matters with witnesses, although approaches may differ between and within jurisdictions.

We also understand that prosecutors and WAS officers may fear being accused of rehearsing or coaching the witness if they discuss these matters. We consider that this risk could be avoided by having standard material available for the complainant or other witness to read or to be taken through orally.

The development of the standard material should be led by DPPs in consultation with WAS, public defenders (where available), legal aid services and representatives of the courts to ensure that it:

- is likely to be of adequate assistance for complainants who are not familiar with criminal trials and giving evidence
- is fair to the accused as well as to the prosecution
- does not risk rehearsing or coaching the witness.

The relevant prosecutor and/or WAS officer would be able to provide the standard material to the complainant or other witness and/or take them through it orally. The material could include information to the effect that, in order to maintain the integrity of the witness's evidence, neither the prosecutor nor the WAS officer is allowed to discuss the witness's evidence with them. It may be particularly helpful for complainants or other witnesses to be taken through the material orally and to be given a copy of the written material to take away with them.

The prosecution's disclosure obligation could be met by informing the defence that the standard material has been provided to the complainant or other witness.

We envisage that the standard material would serve as a minimum guide to the information that should be provided to the complainant or other witness. In some cases, prosecutors or WAS officers may consider it appropriate to provide more information to a complainant or other witness, subject to their ethical obligations not to rehearse or coach the witness.

20.4.9 Conclusion and recommendations

No interested parties objected to our proposed approach of addressing these issues by setting out general principles. In his submission to the Consultation Paper, the Tasmanian DPP expressed his support for us addressing these issues by setting out general principles, noting that the size of the jurisdictions and prosecution agencies varies enormously throughout Australia and that Tasmania has a relative small office.¹³⁴⁵ The Commonwealth DPP also expressed support for general principles rather than specific recommendations,¹³⁴⁶ as did the Australian Capital Territory Victims of Crime Commissioner.¹³⁴⁷

For the reasons discussed above, we are satisfied that we should recommend the possible principles we identified in the Consultation Paper be adopted to guide prosecution responses to child sexual abuse. We have also added a principle in relation to people with disability as complainants, as discussed in section 20.4.7.

We also make a recommendation in relation to developing material to inform complainants and other witnesses in child sexual abuse prosecutions about giving evidence, as discussed in section 20.4.8.

Recommendations

37. All Australian Directors of Public Prosecutions, with assistance from the relevant government in relation to funding, should ensure that prosecution responses to child sexual abuse are guided by the following principles:
- a. All prosecution staff who may have professional contact with victims of institutional child sexual abuse should be trained to have a basic understanding of the nature and impact of child sexual abuse – and institutional child sexual abuse in particular – and how it can affect people who are involved in a prosecution process, including those who may have difficulties dealing with institutions or person in positions of authority.
 - b. While recognising the complexity of prosecution staffing and court timetables, prosecution agencies should recognise the benefit to victims and their families and survivors of continuity in prosecution team staffing and should take steps to facilitate, to the extent possible, continuity in staffing of the prosecution team involved in a prosecution.
 - c. Prosecution agencies should continue to recognise the importance to victims and their families and survivors of the prosecution agency maintaining regular communication with them to keep them informed of the status of the prosecution unless they have asked not to be kept informed.
 - d. Witness Assistance Services should be funded and staffed to ensure that they can perform their task of keeping victims and their families and survivors informed and ensuring that they are put in contact with relevant support services, including staff trained to provide a culturally appropriate service for Aboriginal and Torres Strait Islander victims and survivors. Specialist services for children should also be considered.
 - e. Particularly in relation to historical allegations of institutional child sexual abuse, prosecution staff who are involved in giving early charge advice or in prosecuting child sexual abuse matters should be trained to:
 - i. be non-judgmental and recognise that many victims of child sexual abuse will go on to develop substance abuse and mental health problems, and some may have a criminal record
 - ii. focus on the credibility of the complaint or allegation rather than focusing only on the credibility of the complainant.
 - f. Prosecution agencies should recognise that children with disability are at a significantly increased risk of abuse, including child sexual abuse. Prosecutors should take this increased risk into account in any decisions they make in relation to prosecuting child sexual abuse offences.

38. Each state and territory government should facilitate the development of standard material to provide to complainants or other witnesses in child sexual abuse trials to better inform them about giving evidence. The development of the standard material should be led by Directors of Public Prosecutions in consultation with Witness Assistance Services, public defenders (where available), legal aid services and representatives of the courts to ensure that it:
- a. is likely to be of adequate assistance for complainants who are not familiar with criminal trials and giving evidence
 - b. is fair to the accused as well as to the prosecution
 - c. does not risk rehearsing or coaching the witness.

20.5 Charging and plea decisions

20.5.1 Introduction

As stated in section 20.1, the most significant decisions that prosecutors make for victims and survivors – and for the accused – are decisions:

- whether to commence a prosecution
- to discontinue a prosecution
- to reduce the charges against an accused
- to accept a plea of guilty to a lesser charge.

It probably inevitable that in some prosecutions charges will be downgraded or discontinued having regard to the available evidence. Similarly, where police have not laid charges and the evidence is referred to a prosecutor to decide whether a prosecution should commence, there will be cases where a decision is made that a prosecution should not be commenced. It would be inappropriate for a prosecutor to proceed with a prosecution that, in their evaluation, did not have a reasonable prospect of a conviction.

There are significant benefits to both the criminal justice system and victims when an offender pleads guilty to an offence. A plea of guilty results in significant resource savings for the criminal justice system and spares victims the potential stress and trauma of giving evidence in a criminal trial – particularly as there is no guarantee that a jury will find the accused guilty, even in a case with strong evidence.

However, while there are benefits to victims when an offender pleads guilty to offences, in some cases the guilty plea may have been negotiated with the prosecution so that the offender pleads guilty to fewer charges or to less serious charges and the other charges are discontinued. This can cause considerable distress to victims, particularly if they feel that the charges for which the offender is pleading guilty do not reflect the worst abuse or the extent of the abuse they suffered.

Charge negotiations may occur at any stage of criminal proceedings and are an accepted element of criminal prosecutions in all Australian jurisdictions. They involve the prosecutor agreeing to withdraw a charge or charges upon the promise of an accused to plead guilty to others:

Charge negotiations are a legitimate means of resolving criminal litigation. The process is widely viewed as fundamental to the efficient operation of an under-resourced system and comprises a relatively informal process that incorporates both adversarial and cooperative aspects. In a situation of uncertainty, the prosecution and defence exchange risks and benefits to achieve mutually satisfactory goals.¹³⁴⁸

Charge negotiations can leave victims feeling that the justice system has downplayed the harm they have experienced. Complainants may have negative views about the transparent procedures of the public jury trial being replaced by private discussions between the prosecution and defence.¹³⁴⁹

Charge negotiations may also require victims to limit their victim impact statements because these statements can only describe the impact of crimes for which the offender has been convicted. Victims may be unable to refer to conduct by the offender which did not form part of the lesser charges to which the offender pleaded guilty.

In the Consultation Paper, we suggested that, where decisions are made in relation to charging and pleas, victims may feel that the seriousness of their personal experience is being downplayed by the criminal justice system. Many victims and survivors have told us of their experiences of decisions of this kind. We outline a number of these experiences in section 20.5.2.

In section 20.5.3, we outline the requirements of prosecution guidelines in relation to these significant decisions.

In the Consultation Paper, we identified a number of possible principles to guide prosecution charging and plea decisions and sought submissions on them. The possible principles concerned:

- getting the charges right early
- confirming the appropriateness of the charges as early as possible
- the importance of the charges for which a guilty plea is accepted reasonably reflecting the true criminality of the abuse
- allowing adequate time to consult the complainant and the police in relation to any proposal to downgrade or withdraw charges or to accept a negotiated plea.

A number of interested parties commented on the possible principles, and 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 section 20.5.4.

20.5.2 Complainants' experiences

In this section, we outline a number of examples of complainant experiences in relation to charging and plea decisions.

The prosecution of CDM – a decision to discontinue

In Case Study 38, we considered the prosecution of CDM, who was charged with a number of indecent and aggravated indecent assaults on children at a childcare centre. CDM was charged by police and committed to stand trial. Ultimately, the prosecution was discontinued on the basis that the disclosures could not support the particularisation required by the charges.

We heard evidence from the mother of one of the complainants that she was ‘heartbroken and extremely distressed’ by the decision and that she felt her family had been ‘churned out by the criminal justice system’.¹³⁵⁰ She gave the following evidence:

When I was informed that the DPP would not be proceeding with the trial, I felt overwhelming distress and absolute disbelief. I lost control. I was so angry that the court system had failed us that I drank too much, went to the home of [CDM] and the Director and broke several items in their front yard. I was arrested that night and charged with malicious damage. I explained my circumstances to the magistrate and no criminal conviction was recorded against my name.¹³⁵¹

The prosecution of CDF – a decision to discontinue

In Case Study 38, we also heard evidence about the prosecution of CDF, a school bus driver for a number of children in a special education class. Charges were laid against CDF relating to a number of children in the class. However, the DPP ultimately discontinued the charges because of inconsistencies in the children’s evidence and the likelihood that the children would struggle to give evidence in court.

The mother of one of the children, CDG, told how she felt let down when the charges in relation to her child were dropped. She said that it made her feel like her child ‘wasn’t good enough’ to continue the criminal process.¹³⁵² She also said she was devastated when the charges relating to the other children were dropped.¹³⁵³

The experience of BYC – a decision to accept a guilty plea to lesser charges

In Case Study 36 in relation to the Church of England Boys’ Society, we heard evidence from a survivor, BYC, who told of abuse he suffered over a number of years. The offender was initially charged with multiple offences in respect of BYC, including indecent assault and buggery, but these charges were dismissed at committal due, at least in part, to lack of corroboration and lack of complaint at the time of the abuse.

Police reopened the investigation nearly 15 years later, when other victims came forward with reports of abuse against the same offender. BYC was contacted by police, and the DPP considered reviving the charges in respect of BYC that had been dismissed.

As part of an agreement to plead guilty offered by the offender, the prosecution accepted a guilty plea to one charge of indecent assault in respect of BYC. In his evidence in Case Study 36, BYC said that he understood the decision: ‘The prosecutors told me that they felt that if they had pushed for a guilty plea in relation to all possible charges the other boys and myself might have had to go through a trial proceeding.’¹³⁵⁴

BYC also gave the following evidence:

I was disappointed that Jacobs was only charged with indecent assault in relation to me, but I understood that it wasn’t about getting him charged with every offence, but rather getting him convicted so he can’t do it again.¹³⁵⁵

The experience of JBC – a decision to accept a guilty plea to lesser charges

We investigated the following matter for possible examination in the public hearing in Case Study 38. However, there was not time in Case Study 38 to examine the issue of prosecution decision-making.

JBC participated in a private session. After the private session, the Royal Commission obtained documents in relation to the response of Victoria Police and the Victorian OPP to allegations of sexual abuse that JBC made.

The following information is taken from the information that JBC provided to the Royal Commission and the documents that Victoria Police and the OPP provided. The Royal Commission consulted Victoria Police and the OPP to ensure that the information is accurate within their understanding, particularly as recorded in the documents they produced to us.

JBC was a high school student at a public high school in regional Victoria in the 1980s. JBD was the school librarian at the school.

JBC alleged that he was sexually abused by JBD sometime after 1986. JBC said that JBD joined the after-school sports club that JBC attended and began inviting JBC to his home on weekends. JBC alleged that JBD sexually abused him at JBD’s home over a period of less than two years.

JBC made a complaint to Victoria Police in 2009. JBC also made a statement to police in another state, where he was then living.

In late 2009, Victoria Police arrested JBD.

In May 2010, JBD was charged with two counts of indecent assault and six counts of gross indecency with a person under 16. The counts of gross indecency related to allegations of oral sex and sexual penetration.

In September 2010 an additional charge of gross indecency, involving exposure, was added. A few months later, the charges relating to gross indecency were withdrawn on the basis that they were statute-barred and so could no longer be prosecuted.

JBC spoke to the OPP solicitor and sought further explanations from the OPP and the relevant police officer for the reduction in charges. The relevant police officer wrote to JBC explaining the reasons for withdrawing some charges and limiting the additional charge to only one occasion.

The matter was listed for a committal hearing in late 2010. JBC commenced giving evidence, but he did not complete his evidence. The matter was adjourned part heard to early 2011. JBC had difficulty recalling the offences, and he told the solicitor from the OPP that he did not want to give evidence again after the first day of the committal hearing. The OPP expressed concern that JBD would not be committed for trial on any charge given the difficulties with JBC giving evidence.

The OPP consulted with JBC and Victoria Police and then negotiated with JBD's solicitors to accept a plea of guilty to charge 1, for indecent assault, in return for withdrawing the remaining charges.

In early 2011, JBD pleaded guilty to one count of indecent assault and the OPP withdrew the remaining charges. JBD was sentenced to a 12-month good behaviour bond without a conviction being recorded.

This provides an example of the circumstances in which a guilty plea was negotiated.

The plea bargain meant that JBD only faced one charge, and he was sentenced only to a good behaviour bond. JBC found this outcome to be very disappointing.

The experience of JBH – a decision to accept a guilty plea to lesser charges

We investigated another matter for possible examination in the public hearing in Case Study 38. However, there was not time in Case Study 38 to examine the issue of significance, which was prosecution decision-making.

JBH participated in a private session. After the private session, the Royal Commission obtained documents in relation to the response of Victoria Police and the Victorian OPP to allegations of sexual abuse that JBH made.

The following information is taken from the information that JBH provided to the Royal Commission and the documents that Victoria Police and the OPP provided. The Royal Commission consulted Victoria Police and the OPP to ensure that the information is accurate within their understanding, particularly as recorded in the documents they produced to us.

JBH was a student at a religious high school in Victoria in the 1970s. JBI was a Brother in the religious order and taught at the high school.

JBH alleges that he was sexually abused by JBI in 1970, when JBH was aged between 13 and 14.

JBH disclosed the abuse to his girlfriend in the late seventies.

JBH reported the matter to Victoria Police in November 2013 shortly after his mother died. He did not want to report the abuse while she was still alive. He told the Royal Commission that he did not want his mother to know about what had happened to him because she would have felt responsible for not being able to protect him.

In early 2014, JBH participated in an electronically recorded telephone call with JBI. They did not discuss the details of the alleged offending, but JBI apologised to JBH during the call, acknowledging in relation to the sexual abuse that 'it did happen'.

Shortly after the telephone call, JBI was charged with three offences of indecent assault of a male under 16 in relation to JBH. The charges were:

- Charge 1 – indecent assault on a male. The accused fondled the complainant's genitals with his hand.
- Charge 2 – indecent assault on a male. The accused used the complainant's hand to touch the accused's penis.
- Charge 3 – indecent assault on a male. The accused touched the anus of the complainant.

In mid-2014 JBI's solicitors made an offer for JBI to plead guilty to Charge 1 in exchange for charges 2 and 3 being struck out.

Correspondence from JBI'S solicitors referred to information that JBH provided in relation to the alleged offences that they said was incorrect. This information related to details such as the year of the alleged offending and the description of the room where the offending was alleged to have taken place.

Victoria Police consulted JBH and then accepted JBI's offer to plead guilty to Charge 1 in return for charges 2 and 3 being struck out.

In late 2014, JBI appeared before the local Magistrates' Court. Charges 2 and 3 were struck out and a plea of guilty was entered to Charge 1 – indecent assault on a male under 16.

JBH told us that, although he understood the reasoning that it was better to get a conviction on one count than potentially to lose on all counts, he struggled with the notion that, so far as the public record was concerned, the other two counts did not occur.

20.5.3 Prosecution guidelines in relation to key prosecution decisions

Australian prosecution agencies' guidelines include significant provisions in relation to prosecutorial decisions to prosecute or discontinue matters; and charge negotiations.

The decision to prosecute

While there are slight differences in wording, each state and territory has the same two-tiered test to determine whether a prosecution should be initiated or continued.¹³⁵⁶

The test is, in essence:

- Is there sufficient evidence, or is there a reasonable prospect of a conviction?
- Is the prosecution in the public interest?

There is broad consistency in the factors that are relevant when considering whether a prosecution is in the public interest. The factors that are common to each of the jurisdictions are:

- the seriousness or triviality of the alleged offence
- whether the prosecution would be perceived as counterproductive – for example, by bringing the law into disrepute
- whether the alleged offence is of considerable general public concern
- the staleness of the alleged offence – that is, how long ago the offence took place
- the prevalence of the alleged offence and any need for deterrence
- the availability and efficacy of any alternatives to prosecution
- the likely length and expense of a trial
- the likely outcome in the event of a finding of guilt, having regard to the sentencing options available to the court
- the degree of culpability of the alleged offender in connection with the offence
- the youth, age, maturity, intelligence, physical health, mental health or special disability or infirmity of the alleged offender, a witness or a victim
- the alleged offender's antecedents and background
- whether the alleged offender is willing to cooperate in the investigation or prosecution of others or the extent to which the alleged offender has done so
- the attitude of a victim or in some cases a material witness to a prosecution
- the necessity to maintain public confidence in such basic institutions as the Parliament and the courts

- any entitlement or liability of a victim or other person or body to criminal compensation, reparation or forfeiture if prosecution action is taken
- any mitigating or aggravating circumstances.

There are also additional public interest considerations which only apply in some jurisdictions. These are outlined in Table 20.1.

Table 20.1: Additional public interest considerations in decisions to prosecute

| Consideration | NSW | Vic | Qld | WA | SA | Tas | ACT | NT |
|--|-----|-----|-----|----|----|-----|-----|----|
| The obsolescence or obscurity of the law | ✓ | ✓ | | ✓ | ✓ | ✓ | ✓ | ✓ |
| Whether the proceedings or the consequences of any resulting conviction would be unduly harsh or oppressive | ✓ | ✓ | | | ✓ | ✓ | ✓ | ✓ |
| Whether a sentence has already been imposed on the offender which adequately reflects the criminality of the circumstances | | ✓ | ✓ | ✓ | | | | |
| Whether the alleged offender has already been sentenced for a series of other offences and the likelihood of the imposition of an additional penalty, having regard to the totality principle, is remote | | | ✓ | ✓ | | | | |
| The likely effect on public order and morale | | | ✓ | ✓ | ✓ | | ✓ | |
| Special circumstances that would prevent a fair trial from being conducted | ✓ | ✓ | | | | | | ✓ |
| Whether any resulting conviction would necessarily be regarded as unsafe and unsatisfactory | ✓ | | | | | | | ✓ |
| Whether the Attorney-General's or DPP's consent is required to prosecute | ✓ | | | | | | | ✓ |
| Whether and in what circumstances it is likely that a confiscation order will be made against the offender's property | ✓ | | | | | | | |
| The actual or potential harm occasioned to any person as a result of the alleged offence | | | | | | | ✓ | |
| The need to give effect to regulatory priorities | | | | | | | ✓ | |
| Whether the alleged offence is triable only on indictment | | | | | | ✓ | | |

Some jurisdictions identify additional considerations.

The Queensland *Director's guidelines* provide additional considerations for the decision to prosecute in certain circumstances. In particular, there are additional considerations for the prosecution of aged or infirm offenders, sexual offences and sexual offences by children.

For aged or infirm offenders, the guidelines state that there is a reluctance to prosecute an older or more infirm offender unless there is a real risk of repetition or the offence is so serious that it is impossible to overlook. However, proceedings should not be instituted or continued in general where the nature of the offence is such that, considering the offender, a court is likely to impose only a nominal penalty.¹³⁵⁷

In relation to sexual offences by children, the Queensland guidelines state that a child may be prosecuted for a sexual offence where the child has exercised force, coerced someone younger or otherwise acted without the consent of the other person. They also specify that children should not be prosecuted for a sexual offence where they are also the complainant (such as indecent dealing) or for consensual sexual experimentation with children of similar ages.¹³⁵⁸

The Western Australian guidelines require consideration of whether the prosecution should proceed in order to secure appropriate convictions to complement the operation of the *Community Protection (Offender Reporting) Act 2004* and the *Working with Children (Criminal Records Checking) Act 2004*. In Case Study 11, we heard evidence from Mr Bruno Fiannaca SC, Deputy DPP for Western Australia, that the need to secure appropriate convictions to enliven the provisions in these acts is not determinative but will be weighed alongside the other public interest considerations which determine whether a prosecution should proceed.¹³⁵⁹

All of the prosecution guidelines also state that the decision to prosecute should not be influenced by the following factors:

- race, religion, sex, national origin or political views
- personal feelings of the prosecutor concerning the offender or the victim
- possible political advantage or disadvantage to the government or any political group or party
- the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution.¹³⁶⁰

In New South Wales, Victoria and the Northern Territory, the personal feelings of the prosecutor concerning the offence are also listed as a factor that should not influence a prosecution decision. In New South Wales and the Northern Territory, possible media or community reaction to the decision are also listed as factors that should not influence a decision to prosecute.¹³⁶¹

The decision to discontinue a prosecution

Each jurisdiction's prosecution guidelines contain provisions relating to discontinuing a prosecution. In general, the considerations relevant to a decision to commence a prosecution are also relevant to a decision to discontinue.

However, it is a requirement that the views of the police or investigating agency and the views of the victim be sought and taken into account in making that decision. Requirements to consult victims and investigating officers are discussed further below.

The New South Wales and Western Australian guidelines specify that careful consideration should be given to requests by the victim to discontinue a prosecution. Particularly in sex offence matters, such requests, properly considered and freely made, are to be accorded significant weight. Ultimately, however, the public interest is the paramount consideration, especially where there is other evidence implicating the accused person, there is a history of similar offending or the gravity of the alleged offence requires the prosecution to continue.¹³⁶²

In *The impact of delayed reporting on the prosecution and outcomes of child sexual abuse cases* (Delayed Reporting Research), the researchers report on the high rate of withdrawals or discontinuance of prosecutions in South Australia.

The Delayed Reporting Research states:

A significant difference between the two states [New South Wales and South Australia], and one that affects the calculation of the conviction rates and may also affect plea rates, depending on when the charges are withdrawn or dismissed, is the much greater proportion of matters that are withdrawn or dismissed in South Australia compared with New South Wales. In both the higher and lower courts, the rates in South Australia are about double those in New South Wales. In the recent three-year period 2010–2012, 30.2 per cent of persons in finalised appearances in the higher courts in South Australia had all charges dismissed prior to a hearing compared with 14.9 per cent in New South Wales in 2012–14.¹³⁶³

These data are for child sexual abuse offences. The Delayed Reporting Research also reports on studies by the South Australian Office of Crime Statistics and Research (OCSAR) in relation to the higher level of matters withdrawn by the prosecution in South Australia compared with other states in all criminal offences. A 2004 OCSAR report suggested that the South Australian ODPP may withdraw charges and then lay new ones to start a new prosecution rather than changing the charges, as occurs in New South Wales. However, the Delayed Reporting Research's analysis did not support that hypothesis in relation to child sexual abuse cases.¹³⁶⁴

A January 2013 review by OCSAR of withdrawal rates for all offences in the higher courts in South Australia found the rate to be higher than for Australia as a whole. For offences in general in 2010–11, 29.1 per cent of defendants in South Australian higher courts had their matters withdrawn, compared with 13.5 per cent for Australia as a whole. For sexual assault and related offences, the rates were 32.2 per cent for South Australia and 20 per cent for Australia as a whole.¹³⁶⁵

The main reasons for cases being withdrawn by the prosecution were complainant attrition, the strength of the evidence and ‘the complainant not being up to proof’.¹³⁶⁶

The review noted a much higher rate of ‘white papers’ in circuit courts when compared to Adelaide courts. In South Australia, the ODPP draws a distinction between matters that are withdrawn and matters where the DPP declines to prosecute any charge prior to arraignment under section 276 of the *Criminal Law Consolidation Act 1935 (SA)*, the latter being referred to as a ‘white paper’. The difference in ‘white paper’ rates between regional and metropolitan courts is likely to reflect the lack of ODPP involvement prior to committal in regional areas.¹³⁶⁷

Determining charges and charge negotiation

There is a general principle across jurisdictions that charges should be adequate and appropriate to address the criminality alleged and enable the matter to be dealt with in a fair and expeditious manner according to law. In Western Australia, South Australia and the Australian Capital Territory, there is also a principle that the charges laid will be the most serious available on the evidence unless the circumstances dictate otherwise.¹³⁶⁸

Guidelines in most jurisdictions also provide that charge negotiations must be based on principle and reason, not on expediency.¹³⁶⁹

Charge negotiations are accepted in each jurisdiction on the basis that the public interest is in the conviction of the guilty and that early notice of the pleas of guilty will maximise the benefits for the victim and the community. In Western Australia, New South Wales, Queensland and the Australian Capital Territory, the guidelines include an explicit statement that negotiations between the prosecution and defence are to be encouraged. Similarly, the Victorian guidelines require the solicitor to consider whether the prosecution may be resolved by a plea of guilty to appropriate charges at every stage of the prosecution.¹³⁷⁰

Guidelines in all jurisdictions share the principle that the negotiated charges must bear a reasonable relationship to the nature of the criminal conduct of the accused. While these are not the only determinative factors, the guidelines in most jurisdictions share in common the requirement for prosecutors to consider four key matters when determining whether accepting a plea to an alternative charge would be in the public interest.¹³⁷¹ While the wording varies between jurisdictions,¹³⁷² these matters are whether:

- the alternative charge adequately reflects the essential criminality of the conduct and provides adequate scope for sentencing
- the evidence available to support the prosecution case is weak in any material respect
- the saving of cost and time is substantial when weighed against the likely outcome of the matter if it proceeded to trial
- it will save a witness, particularly a victim or other vulnerable witness, from the stress of testifying in a trial and/or a victim has expressed a wish not to proceed with the original charge or charges.¹³⁷³

The guidelines in Victoria, South Australia and the Australian Capital Territory provide more detailed lists of matters to consider in determining whether to accept a plea to an alternative charge. For example, the Victorian guidelines require a solicitor considering whether a prosecution may be resolved by a plea of guilty to appropriate charges to consider:

- the strength of the evidence – in particular, any admissions
- any probable defences
- the views of the victims and the informant
- the need to minimise inconvenience and distress to witnesses, particularly those who may find it onerous to give evidence
- the accused's antecedents – in particular, any criminal history
- the likely length of a trial
- whether the accused will give evidence for the prosecution (for example, against other offenders or co-offenders) after pleading guilty. In considering this, regard should be had to the value of the accused's evidence and the culpability of the accused compared with the culpability of those against whom the accused's evidence will be used.¹³⁷⁴

Prosecution guidelines also include other considerations, such as whether the accused person has paid compensation in cases where there has been financial loss.¹³⁷⁵ However, these considerations are not relevant to child sexual abuse prosecutions.

In Queensland, Western Australia, the Northern Territory and the Australian Capital Territory, the guidelines also indicate, in essence, that an alternative plea will not be considered where its acceptance would produce a distortion of the facts and create an artificial basis for sentencing or where the accused asserts or intimates that they are not guilty of an offence they are offering to plead guilty to.¹³⁷⁶ In South Australia the prosecution is not to entertain a charge negotiation proposal if the accused maintains their innocence in respect to a charge or charges to which the accused has offered to plead guilty.¹³⁷⁷

The guidelines contain requirements to consult victims and investigating police officers. These are discussed below.

Victim and police consultation

Guidelines in most jurisdictions require prosecutors to consult victims and investigating police officers before decisions are made to discontinue proceedings or to negotiate charges with the accused.

In New South Wales, Victoria, Queensland, Western Australia, South Australia and the Northern Territory, victims must be consulted before any decision is made to discontinue a prosecution.¹³⁷⁸ The guidelines in the Australian Capital Territory require consultation with victims where practicable.¹³⁷⁹

In New South Wales, Queensland and Western Australia, consultations with the investigating police officer and the victim must be recorded and considered before any decision is made to discontinue a prosecution.¹³⁸⁰ The South Australian guidelines require that any person who will be significantly affected by a decision to discontinue after a committal be consulted before any decision is made.¹³⁸¹ There does not appear to be a requirement that those consultations be recorded.

The Victorian guidelines state that victims should be consulted before any decision is made to not proceed with some or all of the charges and they must be informed of any subsequent decision not to proceed.¹³⁸²

The Northern Territory guidelines require a discontinuance report to be prepared which includes, among other things, the views of the investigating police officer and the victim. The guidelines state that the victim must be notified of a decision to discontinue proceedings as soon as practicable, but they also state that reasons for discontinuance will not normally be given.¹³⁸³

The guidelines in New South Wales, Victoria, Queensland, Western Australia, South Australia, the Northern Territory and the Australian Capital Territory require victims to be consulted regarding charge negotiations in certain circumstances. In all cases, while the victim's views must be taken into account, they are not determinative, as it is the public rather than an individual interest which must be served.¹³⁸⁴

The New South Wales guidelines require prosecutors to seek the views of the police officer in charge and the victim at the outset of formal discussions regarding a negotiated plea and in any event before any formal position is communicated to the defence. These consultations must be recorded on file.¹³⁸⁵ Further, where the offence involves sexual violence, the victim must be consulted on charge decisions in general, such as charge variation and discontinuance, in addition to charge negotiation.¹³⁸⁶

In Victoria, the solicitor with conduct of the prosecution must ensure that victims are consulted before a decision is made not to proceed with some or all of the charges or to accept a plea of guilty to a lesser charge.¹³⁸⁷ The Western Australian guidelines require that all victims be consulted where practicable.¹³⁸⁸ Similarly, the guidelines in Queensland require that the views of the investigating officer and the victim or their relatives be sought in all cases.¹³⁸⁹

In South Australia, victims of serious offences, defined as an indictable offence that resulted in death or physical harm to a person or which was a sexual offence, are entitled to be consulted on certain decisions, which include charge decisions.¹³⁹⁰

In the Consultation Paper, we suggested that the Tasmanian guidelines did not contain a clear requirement for formal victim consultation on charging decisions. However, we noted that the guidelines state that 'discussion with the victim should also take place to ascertain their views and forewarn them of the possibility that there might be a discharge or reduction in number and/or severity of the charges, and the reasons that might be so'.¹³⁹¹ We also noted requirements of the guidelines that, where practicable, victims should be informed of any proposed discharge or reduction in charges before the accused and police are informed and that this enables the complainant to have an opportunity to provide their views.¹³⁹²

In his submission in response to the Consultation Paper, the Tasmanian DPP provided the following information on the revised guidelines:

It is submitted that under the revised guidelines (which I will quote below), there is little doubt that there is a requirement for formal victim consultation on charging decisions. At p 17, the guidelines state:

Where practicable, when there is a complaint, a complainant or claimed victim of a crime originally charged, he or she should be informed of any proposed discharge or reduction in charges before the accused or police are informed. This is the task of the prosecutor with conduct of the case, to whom the memorandum should be returned. This enables the complainant to have an opportunity to provide his or her views as to why the prosecution should proceed. It is an important step in the process that a complainant understands the reasons why a decision to discontinue has been made.

It is preferable that the complainant be informed of the reasons in person. However, if this is not possible, it should be done by telephone. A letter should be sent confirming that the charges will not proceed and the complainant has a right to request the Director to review the decision.

Therefore, there is no doubt that it is a requirement of the guidelines, firstly, that a victim should be consulted and, secondly, that a letter should be sent informing them of their right to request the Director to review the decision.¹³⁹³

The Northern Territory guidelines provide that victims may be consulted on charge decisions where the offence is sexual in nature, but they require prosecutors to first consult with the witness assistance officer assigned to the matter to decide whether the victim should be consulted. If that consultation does take place, the WAS is to be informed so that they can provide appropriate support to the victim.¹³⁹⁴

20.5.4 Principles for charging and plea decisions

Possible principles suggested in the Consultation Paper

In the Consultation Paper, we suggested that there may be value in identifying principles to guide prosecution charging and plea decisions.

We suggested the following possible principles for these prosecution decisions:

- Prosecutors should recognise the importance to complainants of the correct charges being laid as early as possible so that charges are not significantly downgraded or withdrawn at or close to trial. Prosecutors should provide early advice to police on appropriate charges to lay when such advice is sought.
- Whether or not such advice has been sought, prosecutors should confirm the appropriateness of the charges as early as possible once they are allocated the prosecution to ensure that the correct charges have been laid and to minimise the risk that charges will have to be downgraded or withdrawn closer to the trial date.
- While recognising the benefit of securing guilty pleas, prosecution agencies should also recognise that it is important to complainants – and to the criminal justice system – that the charges for which a guilty plea is accepted reasonably reflect the true criminality of the abuse they suffered.
- Prosecutors must endeavour to ensure that they allow adequate time to consult the complainant and the police in relation to any proposal to downgrade or withdraw charges or to accept a negotiated plea and that the complainant is given the opportunity to obtain assistance from relevant witness assistance officers or other advocacy and support services before they give their opinion on the proposal.

We sought submissions on these possible principles. We also sought submissions in relation to whether it is sufficient to address these issues by setting out general principles or whether we should consider making more specific recommendations – and, if we should consider making more specific recommendations, what should they be.

A number of submissions in response to the Consultation Paper expressed support for these principles.

The New South Wales ODPP submitted:

We are open to reviewing prosecution guidelines and policy to expressly recognise:

- The importance of laying correct charges
- Sanctioning charges
- Charges reflecting true criminality
- Adequate time being allowed to consult with the victim.¹³⁹⁵

Similarly, the Victorian Government submitted:

The Royal Commission has proposed principles to inform prosecution responses, charging and plea decisions and these are supported by Victoria Police. In Victoria, steps have already been taken to improve communication between prosecutors and police in regard to charging decisions, with the implementation of a Prosecution Frontline Support Unit. This unit supports the management and compilation of summary jurisdiction briefs of evidence by offering legal advice, and operational planning support to ensure that briefs are timely and of high quality.¹³⁹⁶

The Commonwealth DPP outlined measures that are currently in place to meet the aims of the proposed principles, including the following:

- Where a brief is received, it will be allocated promptly to a case officer whose responsibility is to ensure that appropriate charges are identified as early as possible.
- Charges for which a guilty plea is accepted must adequately reflect the true criminality involved. In the ordinary course, the charge or charges should be the most serious disclosed by the evidence, although detailed evidentiary considerations may make it appropriate to proceed with a charge that is not the most serious charge alleged.¹³⁹⁷

Some submissions indicated support for or commented on specific principles. We discuss these below.

Correct charges and charge advice

The later in the course of a prosecution that charges are downgraded or discontinued, the greater the likely negative impact on victims and the criminal justice system. In particular, discontinuing prosecutions close to the trial date raises significant concerns for victims. Victims and their families are likely to be caused significant distress if they are exposed to the stress and uncertainty of preparing for a criminal trial and are then informed that the charges against the accused are to be downgraded or discontinued.

Recent reports have identified steps that could be taken to ensure that appropriate charges are laid early in proceedings and to reduce the likelihood that they will need to be altered later.

In February 2014, the Lord Chief Justice of England and Wales asked the Rt Hon. Sir Brian Leveson, President of the Queen's Bench Division, to conduct a review of the efficiency of criminal proceedings in England and Wales. In his report, he identified the first overarching principle of his review to be 'Getting it right first time'. His view was that, as the gatekeepers of entry to the criminal justice process, it was incumbent on police and prosecutors to make appropriate charging decisions based on a fair appraisal of sufficient evidence.¹³⁹⁸

He noted that the failure to charge appropriately had a considerable impact throughout the life of the case. Out of matters in the Crown Court where a defendant entered an initial plea of not guilty and then changed their plea after a trial date was listed, 15 per cent of those cases were attributable to guilty pleas being entered to alternative new charges offered by the prosecution for the first time on the day fixed for trial. A further 4 per cent resulted from the prosecution accepting pleas to charges which they had initially rejected.¹³⁹⁹ He stated: 'This represents a substantial waste not only of court resources but also the resources of the CPS and the legal aid fund, to say nothing of the cost both financial and emotional to victims and witnesses.'¹⁴⁰⁰

The principle of 'Getting it right first time' is of particular relevance to Rape and Serious Sex Offence (RASSO) units in England and Wales, which handle child sexual abuse prosecutions. Mr Kevin McGinty, Chief Inspector of Her Majesty's Crown Prosecution Service Inspectorate, said:

the whole principle of RASSO units is that you get it right the first time so that there is no need to explain to victims and witnesses later on that the charges have changed. It doesn't necessarily mean to say they weren't corrected later on, but ideally, if a RASSO unit is to work effectively, it should be getting it right first time.¹⁴⁰¹

To a significant degree, the frequent need to vary the charges against an accused can be explained by the different charging considerations for police and prosecutors. The police charge is formulated at a time when the police consider that arrest or issuing a court attendance notice or similar initiating process is appropriate, and it may be informed by evidence and investigations that are incomplete and ongoing.¹⁴⁰² However, prosecutors must not prosecute a matter on a charge unless they have evidence to support a reasonable prospect of conviction. This can result in the variation of charges or the discontinuance of matters based on an appropriate evaluation of the evidence by prosecutors.¹⁴⁰³

In most jurisdictions, the case file for a prosecution is passed from the police to the prosecution agency before committal and after first appearance. In general, the first time a prosecutor reviews the charges and material will be around the time of the committal, and a Crown prosecutor will review the material closer to the date of the trial. The charges against the accused may be revised at any point where a prosecutor evaluates the strength of the available evidence or when new evidence comes to light, but charge variation or discontinuance is common at these two points in the process.

One way to increase the likelihood that appropriate charges are laid early in proceedings is for police to seek advice from the prosecuting agency on the most appropriate charge to be laid at the end of a criminal investigation. In its report on encouraging early guilty pleas, the NSW LRC considered the need for such advice.

The NSW LRC noted overwhelming stakeholder support for an early charge advice regime as an antidote to late charge variations, with the DPP stating that, if the ODPP were responsible for charge decisions, the practice of accepting a plea to a lesser charge would become less frequent.¹⁴⁰⁴

The NSW LRC considered both pre- and post-charge advice models. While it preferred a pre-charge advice model, it recommended that a post-charge advice model be adopted based on stakeholder feedback. Under this model, the police would retain an initial charging decision and seek an adjournment from the court in order to seek charge advice from the ODPP.¹⁴⁰⁵ While this still gives rise to a greater chance of charge variation when compared to the pre-charge advice model, it would ensure that, barring new evidence coming to light or a change in prosecution staff resulting in a different view of the strength of the evidence, any charge variation would occur early in proceedings.

The NSW LRC identified the importance of charge certainty for victims.¹⁴⁰⁶ It was informed that it is the downgrading of charges that caused victims the most distress and that victims would prefer to wait for the correct charge to be laid early in proceedings than experience the disappointment of having a charge downgraded later in the process.¹⁴⁰⁷

In its submission in response to the Consultation Paper, the NSW ODPP submitted:

In NSW, the police retain the discretion to charge. Through our submission to the NSW Law Reform Commission in relation to early guilty pleas, the ODPP made it clear that it would be our preference to have more control over the decision to charge and the identification of the correct charges before those charges were laid. Getting the charge right early in the criminal process, in our submission, adds a number of benefits to the process. It makes it clear to the accused at the outset that these are the charges to which a plea would be accepted, it gives police and victims realistic expectations as to how the case will proceed, and it better enables the defence to prepare the case for trial and the court to case manage the matter.

Charging in respect of child sexual abuse offending is, over and above other offence categories, a technically challenging exercise ... None of this complexity is dissipated in the context of contemporary offences, indeed, the interaction of relevant State and Commonwealth laws is but one example of how the complexity continues to grow. Multiplicity of charges sees NSW police and ODPP lawyers differing in their charging preferences, for example, one party preferring offences with the element of consent and the other party child-specific offences. We encourage police to seek pre-charge advice, particularly in relation to historical allegations of abuse, precisely because of the complexity in charging.¹⁴⁰⁸

The Victorian Government submitted that steps have been taken in Victoria to improve communication between prosecutors and police in regard to charging decisions with the implementation of a Prosecution Frontline Support Unit. It stated:

This unit supports the management and compilation of summary jurisdiction briefs of evidence by offering legal advice, and operational planning support to ensure that briefs are timely and of high quality.¹⁴⁰⁹

The Victorian DPP outlined the current practices of the VPPS in providing charge advice to Victoria Police as follows:

It has been the practice of the VPPS to provide charging advice to Victoria Police, in appropriate cases, since the inception of the DPP in 1983. The function of the Director to provide external advice is formally recognised in the Public Prosecutions Act 1994, and the provision of such advice has been the subject of well-developed policies and practices over more than 30 years. The principal aim of those policies and practices has been to give accurate advice as early as possible in the prosecution process.

... All advice which is provided under that Policy, and which involves advice as to appropriate charges to be filed, is guided and informed by the prosecutorial discretion criteria in my Policy on the General Prosecutorial Discretion, and thus aims to ensure that the subsequent amending or 'downgrading' of charges occurs only where justified according to changes in the available evidence or upon the negotiation of lesser charges, on an appropriate basis in accordance with the Policy in relation to Resolution.

The Advice Policy requires that the request for advice should relate to issues that possess some legal complexity, involve a conflict of interest, have broader public policy implications such as to warrant the Director's involvement, and must relate to a matter which is intended to be prosecuted by my Office.¹⁴¹⁰

In relation to the possible principles recognising the importance of laying the correct charges early, and the provision of charge advice by prosecutors, the Victorian DPP stated:

However, providing advice at an early stage must not result in the VPPS being too closely involved with police, or acting merely as an arm of the investigating agency. Prosecutors must be wary of becoming too close to the case and losing the perspective that independence is designed to bring.

Risks may be managed by using highly experienced prosecutors who are vigilant to not cross over the line and become 'part' of the investigating team. Lawyers giving advice need to be experienced enough to be aware of the risks, and to manage them appropriately.

The fundamental requirement in our system to retain independence from the investigative agency, and to be perceived to be so, remains a key question to be kept front of mind when considering whether to provide advice to police on investigative or operational matters.

I recognise the many advantages of early and accurate prosecution advice being given, and I regard the proper management of early advising as a major current challenge for the VPPS. It is also an issue about which I have spoken at local and international forums, most recently during an IPA Conference in September 2016.

I agree with the Commission that prosecutors must recognise the importance to complainants of the correct charges being filed as early as possible so that charges are not significantly downgraded or withdrawn at or close to trial, and that prosecutors should provide early advice to police on appropriate charges to file when such advice is sought.¹⁴¹¹

The Tasmanian DPP also outlined existing practices in relation to charge advice and its impacts:

this Office has an advice service for Tasmania Police in respect of allegations of sexual assault. In 2014-15 there were 200 complaints to police from which they sought advice from this Office in respect to 140 matters. In my view, the system in place encourages regular early advice by this Office which is demonstrated by the high conviction and low discharge rates. This allows for the correct charges to be laid and for advice to be given concerning further evidence. Further it has the effect of not falsely raising complainants expectations.¹⁴¹²

The Commonwealth DPP outlined the measures that are currently in place regarding the laying of appropriate charges and charge advice:

Prosecutors at the CDPP are trained to ensure that correct charges are identified and laid as early as possible, and where police seek legal advice in significant matters on the appropriate charges during the course of the investigation the CDPP provides that advice. Where such pre-brief legal advice is sought by police on child sex matters this is provided by specialist lawyers in the Human Exploitation and Border Protection Practice Group ... Where a brief is received it will be allocated promptly to a case officer whose responsibility is to ensure that appropriate charges are identified as early as possible.¹⁴¹³

Submissions from prosecution agencies recognised the significance of decisions to discontinue a prosecution and outlined the procedures that are in place to ensure that such decisions are properly made. The Commonwealth DPP noted that the Executive Leadership Group of the Commonwealth DPP had recently decided to increase the level of authority required to make decisions not to commence or to discontinue a prosecution where there are child complainants in a child sex matter. These decisions will now be made at Practice Group Leader level, with the new decision-making process to come into operation shortly.¹⁴¹⁴

Similarly, the DPP for the Australian Capital Territory noted that, in his office, decisions to discontinue sex offence proceedings at either the Magistrates Court or the Supreme Court required approval at a senior level.¹⁴¹⁵ He also referred to the wider public interest considerations that apply to decisions to discontinue prosecutions and the tight time frame in which such decisions must sometimes be made:

It also should be acknowledged that in deciding whether to discontinue a prosecution, it is not just the views of, or indeed the interests of, the complainant to which the DPP must have regard: in accordance with the prosecution policy, the DPP must consider the wider interests of the community, and indeed the interest of the accused. A person must not be put on trial unless there are reasonable prospects of conviction, and it is otherwise in the public interest that the matter proceed.

Decisions not to proceed must sometimes be made within compressed timetables, imposed by impending court deadlines and the like. Once a decision that a matter will be discontinued is communicated to an accused person, then generally it is not practically possible to re-institute the matter.¹⁴¹⁶

ACT Policing submitted that the Australian Capital Territory ODPP has a specialised sex offences team which meets with ACT Policing's Sexual Abuse and Child Abuse Team every six weeks in order to discuss issues and upcoming matters and that this collaboration was beneficial for both parties.¹⁴¹⁷

Other submissions also expressed support for the possible principles recognising the importance of laying the correct charges early and the provision of charge advice by prosecutors. The Australian Capital Territory Victims of Crime Commissioner submitted:

It is important that appropriate charges are laid at the first possible opportunity. This often requires liaison between prosecutors and police. In the ACT police are encouraged to seek advice from prosecutors where charge decisions are not apparent.¹⁴¹⁸

Similarly, CASV submitted:

The risk of charges being downgraded or withdrawn should be minimised through the prosecution process by liaising with the police providing advice about the appropriateness of charges being laid.¹⁴¹⁹

The Victorian Commission for Children and Young People submitted that there was a strong argument for decisions of particular complexity or sensitivity in the laying of charges to be shared with or referred to prosecutors as a matter of routine practice.¹⁴²⁰

Charge negotiation

In submissions in response to the Consultation Paper, interested parties expressed a range of views on charge negotiations.

Dr Holder and Ms Whiting submitted that it is charge negotiation decisions that leave victims feeling 'most excluded and betrayed by the criminal justice process'.¹⁴²¹

Jannawi Family Centre did not oppose the use of charge negotiations but expressed the view that it should be the victim's choice whether they occurred.¹⁴²² Jannawi Family Centre submitted:

Many victims we have supported over the years have struggled with the process of plea bargaining, particularly when they have experienced a lack of choice regarding their engagement with the criminal justice process, to then have that choice offered to the offender seems incongruent and unjust. Whilst we understand the significant cost in proceeding with trials [sic – trials] and that plea bargains are seen to be cost effective, it is our belief that prioritising cost and use of an economic excuse is hurtful to victims, as well as giving a sense of negotiating with someone who is in court for their complete lack of negotiation in hurting another. It is not supported and many victims understand that they would prefer to complete a criminal justice process rather than have the process negotiated with a person who they believe should not have that right, particularly when it occurs without the agreement of the victim. It is a process which we believe potentially causes further harm. This is not to remove the option of plea bargaining however, as it should provide choice, if the victim wishes to proceed with it.¹⁴²³

Similarly, the South Eastern Centre Against Sexual Assault & Family Violence submitted:

Accepting a guilty plea to lesser charges should be fully explored and explained to victims. If they still do not agree they should be allowed to complain or seek a reviews [sic]. We understand that empowering people is an aid to recovery and to take away their right to make a decision the system may not think wise does not empower them. We do not always know what is best for people.¹⁴²⁴

Other submissions noted the value and importance of charge negotiations. For example, the National Association of Services Against Sexual Violence submitted:

Often, this can allow a perpetrator to be convicted and negate the need for a victim to give evidence. There needs to be consultation with all parties involved in a case to make this decision and, if agreed, it can lead to a more streamlined court process and resolution. There should be a proviso that summaries of evidence are not overly 'watered down' to reflect only the lesser charge though.¹⁴²⁵

Some submissions expressed support for the principle that prosecutors should ensure that the negotiated charges reasonably reflect the criminality of the accused's conduct.

CASV submitted that prosecutors and police should 'do their best to assure the charges adequately reflect the crime/s that occurred'.¹⁴²⁶

Dr Holder and Ms Whiting submitted:

We also welcome the Commission's recommendation that the charges resulting from plea negotiations should reflect the true criminality of the act/s. This is not only important to keep faith with the victim and the community and to ensure that offenders are held accountable for the totality of their criminal behaviours, but also to enable the victim to tell the court about the impact of the crime on their lives through a Victim Impact Statement (VIS). There are significant other implications to victims if the full extent of the criminal conduct is not adequately reflected in the charges.¹⁴²⁷

The Victorian DPP submitted that many victims prefer a criminal trial to resolution via negotiated plea, noting that, in the case of sexual offences against children, complainants and their families often prioritised the experience of giving evidence at trial above the certainty of a guilty plea despite the associated trauma and the possibility that the accused will be acquitted.¹⁴²⁸

A confidential submission from members of the judiciary expressed concern that judges are required to sentence on the basis of charges that do not reflect what the accused has done. The submission referred to the examples of an offender who has had sexual intercourse with the complainant but is sentenced after having pleaded guilty to indecent assault; and where aggravating factors such as the offender being in a position of authority are ignored.

The DPP for the Australian Capital Territory submitted that, as with decisions to discontinue proceedings, any plea negotiations or any substantial changes to statements of facts made in the course of negotiations were expressly subject to approval at a senior level.¹⁴²⁹

We are satisfied that victims should be consulted in relation to any proposed charge negotiation, and we discuss consultation further below. However, we are also satisfied that it would not be appropriate for victims to be given what would effectively be a right of veto over charge negotiation decisions.

The experience of BYC, discussed in section 20.5.2, shows that more than one victim may be involved in a prosecution and may be affected by charge negotiations. In these circumstances, it would not be possible for individual victims each to exercise a right of veto.

Further, the prosecutor needs to take some account of the strength of the prosecution evidence in considering charge negotiations. The Hon. Gordon Samuels AC CVO QC reviewed the New South Wales DPP's charge negotiation policies in 2002. His report recognised that, while the prosecution guidelines emphasise the importance of negotiated charges reflecting the criminality of the accused's conduct, 'criminality' in this context refers not to what the accused is *alleged* to have done, but what the prosecution can *prove*. The relationship between the adequacy of charges and the strength of the prosecution evidence is a fundamental part of charge negotiations. He stated:

The optimum outcome of a criminal prosecution is resolution by a plea of guilty to a charge which adequately represents the criminality revealed by facts which the prosecution can prove beyond reasonable doubt, and which give the sentencer an adequate range of penalty.¹⁴³⁰

It is not accurate to characterise the charge negotiation process as allowing the accused a free choice as to the charges to which they will plead guilty. Rather, the process is one which aims, via discussion between the prosecution and defence, to identify the facts that the prosecution can prove beyond reasonable doubt and to establish the charge which reflects the criminality revealed by those facts.¹⁴³¹

The experiences of BYC, JBC and JBH, discussed in section 20.5.2, illustrate the sorts of considerations of the strength of the evidence, as well as the views of the victim or victims, that prosecutors need to take into account in negotiating charges.

We also acknowledge the importance to the criminal justice system generally of appropriate guilty pleas being made and accepted. We discuss the issue of delay in Chapter 32. Courts in some states are facing a backlog of cases, leading to delays. Even when child sexual abuse trials are given priority, they can still experience delays, which can cause significant distress to victims.

We are satisfied that the possible principle we suggested in the Consultation Paper in relation to guilty pleas, when taken together with the principle in relation to victim consultation, is appropriate.

Victim consultation

Insufficient consultation with victims before deciding to discontinue a prosecution or accept a negotiated plea is likely to cause victims to feel greater distress and dissatisfaction with these decisions.

Given the significance of decisions to discontinue proceedings or to accept pleas to lesser charges, it is important that victims be consulted before either decision is made.

In New South Wales, the importance of victim consultation on charge negotiation decisions is recognised in legislation. Charge negotiation may include the prosecution and defence settling a statement of agreed facts for the sentencing hearing. Under section 35A of the *Crimes (Sentencing Procedure) Act 1999* (NSW), a court cannot take into account any statement of agreed facts that was the subject of charge negotiations unless the prosecution has filed a certificate verifying that requisite consultation has occurred with the victim and police.

As discussed above, most Australian jurisdictions impose requirements on prosecutors to consult with victims before discontinuance or charge negotiation decisions are made. However, not all prosecution guidelines require such consultation, and it is clear from evidence we have

heard in public hearings and accounts we have been given in private sessions that victims do not always consider that appropriate consultation occurred. Some survivors have told us they found the consultation process difficult to understand or that it had been too rushed. Others felt that they were pressured to accept pleas recommended by the prosecution.

In Case Study 38, we heard evidence from Mr Dennis Dodt, a survivor, about a prosecutor consulting him over the proposed discontinuance of the prosecution of charges relating to abuse he suffered. Mr Dodt gave evidence that:

The prosecutor told me that as the DPP already had one conviction against Noyes it would be very hard to get another conviction for the same type of crimes. He told me that they didn't have the money or the time to put towards my case as they had already convicted Noyes. I felt like the prosecutor was encouraging me not to proceed with my complaints.

As a result of the attitude of the prosecutor I reluctantly agreed to the withdrawal of my complaint. Throughout my dealings with the police and the DPP I did not feel that I was supported or really consulted about what I wanted. I felt that the process had again abused me and that the focus seemed to be on the law and not the humanity of us.¹⁴³²

We heard evidence from Mr Byrne QC, the Queensland DPP, that it was unlikely a prosecutor would have conveyed to a victim that they did not have the time to pursue a prosecution.¹⁴³³ Regardless of what explanation was in fact given to Mr Dodt, Mr Dodt's evidence illustrates how he felt about the conversation and the decision.

Consultation should enable the prosecutor to obtain the victim's views and the victim to obtain information about what is proposed and the reasons for the proposal. Sufficient time should be allowed to conduct meaningful consultation with police and victims. Prosecutors should also consider ensuring that the victim has support during the consultation. For example, as noted above, the Northern Territory prosecution guidelines require the WAS to be informed when victim consultations occur on negotiated pleas so that they can provide the victim with appropriate support.

In their submissions in response to the Consultation Paper, a number of interested parties expressed strong support for the importance of consulting victims on key prosecution decisions.

The South Australian Commissioner for Victims' Rights submitted that victims throughout Australia should have a right to be consulted before key decisions such as charge decisions are made.¹⁴³⁴ He also submitted that this should be an enforceable right – for example, by providing victims with the authority to make an application to stay proceedings until the right has been honoured.¹⁴³⁵

The Victorian Victims of Crime Commissioner recommended that we consider models to ensure proper consultation has occurred with victims and survivors regarding the withdrawal of charges, such as the New South Wales court certification scheme described above.¹⁴³⁶

ACT Policing submitted that involving the victim will give them a better understanding of the process and make it easier for them to accept the outcome.¹⁴³⁷ Similarly, CASV observed:

It is important for the survivor to feel like they have a voice in the prosecution process that extends beyond writing a victim impact statement. If the survivor is consulted and included in the process, this is likely to empower the survivor.¹⁴³⁸

Other submissions highlighted the need for sufficient time to be given to victims in the course of consultations and expressed concern that this does not always occur.

PACT stated that prosecutorial decisions were often made in haste, such as during a court adjournment, 'which does not give the child or their family adequate time to fully consider the request or the likely future impacts'.¹⁴³⁹ We note that the VLRC also referred to the short amount of time given to victims being a common complaint about consultations, with consultations sometimes taking place on the morning of the court date.¹⁴⁴⁰

knowmore also raised concerns about the provision of support during consultations:

Many survivors have told us that they have experienced difficulty in understanding the process and reasons for such prosecutorial decisions; in that they were simply unable to understand, particularly in a situation that was very stressful for them, the information being provided to them by prosecution staff and the reasons for the decision. Some have spoken of feeling that they had no 'voice' to raise their concerns, or that they simply did not know what questions to ask as they could not understand the legal issues.¹⁴⁴¹

Some prosecution agencies expressed recognition of the difficulties that victims face when they are consulted during times of stress and when a decision has to be made within a short period of time.

In its submission, the New South Wales ODPP stated:

We recognise that information may need to be delivered in several meetings, may need to be repeated and should not be rushed. We also acknowledge that in stressful situations such as on the eve of a trial, victims may not be best placed to fully appreciate or understand the consequences of a decision they are asked to make within a short time-frame.¹⁴⁴²

The DPP for the Australian Capital Territory stated:

A decision to discontinue a prosecution is a matter of great moment for a complainant. For this reason there is a formal requirement within ACT DPP that before any decision whether to discontinue a matter is taken, the views of the complainant are sought. In any such consultation, the consequences of any such decision, and the factors which bear upon it, should be discussed.

Modern prosecutors, and in particular prosecutors who work in my office, understand the importance of such consultation implicitly. We are, frankly, a long way from the culture revealed in some of the case studies considered by the Commission regarding the discontinuance of matters – a sense of empathy for the victim is central to the ethos of the modern prosecutor.¹⁴⁴³

The Commonwealth DPP explained its practice in consulting the complainant and police in relation to any discontinuance or charge negotiation decisions as follows:

Our practice is to consult the complainant and the police where a decision depends on public interest considerations. Where a decision depends on evidentiary considerations the police are consulted. Where there is a critical evidentiary deficiency that cannot be remedied the complainant is advised of the evidentiary deficiency which means that the charge or matter cannot proceed further pursuant to the Prosecution Policy of the Commonwealth.¹⁴⁴⁴

However, the Commonwealth DPP identified difficulties arising from late offers to plead guilty:

One difficulty my prosecutors face is where offers to plead guilty are made in close proximity to the hearing date. Of course prosecutors have no control over the timing of plea offers. In some cases it might be possible to make the relevant witness assistance officers available very promptly to the complainant. In some cases it may be viable to seek a short adjournment of the matter to facilitate the complainant being able to consult others. The risk that costs may be ordered can be a disincentive to the prosecution seeking an adjournment. My office will give further consideration to strategies that might be adopted to ensure there is adequate time to consult a complainant in those circumstances.¹⁴⁴⁵

PACT raised one particular concern in relation to children having time to discuss decisions with their carer or parents. PACT submitted that they have experienced many instances where a child was consulted on decisions such as an offer to plead guilty to lesser charges in the presence of their PACT volunteer but not their carer or parents.¹⁴⁴⁶ Ms Joanne Bryant, representing PACT, told the public hearing in Case Study 46:

We've had many cases where a volunteer will be sitting with the child in the prerecording suites and a prosecutor has come in and said to the 13-year-old, 'Would you like to take a plea to lesser charges? It will mean you won't have to give evidence.'

They shouldn't be put in that position. They should never be put in that position without their carer present ... Children just do not have the emotional capacity or maturity to be able to foresee the ramifications of those decisions at that young age.¹⁴⁴⁷

We consider that the possible principle we proposed in the Consultation Paper should be supplemented to make clear that, where the victim is still a child, prosecutors should endeavour to ensure that they give the child the opportunity to consult their carer or parents unless the child does not wish to do so.

We note that the Victorian DPP's guidelines on resolution require consultation with a parent or guardian where the victim is a child or a person with disability.¹⁴⁴⁸ Similar provisions may assist in other jurisdictions.

Other states and territories may also wish to consider adopting a procedure similar to that applying under section 35A of the *Crimes (Sentencing Procedure) Act 1999* (NSW). The procedure prevents a court from taking into account any statement of agreed facts that was the subject of charge negotiations unless the prosecution has filed a certificate verifying that requisite consultation has occurred with the victim and police. Such a procedure may help to ensure that consultation obligations are met.

20.5.5 Conclusion and recommendation

Prosecutors do not take a decision to discontinue proceedings lightly. A study on prosecutorial decisions in adult sexual offence proceedings found that prosecutors tended to be conservative about decisions to discontinue, recognising increased pressure from both the public and victims to proceed to trial, even though prosecutors may not always feel that to proceed is in the victims' interests.¹⁴⁴⁹

We accept that it is probably inevitable that, in some cases, discontinuing or downgrading the charges against the accused will be necessary and appropriate on the available evidence. We also accept that charge negotiations and guilty pleas are important for the efficient administration of criminal justice, with benefits to both the criminal justice system and victims of crime.

However, we are satisfied that we should recommend that the possible principles we identified in the Consultation Paper be adopted to guide prosecution charging and plea decisions to reduce the risk that prosecutors' decisions on these matters will cause significant distress to victims.

We have modified the principle in relation to consultation to refer specifically to children being given the opportunity to consult their carer or parents unless they do not wish to do so.

We have not recommended an additional principle in relation to charging and plea decisions in prosecutions for child sexual abuse offences where the complainant is a person with disability. As discussed in section 20.4.7, we consider that, in all decisions in relation to prosecuting child sexual abuse offences, including charging and plea decisions, prosecutors should take into account the significantly increased risk of abuse, including child sexual abuse, that children with disability face. This is addressed in the principle we recommended there.

As noted in section 20.4.9, no interested parties objected to our proposed approach of addressing these issues by setting out general principles.

Recommendation

39. All Australian Directors of Public Prosecutions should ensure that prosecution charging and plea decisions in prosecutions for child sexual abuse offences are guided by the following principles:
- a. Prosecutors should recognise the importance to complainants of the correct charges being laid as early as possible so that charges are not significantly downgraded or withdrawn at or close to trial. Prosecutors should provide early advice to police on appropriate charges to lay when such advice is sought.
 - b. Regardless of whether such advice has been sought, prosecutors should confirm the appropriateness of the charges as early as possible once they are allocated the prosecution to ensure that the correct charges have been laid and to minimise the risk that charges will have to be downgraded or withdrawn closer to the trial date.
 - c. While recognising the benefit of securing guilty pleas, prosecution agencies should also recognise that it is important to complainants – and to the criminal justice system – that the charges for which a guilty plea is accepted reasonably reflect the true criminality of the abuse they suffered.
 - d. Prosecutors must endeavour to ensure that they allow adequate time to consult the complainant and the police in relation to any proposal to downgrade or withdraw charges or to accept a negotiated plea and that the complainant is given the opportunity to obtain assistance from relevant witness assistance officers or other advocacy and support services before they give their opinion on the proposal. If the complainant is a child, prosecutors must endeavour to ensure that they give the child the opportunity to consult their carer or parents unless the child does not wish to do so.

21 DPP complaints and oversight mechanisms

21.1 Introduction

We had not anticipated finding significant problems in decision-making processes within the Offices of the Director of Public Prosecutions (ODPPs) in any of our case studies. However, two case studies, which we discuss in detail in section 21.2, revealed such problems.

In Case Study 15, we identified the need to consider whether there should be any process of oversight or review of the administration and decision-making processes of ODPPs.¹⁴⁵⁰ Case Study 15 revealed inadequacies in the processes of the New South Wales and Queensland ODPPs and a failure to comply with the Queensland Director of Public Prosecutions (DPP) guidelines on consulting with complainants.¹⁴⁵¹

Shortly after the public hearing in Case Study 15, further concerns emerged in Case Study 17 in relation to the Northern Territory ODPP. In Case Study 17, we found noncompliance with the Northern Territory DPP guidelines in relation to discontinuing a prosecution and notifying victims and the police officer in charge.¹⁴⁵²

In addition to the issues that arose in these two case studies, in private sessions and in submissions to *Issues Paper No 8 – Experiences of police and prosecution responses* (Issues Paper 8), many survivors have told us that they have not agreed with or have not understood prosecution decisions in matters in which they were complainants, witnesses or close family members. Some survivors remain dissatisfied years after the decisions. This is not to say that the prosecution decisions in question were necessarily unjustified or that they were not explained, at least to some extent, to the complainants. They may even have been accepted at the time. However, it is not surprising that, for many complainants, witnesses or close family members, the criminal justice process is very difficult to understand and its outcomes for them may be very difficult to accept, particularly where prosecutions are discontinued or guilty pleas to lesser charges are accepted.

DPPs make decisions that have significant impacts on complainants. As discussed in section 20.5, DPPs can make decisions to discontinue prosecutions even after the accused has been committed to stand trial in a committal hearing. DPPs can withdraw some charges or substitute less serious charges in return for a guilty plea to the fewer or less serious charges. As discussed in section 20.5.3, DPP guidelines generally require consultation with victims and the police officer in charge of the investigation to ensure that their views are obtained and taken into account in making these sorts of decisions. These requirements in DPP guidelines recognise the importance of these decisions to complainants and, indeed, to the police who have investigated the allegations and who have often laid the charges against the accused.

However, requirements in DPP guidelines may be of limited value if decisions are made without complying with the DPP guidelines in circumstances where there is no mechanism for a victim to complain or seek a review and there is no general oversight of ODPP decision-making.

In the Royal Commission's *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*, we stated:

Any body that is given statutory independence and that cannot be subject to any external reviews is at risk of failure in its decision-making processes. When the decisions being made are critical to the lives of the individuals involved, be they the complainant or accused, and are being made on behalf of the entire community it is relevant to ask whether the current structure, where there is absolute immunity from review of any decision, is appropriate. Experience suggests that an absence of review increases the risk of administrative failure.

The Royal Commission will consider whether there should be any process of oversight or review of ODPPs with respect to their administration and decision-making processes. The Royal Commission will consult widely on this issue and will report as part of its work on criminal justice issues.¹⁴⁵³

In April 2016 we convened a public roundtable to discuss DPP complaints and oversight mechanisms. Participants included a number of DPPs and their representatives, a number of victims' rights commissioners, a public defender, policy officials and academics.

At the public roundtable, we provided information about the complaints and oversight mechanisms that apply to the DPP and the Crown Prosecution Service in England and Wales, including by replaying prerecorded discussions between the Chair of the Royal Commission and relevant participants in the system in England and Wales.

We then explored with participants whether the introduction of any complaints or oversight mechanisms might be beneficial, including in terms of:

- improving the decision-making of Australian DPPs and their offices
- improving public confidence in that decision-making
- providing victims and survivors with avenues to seek review of decisions with which they do not agree.

A transcript of the public roundtable, including the discussions with the participants in the system in England and Wales, is available on the Royal Commission's website.¹⁴⁵⁴

In the Consultation Paper, we discussed a number of possible reforms. Some interested parties addressed these issues in their submissions in response to the Consultation Paper. We discuss what we were told in submissions, and our conclusions in relation to ODPP complaints and oversight mechanisms, in sections 21.5 and 21.6.

21.2 Relevant case studies

We identified the need to consider whether there should be any process of oversight or review of the administration and decision-making processes of ODPPs, particularly because of the circumstances that emerged in two prosecutions, involving three ODPPs, which we examined in case studies 15 and 17.

21.2.1 Case Study 15: Swimming Australia and the DPP

The prosecution of Mr Scott Volkens was one of the matters examined in Case Study 15.¹⁴⁵⁵

Mr Volkens was a swimming coach who became Swimming Head Coach at the Queensland Academy of Sport in 1997. He was regularly seconded to, or contracted by, Swimming Australia to attend international swimming meets and was appointed Swimming Queensland Head Coach in 2010.

On 26 March 2002, Mr Volkens was arrested and charged with five counts of indecent treatment of a girl under 16 years of age in relation to two complainants: Ms Kylie Rogers and Ms Simone Boyce. In June 2002, Mr Volkens was charged with four additional counts of indecent treatment of a girl under 16 years of age in relation to a third complainant: Ms Julie Gilbert. The abuse was alleged to have occurred in the 1980s.

Case Study 15 considered the response of Swimming Australia, Swimming Queensland and the Queensland Academy of Sport to allegations of child sexual abuse against Mr Volkens.

As part of the Royal Commission's consideration of the way the criminal justice system responds to allegations of child sexual abuse, Case Study 15 also considered the decision-making processes within the Queensland and New South Wales ODPPs in determining whether to proceed with charges of child sexual abuse against Mr Volkens.

In July 2002, Mr Volkens was committed to stand trial on seven counts of indecent treatment of a girl under 16. He entered a plea of not guilty on all seven counts.

The then Queensland DPP, Ms Leanne Clare (now Judge Clare), discontinued the prosecution of Mr Volkens by deciding to enter a 'no true bill'.

The Queensland Crime and Misconduct Commission (CMC) investigated the Queensland DPP's reasons for deciding to drop the charges. The CMC published its report in March 2003 and was critical of the Queensland ODPP. The CMC identified a number of mistakes that the Queensland ODPP made in its decision-making process.

In December 2002, the Queensland Police Service, of its own initiative, reopened investigations of the allegations against Mr Volkens. New evidence was obtained on each of the complainants.

The Queensland ODPP considered the new evidence.

In December 2003, the Queensland DPP sought the advice of Mr Nicholas Cowdery QC, the then New South Wales DPP. Mr Cowdery QC asked Ms Margaret Cunneen (now Ms Cunneen SC), Deputy Senior Crown Prosecutor with the New South Wales ODPP, to advise him on the questions that the Queensland DPP asked. Ms Cunneen provided written advice to Mr Cowdery QC.

Mr Cowdery QC provided a copy of Ms Cunneen's advice to Ms Clare, stating that he agreed with the advice. Mr Cowdery QC's evidence in Case Study 15 made plain that he did not agree with some propositions in Ms Cunneen's advice or the weight Ms Cunneen gave to some matters. However, he did not tell Ms Clare of his view of those various matters.

Judge Clare gave evidence that she agreed with the conclusion in Ms Cunneen's advice. However, she agreed that the reasons in Ms Cunneen's advice were not her reasons and in some respects she did not agree with or attach weight to them. The Royal Commission was not provided with any written record of Ms Clare's second decision not to prosecute or her reasons. Judge Clare told us that she had made a written record of her reasons for deciding not to recharge Mr Volkens; however, no such record was produced. Judge Clare submitted that there was no established process for the recording of reasons for her second decision, and this was a flaw in the Queensland DPP's processes.

Ms Rogers, Ms Boyce and Ms Gilbert first heard that there would be no prosecution from the Police Commissioner. We note that this is contrary to Guideline 18 of the Queensland *Director's guidelines*, which stated:

The views of the victim must be recorded and properly considered prior to any final decisions, but those views alone are not determinative. It is the public, not any individual interest that must be served (see Guideline 4).

We found this lack of consultation surprising given that the CMC report had suggested the Queensland DPP consider reviewing the effectiveness and adequacy of the ODPP's communication with complainants.

Ms Gilbert requested a meeting with Ms Clare. During that meeting, Ms Clare showed Ms Gilbert a copy of Ms Cunneen's advice. Judge Clare gave evidence that she should not have shown Ms Gilbert the advice. As stated in the report on Case Study 15, we were satisfied that the process Ms Clare adopted in advising Ms Gilbert of the second decision was flawed.

In November 2004, Ms Gilbert unsuccessfully sought leave to commence a private prosecution against Mr Volkens in the Supreme Court of Queensland at Brisbane.

In Case Study 15, we concluded that the inadequacies identified in the processes for recording the New South Wales and Queensland ODPPs' reasons not to proceed raise issues of significance to the internal decision-making of all DPPs.

This led us to conclude that we would consider whether there should be any process of oversight or review of ODPPs' administration and decision-making processes.

21.2.2 Case Study 17: Retta Dixon Home

In Case Study 17, we examined the response of the Australian Indigenous Ministries, the Australian and Northern Territory governments and the Northern Territory Police and prosecuting authorities to allegations of child sexual abuse at the Retta Dixon Home.¹⁴⁵⁶

The Retta Dixon Home operated as a home for Aboriginal children from 1946 to 1980.

We heard evidence from 10 former residents of the Retta Dixon Home about sexual and physical abuse they suffered from houseparents, and occasionally other children, while living at the home.

One of the perpetrators named by some of the former residents was Mr Donald Henderson, a former houseparent.

In 1973 girls at the home told a houseparent that Mr Henderson was sexually abusing boys at the home. The houseparent told the superintendent of the home. Mr Henderson stayed on as a houseparent. He was not dismissed and the matter was not reported to the police.

In 1975, after further allegations were raised, Mr Henderson was charged with seven sexual offences against five children living at the home. None of the charges proceeded to trial, and Mr Henderson was not convicted of any offence.

In 1998 a former resident of the home, AJB, made a complaint to the police about having been sexually abused by Mr Henderson in the 1960s. During the investigation, police also obtained statements from AJD, AKU and AJE, who also alleged they had been sexually assaulted by Mr Henderson at the home.

On 4 June 2001, the Northern Territory Police laid charges against Mr Henderson in relation to AJB, AJD, AKU and AJE. The Northern Territory DPP assumed conduct of the prosecution of Mr Henderson in late 2001.

Committal proceedings were heard in the Darwin Magistrates Court in February 2002. AJB died before the hearing. Mr Henderson was committed for trial on 15 counts. In March 2002 Mr Henderson was arraigned in the Supreme Court on 15 counts. He pleaded not guilty.

In November 2002, a senior prosecutor at the Northern Territory ODPP, Mr Michael Carey, recommended that the prosecution be discontinued on the basis there were no reasonable prospects of conviction.

On 11 November 2002, the prosecution was discontinued. The DPP did not notify the victims or the police officer in charge of the investigation of the decision until 27 November 2002.

The Northern Territory DPP guidelines that applied to discontinuing prosecutions in 2002 are the same as those that currently apply. The relevant section is found at paragraphs 7.11–7.13 of the *Director's guidelines*.

In evidence in Case Study 17, Mr Carey agreed that his memorandum that contained his recommendation to discontinue the prosecution against Mr Henderson did not comply with the DPP guidelines. He could provide no explanation for this.

The current Northern Territory DPP, Mr Wojciech Karczewski QC, gave evidence that Mr Carey's memorandum was insufficient and fell short of what was required by paragraph 7.11 of the *Director's guidelines*. In particular, he agreed the memorandum provided no summary of the charges; no analysis of the evidence in respect of each charge; no precis or analysis of any pre-trial applications such as an application for separate trials or a stay of proceedings; and no reference to the defendant's criminal history or the previous prosecution of him in 1975. There was an inaccurate statement of the views of the police and victims about the charges being withdrawn.

In evidence, Mr Karczewski QC agreed that six counts on the indictment could have and should have proceeded to trial. Also, one of those six counts could have and should have been charged as two separate counts. He agreed it was 'crystal clear' that there was sufficient evidence to charge and to proceed with those charges.

In Case Study 17, we concluded that the memorandum with the recommendation by Mr Carey of the ODPP to discontinue the prosecution against Mr Henderson did not comply with the DPP guidelines in that it did not provide:

- a summary of the charges
- an analysis of the evidence in respect of each charge
- any reference to pre-trial applications foreshadowed by the defence, such as an application for separate trials or a stay of proceedings
- any reference to the defendant's criminal history and the previous prosecution of him in 1975
- an accurate statement of the views of the police officer in charge and victims about the charges being withdrawn.

We were satisfied that the DPP did not notify the police officer in charge and victims of the decision to discontinue the prosecution as soon as practicable after the decision was made, as required by the DPP guidelines.

We were also satisfied that Mr Carey's recommendation, which was accepted by the then DPP, Mr Rex Wild QC, to discontinue the prosecution in relation to the six counts (which Mr Karczewski QC agreed could and should have proceeded to trial), on the basis there were no reasonable prospects of conviction and it was not in the public interest to proceed, was wrong.

21.3 Complaints and oversight mechanisms in England and Wales

In *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*, we included a brief description of some of the oversight and accountability processes that have been created in England and Wales for the Crown Prosecution Service (CPS),¹⁴⁵⁷ which is headed by the DPP for England and Wales.

Before the public roundtable in April 2016, it became clear that a better understanding of how the complainants and oversight mechanisms work in England and Wales would assist those participating in our consultations. While time zone differences did not readily allow for those in London to participate directly in our roundtable discussion in Sydney, Justice McClellan prerecorded video discussions with the following persons:

- Ms Alison Saunders CB, Director of Public Prosecutions for England and Wales
- Ms Angela Deal, head of the Appeals and Review Unit of the CPS, and Ms Sarah Boland, legal manager of the Appeals and Review Unit
- Mr Kevin McGinty, Chief Inspector of Her Majesty's Crown Prosecution Service Inspectorate (HMCPSI).

We greatly appreciate their generosity in discussing with us at some length key features of the complaints and oversight mechanisms in England and Wales and how they work in practice. We replayed the video recordings of these discussions at the public roundtable.

21.3.1 Victims' Right to Review scheme

The complaints mechanism of most relevance to the issues we identified in case studies 15 and 17 is the Victims' Right to Review (VRR) scheme.¹⁴⁵⁸

The VRR scheme commenced on 5 June 2013. It gives victims the right to request a review of a CPS decision not to prosecute or to terminate criminal proceedings.¹⁴⁵⁹

The CPS explains that the VRR scheme followed the Court of Appeal's decision in *R v Christopher Killick*¹⁴⁶⁰ (*Killick*). In that case, the court considered that victims have a right to seek a review of a CPS decision not to prosecute and that they should not have to resort to seeking judicial review.

Victims could seek judicial review of decisions by the CPS not to prosecute, and the CPS states that the courts were likely to order the CPS to review its decisions, including where:

- the law has not been properly understood and applied
- some serious evidence supporting a prosecution has not been carefully considered
- in a significant area, a conclusion as to what the evidence is to support a prosecution is irrational
- the decision is perverse – that is, one at which no reasonable prosecutor could have arrived
- CPS policy has not been properly applied or complied with (including by taking into account irrelevant considerations)
- the decision has been arrived at because of an unlawful policy
- the decision was arrived at as a result of fraud, corruption or bad faith.¹⁴⁶¹

However, in *Killick*, the Court of Appeal considered that, instead of requiring victims to seek judicial review through the courts, the right to review should be made the subject of clearer procedure and guidance.¹⁴⁶²

The VRR scheme gives effect to the principles in *Killick* and to Article 11 of the European Union Directive establishing minimum standards on the rights, support and protection of victims of crime.¹⁴⁶³ Ms Saunders told us that, in *Killick*, the court overturned the decision not to prosecute but said:

really this shouldn't be for the court to do; there should be a step before it gets to judicial review, which is that the prosecutor should review their decisions first and that victims should have a right to sort of ask the prosecution to do that.

So it was very much in response to the case of *Killick* ... that really sort of set out for us that we needed to be able to have a process of Victims' Right to Review ... so that we took responsibility for reviewing our own decisions ...¹⁴⁶⁴

The VRR scheme was subject to public consultation during its development.¹⁴⁶⁵

The VRR scheme applies to victims who wish to exercise their right to request a review of what are called 'qualifying decisions', which are decisions by the CPS:

- not to bring proceedings
- to discontinue proceedings or withdraw all charges involving the victim

- to offer no evidence in all proceedings relating to the victim
- to leave all charges in the proceedings to 'lie on file' such that they cannot be proceeded with without the leave of the court or the Court of Appeal.¹⁴⁶⁶

Ms Boland told us that decisions, for example, to accept pleas to lesser charges or to only prosecute some counts are not reviewed under the VRR scheme. Ms Boland told us that the VRR scheme allows review where otherwise 'a victim has had no remedy at all'.¹⁴⁶⁷ Ms Boland told us that it would be wholly impractical to review other cases because of time constraints, given the thorough nature of the review and the need to comply with fast-moving court timetables, and the high volume of potential matters that would fall for review.¹⁴⁶⁸

The VRR scheme applies only to qualifying decisions made on or after 5 June 2013.

The 'victims' who can apply include parents or guardians where the main victim is under 18 and family spokespersons of victims with a disability.¹⁴⁶⁹

When victims are notified of the qualifying decision, they only need to notify the CPS that they request a review. They do not need to explain why they are requesting a review. Normally a review should be requested within five working days of receipt of the notification, but it can be requested up to three months after receipt of the notification.¹⁴⁷⁰

Where a review is requested, the CPS first arranges 'local resolution' by the CPS area responsible for the decision. It is carried out by a prosecutor who has had no previous dealings with the case. Local resolution gives the CPS the opportunity to check the decision and to ensure that the victim has been given a sufficiently clear and detailed explanation of the decision.¹⁴⁷¹ Even where local resolution agrees with the original decision, Ms Saunders told us:

sometimes what the victims want is a better explanation, so they will get a very full explanation as to why the manager thinks that decision was right not to prosecute. That may be an end to the matter for some victims ...¹⁴⁷²

If local resolution does not resolve the issue to the victim's satisfaction, it then proceeds to an independent review. The independent review is carried out by:

- the Appeals and Review Unit – if the qualifying decision was not to charge, to discontinue or to lie on the file; or if the qualifying decision was by the DPP, the Private Office Legal Team, a chief Crown prosecutor, deputy chief Crown prosecutor or head of a Complex Casework Unit
- a chief Crown prosecutor, head of division or deputy in the area or division where the decision was made – if the qualifying decision was a decision to offer no evidence.¹⁴⁷³

Ms Boland told us that victims will be told they can contact the Appeals and Review Unit by email, letter or telephone and that a simple telephone call is sufficient. Ms Boland also told us that, in cases where the relevant CPS area knows that the victim will still be unhappy with the

outcome of the local resolution and that the victim will inevitably come to the Appeals and Review Unit, the area manager can send the case straight to the unit, and this happens in probably around 10 or 15 per cent of cases.¹⁴⁷⁴

If the decision was taken by a specialist in a particular legal field (for example, a specialist in rape and serious sexual offences), the local resolution process and any independent review will also be conducted by a relevant specialist.¹⁴⁷⁵ Ms Boland told us that every lawyer who deals with a charging decision in rape and child abuse cases has to be a specialist and must have undergone intensive training. Almost all of the lawyers in the Appeals and Review Unit have undergone this training.¹⁴⁷⁶

Reviewing prosecutors approach the case afresh to determine whether the original decision was right or wrong.¹⁴⁷⁷ Ms Saunders told us that the reviewing lawyer will look at the case again, may go back to the police and ask for further evidence to be obtained and may look to build the case themselves.¹⁴⁷⁸

In response to a question from Justice McClellan in relation to the reasons the unit might have for overturning decisions, Ms Deal told us:

The sort of review that we carry out is a full code test review based on our Code for Crown Prosecutors, so it's a complete, fresh, relook at all the evidence. We're not initially looking at the approach taken by the original lawyer; we're looking at it afresh. And so we will review the case to see whether we consider there to be sufficient evidence and whether it would be in the public interest [to prosecute]. And we then look – once we've reached our own view on that, we look back at what the original decision-making lawyer had done, how they'd approached it, and what we consider to be wrong about the approach that they took ...

And, ordinarily, I would say the majority of the cases that we look at in some way, we say the evidential part of the code test has not been applied in the correct way. So that might be that we believe, for instance, that lawyers have attributed too much weight to elements of the evidence that we don't think deserve that much weight; perhaps they have been influenced by myths and stereotypes, particularly in the sort of rape and sexual offence-type cases.

Sometimes there are issues around what we believe to be a misunderstanding of case law. So it's those sorts of issues that we would highlight and we then – in every one of the cases that we overturn, we feed back to the area and give them a copy of our review so that they have something for learning purposes.¹⁴⁷⁹

In relation to reviewing child sexual abuse cases, and sexual assault cases generally, Ms Deal told us:

they are amongst the most difficult cases that we deal with. They are extremely time consuming. Most of the evidence or a lot of the evidence is video-recorded evidence. It takes a lot of time to observe all of that evidence. But our lawyers are trained in rape and serious sexual offence prosecutions, so it's an area that they are very familiar with. So it's more an issue of they are just very, very time consuming and difficult cases in themselves.¹⁴⁸⁰

The victim is to be notified of the outcome of the review and provided with a full explanation of the reason for the decision. This would be done initially by letter.¹⁴⁸¹ Ms Saunders told us that:

for families of victims who have died or rape/serious sexual assaults, we also offer the victims or the families the ability to come and talk to us and we will explain in more detail what our reasoning is.¹⁴⁸²

Ms Saunders told us that these conversations can be very difficult, but they explain all of the circumstances to the victim.¹⁴⁸³

If the qualifying decision was not to charge or to discontinue or withdraw, it may be possible to bring proceedings if the review finds the original decision to be wrong. If the qualifying decision was to offer no evidence, the proceedings cannot be recommenced and redress will be limited to an explanation and apology.¹⁴⁸⁴

If the victim remains dissatisfied or wishes to challenge the decision, the victim can apply to the High Court for a judicial review.¹⁴⁸⁵ However, Ms Saunders told us that that the introduction of the VRR scheme has effectively stopped cases going to the Court of Appeal for judicial review. Ms Saunders told us in relation to the right to seek judicial review:

In theory, it's still there, but we've had a number of cases where following a Victims' Right to Review the victim has then tried to judicially review the cases and the courts have said, 'No, this has all gone through the right processes. It's been reviewed in accordance with the VRR procedures – the Victims' Right to Review – and, therefore, we're not going to judicially review it.'¹⁴⁸⁶

Ms Boland told us that, of the 13 applications for leave to apply for judicial review in relation to decisions that had already been reviewed through the VRR scheme, none had been granted leave.¹⁴⁸⁷ A decision could be overturned if the court was satisfied that the unit's decision was irrational or so unreasonable that no reasonable prosecutor would have come to it,¹⁴⁸⁸ but the processes that the Appeals and Review Unit follows must make such a finding very unlikely. Ms Boland told us that:

the High Court has been very supportive of the Victims' Right to Review Scheme, because they were the ones who decided that it should be set up in the first place ...

And what they said is that they will not – you can judicially review any decision of the CPS, but what the High Court have said is they will not entertain any application for judicial review of a decision not to prosecute unless it's been through our unit first. So they want it to come to us first and then there is the possibility of reviewing our decision, but as you've heard, there has been no success in that at all yet.¹⁴⁸⁹

Ms Saunders told us that the CPS prosecutes annually somewhere just short of 800,000 cases and that, from June 2013 until December 2015, they had received 4,170 requests for review, in respect of which they overturned 519 decisions. Ms Saunders also told us that the vast majority of the cases that come to the Appeals and Review Unit are offences against the person, particularly sexual offences.¹⁴⁹⁰

The CPS Annual Report for 2014–2015 provides the following data in relation to qualifying decisions, reviews by the Appeals and Review Unit and outcomes of those reviews:

Between 1 April 2014 and 31 March 2015, of the 126,589 qualifying decisions the CPS made, we reviewed 1,674 cases and decisions in 1,464 of those cases were found to be the right one. In total, 210 decisions have been overturned, which accounts for 0.17% of all qualifying decisions finalised in the period.¹⁴⁹¹

The 210 decisions overturned represent some 12.54 per cent – or approximately one in eight – of the 1,674 decisions in respect of which victims sought review by the Appeals and Review Unit.

21.3.2 Her Majesty's Crown Prosecution Service Inspectorate

The oversight mechanism of most relevance to the issues we identified in case studies 15 and 17 is Her Majesty's Crown Prosecution Service Inspectorate (HMCPPI).

HMCPPI is established under the *Crown Prosecution Service Inspectorate Act 2000*. It commenced on 1 October 2000. The Chief Inspector reports to the Attorney General and the reports are to be tabled in Parliament. (HMCPPI has also been given inspection powers beyond the CPS – for example, to include the Serious Fraud Office.)

In answer to a question from Justice McClellan about why HMCPPI was created, Ms Saunders told us:

I think the Inspectorate came about because perhaps the Attorney, and externally, they wanted more reassurance about the performance of the CPS. We had established inspectorates into the police and, at that time, we also had an inspectorates [sic] into the courts, so the CPS was really the only part of the criminal justice system that didn't have an independent inspectorate, so I think it was more around making sure that everyone had the same sort of transparency and accountability.

And those words have become very important to us. So in 1986 there wasn't sort of a huge amount of transparency in the way in which we did things, so we talked to the Attorney, but we didn't talk to very many other people. Now, we publish vast amounts of data, we publish all our policies – and not just publish them but we consult the public when we're drafting the guidance so that they can have input. We publish reasons for our decisions. We publish press statements. I go to Parliament. We talk to the press. So the transparency around the way in which we operate and the work that we do and why we make our decisions is completely different to 1986.¹⁴⁹²

Mr McGinty told us that HMCPSI grew out of an internal audit process within the CPS and that it became clear in about 1999 that this process would be better if it were external and independent of the CPS.¹⁴⁹³

HMCPSI carries out the following types of inspections:¹⁴⁹⁴

- **Area/unit based inspections:** The CPS Areas or units are identified for inspection based on risk-based assessments. Mr McGinty told us that HMCPSI is adopting a new way of looking at CPS areas which is much more focused on risk and would allow HMCPSI to cover all of the CPS areas over a period of 18 months to two years.¹⁴⁹⁵
- **Follow-up and reinspection activity:** These activities follow up on progress against previous recommendations made by the HMCPSI.
- **Annual Casework Examination Programme (ACEP):** The ACEP commenced in 2012 and provided a benchmark. ACEP is a detailed office-based examination of case files from a cross-section of CPS areas. They review such things as pre-charge decision-making, post-charge review and decision-making, case progression, disclosure of unused material, and victim and witness liaison. In 2014–2015, they planned to examine up to 900 files.¹⁴⁹⁶
- **Thematic inspections:** For example, in January 2016, HMCPSI published a report on communicating with victims after their inspection on the quality and timeliness of CPS communication with victims.

In February 2016, HMCPSI published a report, *Thematic review of the CPS Rape and Serious Sexual Offences Units* (Rape and Serious Offences (RASSO) Units cover a number of cases, including rape, non-summary serious sexual offences and penetrative offences, all Crown Court cases of child sexual abuse and sexual offence cases with multiple victims). Mr McGinty told us more about the RASSO inspection, including the impact the reduction in the CPS's budget has had on the resourcing of RASSO units.¹⁴⁹⁷

- **Joint thematic inspections:** HMCPSI conducts joint inspections, particularly with Her Majesty's Inspectorate of Constabulary and also with Her Majesty's Inspectorate of Prisons and Her Majesty's Inspectorate of Probation. The Criminal Justice Joint Inspection business plan provides for a number of joint inspections, some of which include HMCPSI.

Mr McGinty told us that HMCPSI is required to consult stakeholders and the Attorney General on what their program should be for the next year, and the program is published after consultation.¹⁴⁹⁸ There is a list of stakeholders, including the DPP, the other criminal justice inspectorates, the Victims Commissioner, a senior Court of Appeal Judge, the Chief Magistrate and the Justice Committee.¹⁴⁹⁹

HMCPSI also responds to specific requests from the Attorney General and the DPP to review specific matters.¹⁵⁰⁰ Ms Saunders told us of one high-profile case in which her predecessor as DPP asked HMCPSI to conduct a review.¹⁵⁰¹ Mr McGinty told us of one inspection that HMCPSI has done at the request of the Attorney General.¹⁵⁰²

In 2006, HMCPSI was given clearer powers of entry and to obtain documents.¹⁵⁰³

Mr McGinty told us that HMCPSI currently has approximately 33 staff across two offices and includes both business and legal inspectors.¹⁵⁰⁴ It is subject to a budget reduction of 15 per cent, which will require a reduction in staffing.¹⁵⁰⁵

Mr McGinty agreed that HMCPSI's inspection work inevitably imposes burdens on the CPS, but he also told us that it was not a big issue and that HMCPSI has access to the CPS computer system, so it can obtain a lot of information for itself.¹⁵⁰⁶ Mr McGinty told us:

The biggest burden I suspect for the CPS is actually arranging for people to be interviewed, perhaps, but it's not – they will argue sometimes about the time limits we give them to comply, but there's never been any – as far as I'm aware, there's really never been any sort of kickback about, 'We can't do this.'¹⁵⁰⁷

Ms Saunders described HMCPSI as having been 'very useful'.¹⁵⁰⁸ Ms Saunders told us that they – the DPP and CPS – see HMCPSI as 'a critical friend'.¹⁵⁰⁹

Ms Saunders told us that:

we talk to the Inspectorate on an annual basis about what their work program is going to be for the forthcoming year and, indeed, the Inspectorate will ask us if we have any ideas particularly for the thematics that we think would be useful for them to look at. So there is a great deal of cooperation between us about their work program and, also, the way in which they do it, so they're very clear about how they conduct their inspections, the sort of documentation they expect, the access they expect.¹⁵¹⁰

Ms Saunders also told us that HMCPSI provides the CPS with a copy of their draft reports so that they can challenge anything that is factually incorrect. They also prepare their own media statement and publish a document setting out the CPS response to HMCPSI's findings and recommendations.¹⁵¹¹

Mr McGinty told us that draft reports are usually provided to the chief Crown prosecutor for the relevant CPS area or the DPP, depending on who is the most appropriate person, but that the draft report can be shared within the CPS.¹⁵¹² There may be debate, particularly around changes the CPS has made since the inspection was conducted and whether or how those changes should be reflected in HMCPSI's report.¹⁵¹³ Mr McGinty also told us:

There has grown a tendency in recent years, which I may stop – I don't know yet – is that after we have made our amendments, we send it back to the CPS and then there's another argument [about] what we have accepted and what we haven't accepted. The other Inspectorates don't do that.¹⁵¹⁴

HMCPSI reports are provided to the Attorney General, other stakeholders and the media.¹⁵¹⁵

Mr McGinty gave us his views of the benefit HMCPSI provides in inspecting the CPS and in helping others, such as the Solicitor General, the Attorney General and the Justice Committee, to be better able to hold the CPS to account with the benefit of information from HMCPSI.¹⁵¹⁶ He also told us that the independence of HMCPSI from the CPS gives the public and the media some assurance of the effectiveness of the CPS, although, given the nature of the criminal justice system, it is not going to reassure everyone.¹⁵¹⁷

21.3.3 Other complaints and oversight mechanisms

The CPS is also subject to other complaints and oversight mechanisms, in addition to the VRR scheme and HMCPSI. These other mechanisms include:

- **The CPS Feedback and Complaints procedure:**¹⁵¹⁸ This allows for two stages of internal review of complaints in relation to the CPS. It covers complaints relating to legal decisions made by the CPS and service complaints relating to the way in which the CPS has conducted itself. Ms Saunders told us that anyone can make a complaint about the CPS under this procedure, including any member of the public, a defendant, a victim, a witness or a member of Parliament.¹⁵¹⁹
- **The Independent Assessor of Complaints (IAC) for the CPS:**¹⁵²⁰ The IAC reviews complaints about the quality of service provided by the CPS if they are not resolved under the CPS Feedback and Complaints procedure. The IAC also reviews the CPS's adherence to its published complaints procedure and the complaints aspects of the Victims' Code. The IAC reports biannually to the DPP and the CPS Board, and the CPS publishes the IAC's annual report on its website.
- **The CPS Child Sexual Abuse Review Panel:**¹⁵²¹ The panel considers police and prosecution decisions relating to allegations of child sexual abuse alleged to have occurred on or before 5 June 2013, when the VRR scheme commenced. The panel considers whether the approach taken in any case where the police or CPS previously advised against taking further action was wrong and advises whether the police

should reinvestigate allegations or the CPS should review the prosecution decision. The panel includes prosecution and police representatives and an independent person in an advisory capacity. Ms Saunders told us that the panel has a fairly limited shelf life because it is looking at a limited number of cases that are not recent. She also told us of Operation Hydrant, which the police have set up to deal with sexual abuse cases in a better way than they were dealt with in the past.¹⁵²²

- **The National Audit Office:**¹⁵²³ In addition to annual audits, the National Audit Office has conducted other reviews of the CPS or justice agencies, including the CPS. It also sometimes reports jointly with HMCPSI and other justice agency inspectorates.
- **Internal audit:** Ms Deal told us that there is an internal audit process for quality assurance in relation to case progression. Ms Deal said that they do not look at the quality of legal decision-making, but they look to assure the CPS board that the performance assurance measures are in place. Ms Deal said it was a very small-scale process. Ms Deal told us that the internal audit team used to be within CPS, but she thinks it is now within a team based at the Ministry of Justice.¹⁵²⁴
- **Parliamentary committees:** As noted above, Ms Saunders told us that she speaks to parliamentary committees.¹⁵²⁵ Mr McGinty told us of the interest the House of Commons Justice Committee has taken in relation to the justice inspectorates, including HMCPSI. Mr McGinty also told us of the relationship he has been working to develop with the Justice Committee.¹⁵²⁶ He said:

I was concerned that no-one was reading these [HMCPSI] reports, and so I have tried to ensure that they get a broader reading base. I've tried to engage the Justice Committee to explain to them that these reports give them material upon which they can challenge and question both the Director of Public Prosecutions and the Attorney-General, who superintends them.¹⁵²⁷

Mr McGinty told us that the Justice Committee can summons him – and has, in fact, summonsed him – to appear and that they may speak to him before they take evidence from the DPP.¹⁵²⁸

21.4 Current position for Australian DPPs

Any discussion of complaints and oversight mechanisms in relation to DPPs inevitably raises concerns about the impact of any mechanism on the independence of the DPPs. It also raises the issue of the accountability mechanisms to which DPPs are already subject.

21.4.1 Independence of the DPPs

Australian DPPs are established under legislation. Tasmania and Victoria were the first Australian jurisdictions to enact legislation, and in each case the legislation was motivated at least in part by a concern to secure the independence of prosecution decision-making from political influence.

In Tasmania, the *Crown Advocate Act 1973* (Tas) was enacted in 1973. In 1986 it was renamed the *Director of Public Prosecutions Act 1973* (Tas). It has been suggested that the legislation was introduced to ensure independence of the criminal prosecution process from the Attorney-General following a perception of political influence on the decision of the previous Attorney-General not to proceed with prosecutions against certain persons.¹⁵²⁹

In Victoria, in the second reading speech for the Director of Public Prosecutions Bill 1982 (Vic), the Minister of Housing, on behalf of the Attorney-General, stated:

A major aim of the Bill is to remove any suggestion that prosecutions in this State or, indeed, the failure to launch prosecutions can be the subject of political pressure. ... At present the Attorney-General can refuse to give his consent to initiate certain prosecutions, and I regret to say that there have been instances where previous Attorneys-General, despite the advice of the Law Department and the Crown Solicitor, have refused to give that consent, apparently for political reasons.¹⁵³⁰

The 1982 Victorian Act was later replaced by the *Public Prosecutions Act 1994* (Vic).

Legislation was introduced in the other jurisdictions as follows:

- Queensland: the *Director of Public Prosecutions Act 1984* (Qld)
- New South Wales: the *Director of Public Prosecutions Act 1986* (NSW)
- Australian Capital Territory: the *Director of Public Prosecutions Act 1990* (ACT)
- Northern Territory: the *Director of Public Prosecutions Act* (NT), which was enacted in 1990
- South Australia: the *Director of Public Prosecutions Act 1991* (SA)
- Western Australian: the *Director of Public Prosecutions Act 1991* (WA).

While the particular provisions of the various Acts differ, they all create the statutory office of DPP and give that office responsibility for prosecuting serious criminal offences. This places the responsibility for prosecutions in a politically independent person rather than in the Attorney-General as a member of the elected government of the day.¹⁵³¹

The DPP is part of the Attorney-General's administration, and the Attorney-General is responsible to the Parliament for the operation of the DPP. However, despite the relationship between the Attorney-General and the DPP, the DPP's independence is secured by the limitations on the ability of the government to remove the DPP. Restrictions on removal ensure that the DPP can make decisions independently of political influence or interference.

In all Australian jurisdictions except Victoria, the legislation prescribes specific and narrow grounds for removing a DPP. These jurisdictions all allow removal for misbehaviour and incapacity.¹⁵³² Some jurisdictions also allow removal on other grounds, including bankruptcy, absence without leave, practising as a lawyer elsewhere and failure to disclose a pecuniary interest. In Victoria, the Governor in Council may suspend the DPP from office without specifying grounds for suspension, but removal may only occur if a resolution to remove the DPP has been passed by both Houses of Parliament.¹⁵³³

In 2007 Mr Damian Bugg AM QC, the then Commonwealth DPP, told a conference that, before the establishment of independent statutory offices, prosecution services in Australia were and were seen to be part of the government, and they were seen by many to be undertaking their work at the direction of government. He said:

The proximity of the prosecution to Government and the Law Offices which acted for and advised Government was seen as the single most important reason for establishing a separate Independent Statutory Office responsible for the conduct of prosecutions.¹⁵³⁴

The independence in question for DPPs was not just independence from the political process but also independence from the police as investigators. Mr John McKechnie QC, first DPP for Western Australia, referred to the importance of independence from 'political and other influences, including that of the police'.¹⁵³⁵ Speaking in 2004, Mr Bugg broadened independence even further as follows:

The decision to prosecute, to not prosecute, to discontinue a prosecution, to appeal a sentence, to indemnify a witness or give a witness an undertaking or assurance and, in other jurisdictions decisions pursuant to specific statutory provisions ... all involve the exercise of a discretion, which is commonly referred to as the prosecutorial discretion. ...

In exercising their discretion Prosecutors should be independent of influence, pressure or persuasion from those who have an interest in the outcome of that decision. It is not just Governments, but Police Services, any other Investigative Agency, the Court, and victims or the families of victims from whom the Prosecutor should be not only independent but seen to be independent.¹⁵³⁶

21.4.2 Current accountability measures

The various Acts establishing Australian DPPs contain a number of measures that are relevant to accountability:

- **General statement of responsibility to the Attorney-General:** The New South Wales, Queensland and Victorian Acts each contain a general and non-justiciable statement that the DPP is responsible to the Attorney-General or relevant Minister.¹⁵³⁷ The New South Wales provision is typical:

The Director is responsible to the Attorney General for the due exercise of the Director's functions, but nothing in this subsection affects or derogates from the authority of the Director in respect of the preparation, institution and conduct of any proceedings.¹⁵³⁸
- **Attorney-General's power to direct or request:** In all Australian jurisdictions, the relevant Act lists the DPP's functions or powers.¹⁵³⁹ Under the Commonwealth,¹⁵⁴⁰ Queensland¹⁵⁴¹ and Tasmanian¹⁵⁴² Acts, some of those functions contemplate the DPP acting on direction from or request by the Attorney-General. However, the legislation does not provide any direct remedy if the DPP does not fulfil one of these functions.
- **Consultation:** Under the Commonwealth, New South Wales, Western Australian, South Australian, Australian Capital Territory and Northern Territory Acts, the DPP and the Attorney-General must consult with the other, upon the other's request, with respect to matters concerning the performance of the DPP's functions.¹⁵⁴³
- **Directions and guidelines:** Under the Commonwealth, New South Wales, Western Australian, South Australian, Australian Capital Territory and Northern Territory Acts, the Attorney-General may issue directions or guidelines to the DPP, such as in relation to the circumstances in which the DPP should institute or carry on prosecutions.¹⁵⁴⁴ Under the Commonwealth and South Australian Acts, directions or guidelines may relate to specific cases, but in New South Wales, Western Australia, the Australian Capital Territory and the Northern Territory, they may only be of a general nature.¹⁵⁴⁵ The Western Australian, South Australian and Northern Territory Acts expressly state that, apart from these directions or guidelines, the DPP is not subject to direction.¹⁵⁴⁶ In Queensland, the Attorney-General has power to issue guidelines to the DPP but only in very limited circumstances.¹⁵⁴⁷ Those guidelines may not be furnished in relation to specific cases.¹⁵⁴⁸
- **Attorney-General's exercise of powers prevails over DPP's:** In each Australian jurisdiction except Victoria, the legislation does not affect the prosecutorial powers of the relevant Attorney-General.¹⁵⁴⁹ In Victoria, the Attorney-General retains the power to discontinue a prosecution by entering a nolle prosequi.¹⁵⁵⁰ In New South Wales, if the DPP and the Attorney-General each exercise their functions in relation to a single matter in a way that is inconsistent, the Attorney-General's exercise of his or her functions prevails.¹⁵⁵¹ In Western Australia and the Northern Territory, the DPP must not act inconsistently with the Attorney-General without the Attorney-General's consent.¹⁵⁵²

- **Annual reporting obligation:** Legislation in each Australian jurisdiction requires the DPP to prepare an annual report for each financial year.¹⁵⁵³
- **Director’s Committee:** In Victoria only, there exists a Director’s Committee comprising the DPP, chief Crown prosecutor and other lawyers.¹⁵⁵⁴ Before the DPP may make a ‘special decision’, which includes a decision to discontinue proceedings or issue a no-bill,¹⁵⁵⁵ the Director’s Committee must advise the DPP on the decision.¹⁵⁵⁶ The DPP may make a decision contrary to the Director’s Committee’s advice but then must, as soon as practicable, submit the reasons to the Attorney-General,¹⁵⁵⁷ and those reasons must be tabled in Parliament.¹⁵⁵⁸ The Director’s Committee also has other functions.¹⁵⁵⁹

Further, DPPs may be required to provide the Attorney-General with information to discharge the Attorney-General’s responsibility to Parliament for the conduct of agencies for which he or she is accountable. Mr McKechnie described this accountability mechanism as follows:

This accountability to Parliament is a useful corrective to incipient notions of megalomania. Parliamentary questions, even the incomprehensible ones, are an opportunity for the legislature to require responsibility from a DPP, without intruding on the decision-making of that office.¹⁵⁶⁰

A particularly important accountability mechanism established outside of the DPP legislation is the guidelines or policies adopted by the DPP and in accordance which the DPP undertakes to make decisions.

Australian DPPs adopted uniform guidelines for the exercise of the prosecutorial discretion, particularly in relation to the test for continuing with a prosecution, in 1989–1990.

Mr Bugg said:

the establishment of uniformity, the publication of the guidelines and the process of deliberation provided the community at large and legal and special interest groups and politicians alike with the reassurance that the DPP’s would endeavour to achieve uniformity in this important part of the criminal justice system by a process which was both transparent and consistent with the attainment of quality in the ‘decision making and case preparation’ and that the decisions of prosecutors were not ‘susceptible to improper influence’ (that other significant goal of the Crown Prosecuting Service in the UK).¹⁵⁶¹

Mr McKechnie also identified the importance of guidelines for independence and accountability, stating:

A written Prosecution Policy is an important keystone of independence ...

A fixed set of guidelines enables a degree of objectivity to be brought into the decision-making process, and independence is confirmed if the decision-maker is able to justify a decision in accordance with previously published material.

A discretion by a prosecution is, after all, not arbitrary but to be exercised according to law ...¹⁵⁶²

21.5 Possible reforms

21.5.1 Introduction

Substantial administrative law reforms since the 1970s have recognised that oversight and review encourage better decision-making. They also provide important avenues for those who are affected by administrative decisions to challenge those decisions. The prospect of oversight and review may itself improve decision-making by improving compliance with policies and guidelines and improving documentation of reasons for decisions. The conduct of oversight and review may improve practices by identifying current failures and areas for improvement and by overturning or requiring the remaking of wrong decisions.

Case studies 15 and 17 have revealed for us a significant gap in the accountability of DPPs. While DPPs generally have guidelines and policies to guide their decision-making, there is no established mechanism by which complainants can challenge or seek review of decisions, including where decisions have been made without adhering to the relevant guidelines and policies. Also, there is no established mechanism by which the broader community can be satisfied that DPPs and their prosecution services are adhering to their guidelines and policies.

This suggests to us that, at a minimum, complaints or oversight mechanisms should be established to enable:

- individual complainants to challenge or seek review of decisions, particularly where the prosecutor decides not to prosecute or to withdraw the prosecution in relation to that complainant
- ongoing oversight of compliance with prosecution guidelines and policies.

In the Consultation Paper, we put forward a number of possible reforms. We suggested that DPPs or ODPPs could:

- As minimum requirements:
 - adopt comprehensive written policies for decision-making and consultation with victims and police

- publish all policies online and ensure that they are publicly available
- provide a right for complainants to seek written reasons for key decisions.
- Implement formalised internal complaints mechanisms to allow victims to seek internal merits review of key decisions.
- Make available judicial review of key prosecution decisions.
- Conduct internal or external audits of compliance with DPP policies for decision-making and consultation with victims and police.
- Publish data relevant to complaints and oversight mechanisms.

We also stated that, at that stage, we were not minded to consider other accountability measures, such as parliamentary committees and the like.

We sought submissions from the Australian Government and state and territory governments and other interested parties on possible DPP complaints and oversight mechanisms, including in relation to which – if any – mechanisms are favoured and any resourcing issues.

21.5.2 Minimum requirements

At our public roundtable, we proposed that, at a minimum, all Australian DPPs should be able to implement the following measures, if they do not already have them in place:

- Adopt comprehensive written policies for decision-making and consultation with victims and police.
- Publish all policies online and ensure that they are publicly available.
- Provide a right for complainants to seek written reasons for key decisions.

No participant in the roundtable discussion raised any objection to the proposition that all DPPs should adopt written policies for decision-making and consultation with victims and police.¹⁵⁶³

In relation to the publication of policies, Mr John Champion SC, the Victorian DPP, told the roundtable:

We don't publish all policies and that's probably something that we need to work on. I think – I don't know quite the figure – we've got about 180 policies, which is a large amount, and I'd say approximately a third of them are not published, but they would probably be ones that the public wouldn't be so interested in.¹⁵⁶⁴

Mr Michael Byrne QC, the Queensland DPP, told the roundtable that guidelines issued under the Queensland Act are published but that there is another level of instruction that perhaps should not be published. Mr Byrne said:

There is some risk that if you publish material to the public at large, as opposed to the profession, that it can be misunderstood in the context in which it is taken, that is one of the risks that's associated, but the primary policies, from my perspective anyway, should be published and are in our case.¹⁵⁶⁵

Mr Daryl Coates SC, the Tasmanian DPP, told the roundtable that the Tasmanian policies would be published 'very shortly'.¹⁵⁶⁶

Mr Michael O'Connell APM, the South Australian Commissioner for Victims' Rights, told the roundtable that he regards the publication of policies as really important in terms of both transparency and accountability.¹⁵⁶⁷

Mr Nicholas Cowdery AM QC, who was unable to attend the public roundtable, provided a written submission after the public roundtable and before publication of the Consultation Paper. Mr Cowdery submitted that general prosecution policies or guidelines, such as the New South Wales DPP *Prosecution guidelines*, should be publicly available, but more specific policies or guidelines for addressing particular aspects of prosecution (such as in manuals tailored to specific types of crime or specific procedures) should not be publicly available. He submitted that the public interest could be served by making publicly available provisions in them that relate to the rights of victims.¹⁵⁶⁸

In relation to the provision of written reasons for decisions, Mr Champion told the roundtable that the Victorian DPP has a policy for providing written reasons and that it was the second prosecuting agency in the world – after the DPP in the Republic of Ireland – to instigate a policy of giving reasons for discretionary decisions. Mr Champion said that he probably issues an average of about 30 letters giving reasons under the policy each year.¹⁵⁶⁹

Mr Adam Kimber SC, the South Australian DPP, told the roundtable that his office does not have a policy to provide written reasons but that he has decided that they should have such a policy. He referred to the importance of explaining things better and to being more transparent.¹⁵⁷⁰

Some concerns were raised about the difficult material that may need to be discussed in giving reasons to the complainant and the support that the complainant may need to have when receiving reasons.

Mr Champion told the roundtable:

I might also add that I find that they are actually very difficult letters to write ... there is a fine balance as to how much information you can give people because some of the information that we use in order to make the discretionary decisions is very, very difficult material to grapple with and we have to be protective of people's, often, mental health. Some of the decisions we make in that area can impact and if people are told that some of these issues are too difficult, they contribute to the difficult decision to either discontinue or settle a case. If we go the full distance in telling them everything, that can be really challenging for them.¹⁵⁷¹

Ms Marisa De Cicco, Deputy Secretary of the Victorian Department of Justice and Regulation, told the roundtable that, through their victim support agencies, they know that victims of crime will need support ahead of a meeting to discuss reasons as well as during and after the meeting.¹⁵⁷² Ms De Cicco said:

To think that the process itself can be treated in that sort of independent sort of exchange of information would be erroneous. It needs a lot of supports around it to be done effectively and to avoid doing any further harm to the victim and ensuring that in some cases they may understand it but still will not accept it and it is around how you then treat with that after that event.¹⁵⁷³

Mr Paul Usher, the Northern Territory Deputy DPP, told the roundtable:

in the Northern Territory the majority of our prosecutions relate to victims who are indigenous whose first language is not English, sometimes it may be their 10th language. We focus more on the spoken and the oral. We don't have a policy or guideline in relation to providing written reasons, but we do try to make contact as early as possible through our Witness Assistance Service in relation to the matter and we will have that conversation with an interpreter and also with our indigenous liaison officer as well. We try to promote that focus at the spoken word, there are no written words that could overcome those issues.¹⁵⁷⁴

Mr John Hinchey PSM, the Australian Capital Territory Victims of Crime Commissioner, told the roundtable that he supported the approach of giving oral reasons, provided that written information is also provided. He said:

I would support that approach for all of the jurisdictions as long as people can come away with some written information that they can refer to, but many times the process itself is a justice process for victims of crime, particularly when the justice system doesn't end in a conviction or a sentence, and it is the procedural justice issue for many victims of crime that stays with them as much as the crime itself.

The opportunity to be acknowledged and to have their questions answered and to have things explained to them in a way that they can understand is critical for their level of satisfaction.¹⁵⁷⁵

Ms Kara Shead, then representing the New South Wales Public Defenders Office, noted that it would be important not to provide reasons to a complainant in a way that might contaminate any evidence they might give.¹⁵⁷⁶

Mr Cowdery submitted that some victims choose not to be part of a consultation process and not to receive information about a prosecution and that their choice must be respected. He also expressed support for initial communication being oral, with written confirmation to follow.¹⁵⁷⁷

In their submissions in response to the Consultation Paper, a number of interested parties addressed the proposed minimum requirements.

The New South Wales ODP, the Victorian DPP and the Commonwealth DPP expressed agreement with these requirements and outlined how they are already met in their offices under existing policies and practices.¹⁵⁷⁸

In relation to the giving of written reasons, the New South Wales ODP set out Prosecution Guideline 12 and stated:

The provision of written reasons where requested is desirable and the NSW Prosecution Guideline 12 deals with the provision of reasons for decisions and is reproduced here. There are a number of factors that we need to consider when providing written reasons, including that reasons may need to take into account particular sensitivities of the victim for example, the fact that family or friends directly contradict their account.¹⁵⁷⁹

The Victorian DPP expressed support for the suggestion that complainants should be provided with a right to seek written reasons for key decisions and provided further information on the Victorian policy.¹⁵⁸⁰

The policy on *Giving reasons for discretionary decisions* was issued in December 2008, and the Victorian DPP stated that the Victorian Public Prosecution Service (VPPS) regards it as one of its most significant policies.¹⁵⁸¹

While no legislation requires the giving of reasons for decisions, the policy allows reasons to be given where appropriate.¹⁵⁸² The Victorian DPP submitted that the policy also constituted a type of review mechanism, as in the course of articulating the reasons for a decision it may become apparent that the decision was wrong. If there are no legal impediments, the decision may then be changed.¹⁵⁸³

The Victorian DPP noted that, during the first six years of the policy's operation, there has been an average of 29 'reasons for decision' applications per year.¹⁵⁸⁴ The VPPS website includes material which describes the purpose of the policy and provides a process for making an application.¹⁵⁸⁵

The criteria to be considered when deciding whether it is appropriate in the circumstances to provide reasons include:

- the nature and importance of the decision
- the competing rights and interests of the parties affected by the decision
- whether the provision of reasons would tend to inform rather than harm affected parties

- whether information can be provided to certain parties without the risk of further harmful dissemination
- whether the interests of justice are served by the giving of reasons.¹⁵⁸⁶

The Commonwealth DPP expressed a preference for giving reasons in conversation with the complainant before confirming them in writing:

The CDPP is committed to explaining to complainants the reasons for the decisions. I think it best that that explanation be provided in conversation with the complainant (and in the case of a child complainant through a parent or legal guardian) and then confirmed in writing by my office. The CDPP Executive Leadership Group has recently recommended and I agree that where a prosecution is not commenced or where a prosecution is discontinued in a child sex matter, and where the complainant seeks written reasons for that decision, that I will provide written reasons if it is appropriate to do so.¹⁵⁸⁷

In its submission in response to the Consultation Paper, the Law Council of Australia expressed its support for these minimum requirements.¹⁵⁸⁸ The Australian Capital Territory Victims of Crime Commissioner also expressed his agreement with the minimum requirements.¹⁵⁸⁹

21.5.3 A complaints mechanism

In preparing for the roundtable discussion, we identified that, even if complainants are given reasons for a decision, unless there is a right to seek a merits review of key decisions, individual complainants may still suffer the effects of a decision that is not the correct and preferable decision.

This is likely to be particularly significant where the effect of the decision is that no charges relating to the particular complainant are prosecuted. In effect, if the decision is not the correct and preferable one, the complainant is wrongly denied any opportunity to obtain justice through the criminal justice system. The community at large also suffers because of the decision not to pursue charges.

We raised options for possible reforms to address this concern at the public roundtable, drawing on the example of the England and Wales VRR scheme.

We identified the following as possibilities for further measures:

- formalised complaints mechanisms, with written responses
- a right for victims to seek an internal merits review of key decisions, particularly in relation to not commencing or discontinuing a prosecution.

Our public hearing in Case Study 38 in relation to criminal justice issues identified that some DPPs do conduct internal reviews of decisions, although it seems that this occurs on a fairly ad hoc basis. In Case Study 38, in the South Australian case of CDI, parents of the young complainants were offered the opportunity to have the decision to discontinue proceedings reviewed, and the decision was reviewed at their request. The review confirmed the original decision in terms of the charges that had been laid but identified new charges in relation to some matters.

Mr Kimber confirmed that there is a system of review in his office. He told the roundtable:

There is a system of review in my office. Decisions are delegated down and with respect of those decisions there is a written policy with respect to, first, who can make those decisions; and, secondly, that a review will be conducted if it is requested – and that is a merits review, in that instance – and by whom that review will be done.¹⁵⁹⁰

Mr Kimber suggested that it is likely that he will move to provide victims with written advice about the review process.¹⁵⁹¹

Mr Champion told the roundtable that all decision-making in the Victorian OPP is done in writing and that written memoranda will be provided from the case officer, through supervisors, to the Crown prosecutor or senior Crown prosecutor and then to Mr Champion himself as DPP.¹⁵⁹²

Mr Champion told the roundtable:

We don't have a written process that sets out for victims that they could ask for a review, but there have been occasions when people have made their displeasure very clear and I've re-looked at cases. It doesn't happen very often.¹⁵⁹³

Mr Byrne told the roundtable that, in Queensland, a decision to discontinue a prosecution must be made at the level of a principal Crown prosecutor and, if the decision to discontinue is to be based on the public interest test, it must come to Mr Byrne as the DPP or his Deputy DPP.¹⁵⁹⁴

Mr Byrne said that, if he has any concerns about the matter, he will form his own committee from senior lawyers within the office or, if he has doubts about whether there are reasonable prospects of success, depending on the views of the victim, he may determine that the matter should be left to the jury.¹⁵⁹⁵

Mr Byrne told the roundtable:

As a result of these hearings over a number of months now, it has become apparent to me that we haven't been giving our victims enough notice of what they can do. My experience, however, is that our staff across the whole State have developed far more of a victim focus than they had back in the time of case study 15, and that where they perceive that there remains real discontent, they are willing to tell them, 'You can speak to my Principal Crown Prosecutor', or the Principal Crown Prosecutor might be saying, 'I will be

speaking to the director or deputy director, can you give me a phone number in case we need to chat', or something like that. I find myself speaking with victims as part of the decision-making process, both before and after, I should say.¹⁵⁹⁶

Mr Byrne also agreed that the available processes should, and will, be set out in guidelines.¹⁵⁹⁷

Mr McGrath told the roundtable that, in Western Australia, if counsel forms a view that a matter should be discontinued:

it must then be put in writing to a senior state prosecutor who is at a very senior level. That senior state prosecutor would have the power to sign a discontinuance but under our system of review they are required to consult with what is called a consultant state prosecutor and that's usually done by way of memorandum. At that point a decision would be made to continue or discontinue.

If a victim is not satisfied with that, they can request to meet with myself or when we've got a deputy director. There is one thing I accept and that is that we don't have it recorded that they are told that you have the right to speak to the director and that's something that I've learnt from this Commission, we'll do that, but invariably, consultant state prosecutors would tell me about that.¹⁵⁹⁸

Mr McGrath said that the delegation to decide to discontinue a prosecution on public interest grounds is limited to only five people: the consultant state prosecutors and the Deputy DPP. Decisions to discontinue on other grounds can be made by senior state prosecutors.¹⁵⁹⁹

Mr Coates told the roundtable that, in Tasmania, there is effectively a review of decisions before they are made. That is, if the lawyer with carriage of a matter thinks it should be discharged, that proposal will go to a committee of three, drawn from the Deputy DPP and four principal Crown counsel. The lawyer will have been spoken to the victim and will provide an account of the victim's views to the committee. If the committee is not unanimous in its views, the matter is referred to Mr Coates as DPP, and he will then make the decision.¹⁶⁰⁰ Mr Coates said:

in that way, we've tried to in-build the review and the consultation with the complainant before the decision is made, before the accused is notified or his counsel or solicitor is notified.¹⁶⁰¹

Mr Usher told the roundtable that, in the Northern Territory, decisions to discontinue have to be approved by the Deputy DPP. Mr Usher said that he did not see the benefit of a committee in a smaller office such as the Northern Territory, where he has direct contact with all of the 45 prosecutors in the office.¹⁶⁰²

Ms Shead told the roundtable that the process in New South Wales is similar to the process in Victoria in that it steps up through more senior decision-makers, with a number of independent assessments of the brief of evidence available for the final decision.¹⁶⁰³

Mr Mark Pedley, Acting Commonwealth DPP, told the roundtable that the Commonwealth DPP also has a stepped process, with decisions on summary matters involving at least two people and decisions on indictable matters involving at least three, and possibly five, people.¹⁶⁰⁴ Mr Pedley said that the Royal Commission has made the Commonwealth DPP reflect that perhaps they are not doing quite enough to allow victims to seek reconsideration of decisions and that they will be looking to 'build in a greater capacity for the victims to take up a right to ask us to reconsider'.¹⁶⁰⁵

In discussion at the roundtable, Mr Usher suggested that smaller offices allowed 'front-end direct contact' with victims, so there were no tiers or layers as in the English model.¹⁶⁰⁶ Even in Western Australia, Mr McGrath suggested that the smaller population and the smaller prosecution office makes decision-making processes quite different from the position in England and Wales.¹⁶⁰⁷ Mr Jonathan White SC, the DPP for the Australian Capital Territory, also referred to having a small office with a flat structure, but he said that more than one or two people in the office will have looked at a matter before the decision is made at a senior level.¹⁶⁰⁸

In answer to a question about whether the committee system for decision-making adopted in Tasmania might be of use in Victoria, Mr Champion told the roundtable:

In a small office I could see that that could work. I think in our office, with so many cases, that could tend to be a cumbersome process. I am not saying it's impossible but it might tend to make the process of cases more difficult to achieve.¹⁶⁰⁹

Mr Craig Hyland, New South Wales Solicitor for Public Prosecutions, and Ms Shead told the roundtable that, while some decisions in New South Wales are made in regional offices, the decision-makers are more senior than the decision-makers in England and Wales and that decisions are looked at by a number of people, not just by the person with carriage of the matter.¹⁶¹⁰

Ms Shead also told the roundtable that affording every victim in New South Wales the opportunity to speak to the final decision-maker before a decision is made on reducing charges, discontinuing the prosecution or accepting a negotiated plea would be incredibly onerous for the DPP and Deputy DPPs given the size of the New South Wales ODPP. In answer to a question as to whether the English and Welsh approach of allowing review only in the event that no charges are proceeding would be more sensible, Ms Shead agreed that it would be.¹⁶¹¹

As in the discussion on minimum requirements, some concerns were raised about written reasons in a review process.

Mr Kimber told the roundtable:

I think, at least from my perspective, that we have to be really careful about where written reasons come in. Written reasons, for me at least, are the very end of the process. If we adopt a process of using written reasons too much, we don't want that to become a substitute for all of the meetings that we have along the way that are the explanation.

The conveying of the decision, unless the victim doesn't want this, should be a face-to-face personal meeting and then if subsequent to that they want written reasons to confirm or further explain or to have a record of what was discussed in that meeting, that's when the written reasons come in.

It is not really a concern that I have about written reasons because I think they are appropriate in certain circumstances, but we need to make sure that they're the very end of the process, not the substitution for what I think has over the last decade or two decades become much more of the DNA of DPPs, which is to consult with victims and try and explain the decision and give them a chance to have the meeting and have their say and learn about the criminal justice process, which is often very foreign to them, because it is there you get the understanding, not through a letter in the post about, 'You've never met me but here is the decision.'¹⁶¹²

Ms Shead referred to the benefits of providing written reasons after a meeting. Ms Shead told the roundtable:

I do wonder sometimes at the timing issue when it's a very short time and a trial is due to commence and a victim is asked in a really limited amount of time to provide their views, their capacity to do so in times of stress, where they are due to give evidence the next day, for example, and we all know from experience that is a deeply distressing time where a great deal of anxiety comes to the fore.

I have also had the experience on many occasions personally where what I thought I communicated to a victim or a complainant about the process, reasons, difficulties, and I thought that I'd done so clearly and having had considerable experience in doing that, was not understood, often because the complainant or a victim is very stressed or inexperienced in the criminal justice process or I've perhaps explained things poorly and what they may take away from a conference might be very different to what was sought to be conveyed.

I think the face-to-face meeting is very important to allow for discussion, but if reasons are to be given at the very end of the process, doing so in writing I think can be valuable because it doesn't leave scope for misunderstanding about what those reasons were, so far as they can be done in such a way to reveal what they truly were and I think there's a real issue with that.¹⁶¹³

While the complaints and oversight mechanisms that apply in England and Wales provide a starting point for considering what mechanisms might be adopted in Australian jurisdictions, the discussion at the roundtable identified a number of relevant differences between the situations of Australian DPPs and the CPS in England and Wales.

First, it must also be recognised that the CPS is significantly larger than individual Australian DPPs and their offices and is significantly larger than all Australian DPPs and their offices combined.¹⁶¹⁴

Secondly, it appears that decision-making in Australian ODPPs already occurs at a more senior level. This means that there is the capacity for a degree of informal review before the decision is made. It also means that there may be limited capacity for further internal review.

However, in the Consultation Paper, we suggested that providing a formalised internal complaints mechanism, allowing an internal merits review of key decisions – particularly decisions that would result in a prosecution not being brought or being discontinued in relation to charges for alleged offending against that victim – should be available to victims.

In the Consultation Paper, we suggested that there appears to be real merit in setting out a victim's right to seek such a review in guidelines and to draw this right to the attention of the victim at the time they are advised of the relevant decision. The information provided on the VRR scheme in England and Wales appears to be a good starting point for developing a complaints mechanism that is well publicised for the benefit of affected victims.

We recognised that the complaints mechanism itself would probably need to be quite different from that available in England and Wales given the more senior decision-making already undertaken in Australian ODPPs and the resultant more limited capacity for internal review.

We suggested that, if there were any concern in smaller offices that internal reviews might not be able to be conducted in a manner that was sufficiently arms-length from the original decision-makers, or if the decision to be reviewed had been made by the DPP personally, another option might be to provide for merits review by a senior member of the private bar, at least where the decision results in no charges that relate to the particular complainant being prosecuted.

We also suggested that a formalised complaints mechanism should not in any way reduce the priority given to consulting victims in the course of preparing a prosecution, including obtaining their views before any recommendations on key decisions are made. If victims are consulted and understand the reasons for particular decisions as they are made, it may be that they would be less likely to make use of any complaints mechanism. However, as case studies 15 and 17 made clear, ODPPs are not perfect when it comes to following their guidelines and decision-making processes, and a formalised complaints mechanism should help to identify and reverse any errors that are made, at least in those cases where a victim seeks a review.

We also suggested that conversations with victims are very important and that written reasons or decisions should not replace those conversations. Ideally, a complaints mechanism would allow for the review decision and reasons to be discussed with a victim, in the presence of an appropriate support person, with a written decision and reasons to be provided at or after the discussion. Written decisions and reasons have the benefit of providing a clear record and may help to reduce any miscommunication or misunderstanding in the discussion. Unless a victim specifically requests not to be given a written decision or reasons, it seems preferable to provide them as a matter of course.

After the Consultation Paper was published, the Victorian Law Reform Commission (VLRC) published its report *The role of victims of crime in the criminal trial process*. The VLRC recommended that victims should have a right to seek internal review by the DPP to discontinue a prosecution or to accept a negotiated plea.¹⁶¹⁵ In relation to the VRR scheme, it stated:

The Victims' Right to Review Scheme is designed for a large organisation, where decisions to prosecute or to discontinue a prosecution are devolved to local offices. The two-stage approach to internal review, which focuses first on local resolution and then an independent review within the organisation at a higher level, is not appropriate for the Victorian public prosecutions service.

As noted above, decisions of this type made by and on behalf of the [Victorian] DPP are centralised and made at the highest level. It is neither feasible nor desirable to introduce an internal review scheme that reviews the decisions of the statutory office holders who made them.¹⁶¹⁶

In their submissions in response to the Consultation Paper, a number of interested parties addressed the issue of a complaints mechanism.

A number of survivor advocacy and support groups expressed support for complaints and review mechanisms.

The Centre Against Sexual Violence Queensland (CASV) submitted:

The CASV believes that the survivor should have the right to access a transparent and accessible complaints process or to seek a review of the prosecutor's decision. The survivor should be given information about the complaints process at the commencement of the prosecution process.¹⁶¹⁷

Ballarat Centre Against Sexual Assault (CASA) Men's Support Group and Jannawi Family Centre also expressed support for complaint and review mechanisms.¹⁶¹⁸

Care Leavers Australasia Network (CLAN) expressed support for complainants and oversight mechanisms, submitting:

It is obvious that there needs to be some sort of complaints or oversight mechanisms for appealing decisions made by the DPP's office. For many Care Leavers, the hope of justice lives and dies in the hands of the DPP's office. Unfortunately, as addressed in the section above, many DPP's may not always have justice at the forefront of their considerations. When DPP's unfairly assess how much evidence they feel SHOULD be available as opposed to the reality of a child abuse case, and when they are more concerned with their win/loss record, or the threat of paying costs, justice for Care Leavers and other victims may not play a role in the decision making process.

When this happens, Care Leavers and other victims have no one to turn to, no one to fight for them, and no one to keep the DPP's office in check. Without a complaints or oversight mechanism, the DPP's office is free to carry on making decisions that are not in the best interests of justice or the community. In order for any system to work in the best interests of the community as a whole there needs to be transparency and accountability. This will not happen if they have no one to answer to.¹⁶¹⁹ [Emphasis original.]

CLAN submitted that it 'strongly recommends the introduction of a complainants and oversight mechanism that is external to the DPP's office', taking the form of a separate tribunal that hears complaints and conducts reviews of decisions.¹⁶²⁰

People with Disability Australia (PWDA) referred to a submission it made jointly with the National Association of Community Legal Centres in 2014 in response to the ALRC's *Equality, capacity and disability in Commonwealth laws: Discussion paper*, in which it outlined its position 'in terms of a national oversight mechanism to govern the whole spectrum of ways a person can exercise their legal agency'.¹⁶²¹

PWDA submitted:

Part of the ongoing problem in responding to the barriers to justice that people with disability experience is that there are numerous decisions made within the justice system which are not easily subject to review, complaints and oversight. ...

However, the decisions of prosecutors are of particular concern, especially where there is no oversight mechanism with adequate understanding of the situation of people with disability, and there is evidence of reluctance to make use of the availability of supports under evidence legislation. The reality is that if support is adequate and appropriate all people, including people with disability are competent. All people equally have rights, have the capacity to act on those rights, and to have those acts recognised by law. It is the quality and appropriateness of the support available that affects a person's competency (capacity).¹⁶²²

Ms Margaret Campbell, a survivor, expressed support for a right to complain or seek review of the prosecutor's decision to discontinue a prosecution, withdraw charges or accept a guilty plea to lesser charges. She stated that the prosecution in which she was a complainant was discontinued for reasons that she still cannot understand.¹⁶²³

The In Good Faith Foundation (IGFF) submitted that there should be an oversight body with powers to direct investigations.¹⁶²⁴ In the public hearing in Case Study 46, Mr Glenn Davies, representing IGFF, said in relation to this proposal:

I think it could be extended to the OPP. I think where this comes into play is that our clients in the past have felt they had nowhere to go to complain about what has happened or to complain about how they were looked after or how their case wasn't progressed. They are

often aggrieved by that. From my policing background, we always said, ‘We will represent you back to the OPP – to the DPP’, but often that wasn’t dealt with in a way that was suitable for the client as well, and they were left empty handed and often very dejected about it.¹⁶²⁵

The Victorian Victims of Crime Commissioner referred to relevant submissions he made to the VLRC inquiry as follows:

I also submitted to the VLRC that the current OPP complaints policy fails to set out a clear process for review or complaint. I recommended the OPP complaints policy should comply with the Victorian Ombudsman’s Guide to complaint handling for Victorian Public Sector Agencies. I also referred to the UK’s Victims’ Right to Review Scheme (VRR) as a well-documented system that clearly articulates its processes.

I submitted to the VLRC that a system needs to be developed to provide victims with an avenue to have a decision to discontinue re-examined and where relevant be provided with reasons for these decisions. I further stated that a system of review *similar* to the VRR may sufficiently meet the needs of victims. However, I reiterate my concerns that any review process should be expedient and transparent ...¹⁶²⁶ [Emphasis original. References omitted.]

The Victorian Victims of Crime Commissioner recommended that:

The Royal Commission consider models for internal review and or complaint in relation to decisions to discontinue charges. The model should:

- be expedient, accessible and clearly articulated, to provide victims/survivors with a sense of transparency and confidence in the system
- provide victims/survivors with written reasons for any decision
- include processes that provide victims/survivors with the opportunity to discuss the reasons in person, before written reasons are given
- allow for the provision of appropriate support for victims/survivors in the course of discussions relating to written reasons.¹⁶²⁷

The South Australian Commissioner for Victims’ Rights submitted:

There should be a formalised internal victim–survivor grievance or complaints mechanism that affords victims–survivors a just and fair review of key decisions. South Australia’s Declaration Governing Treatment of Victims provides for victims to be informed on an existing complaint mechanism and, to his credit the DPP works with me as Commissioner to resolve victims’ grievances, although some are irreconcilable due to the conflicting interests – victim interest versus the public interest. The declaration also acknowledges that victims

are entitled to ask the DPP to review a decision that has affected them, however, that 'right' is worded in a manner that suggests it is applicable to court outcomes, such as asking the DPP to review a sentence to determine if it is manifestly inadequate and whether an appeal ought to be lodged.¹⁶²⁸

The Australian Capital Territory Victims of Crime Commissioner expressed support for 'a formalised complaints mechanism with written responses and a right for victims to seek an internal merits review of key decisions'.¹⁶²⁹ He stated that, if this model is adopted, victims should be informed that the outcome of a complaint does not include a power to overturn the DPP's decision.¹⁶³⁰

The Law Council of Australia expressed support for all Australian DPPs implementing a formalised complaints mechanism with written responses and providing a right for victims to seek an internal merits review of key decisions, particularly in relation to not commencing or discontinuing a prosecution.¹⁶³¹ It noted that the right of a victim to seek internal merits review of key decisions is well established under the VRR scheme.¹⁶³² It stated:

discussion of complaints and oversight mechanisms in relation to DPPs inevitably raises concerns about the impact of any mechanism on the independence of the DPPs, however the proposed measures [the minimum requirements discussed in section 21.5.2, the complaints mechanism and a right to seek internal merits review] appear to appropriately address issues of accountability without threatening the independence of the DPP.¹⁶³³

Some interested parties expressly stated their support for merits review in the form provided in England and Wales under the VRR scheme.

In its submission in response to the Consultation Paper, the Australian Lawyers Alliance referred to Case Study 15. It stated that many of the problems in Case Study 15 'emanated from one of the most senior prosecutors in Australia' and suggested that better supervision would not necessarily ensure better outcomes.¹⁶³⁴ The Australian Lawyers Alliance submitted:

Rather, a system of independent review could be usefully implemented to safeguard against the risk of DPPs deciding not to prosecute cases in which prosecutions would be possible and beneficial.¹⁶³⁵

The Australian Lawyers Alliance suggested that the VRR scheme in England and Wales offered a useful model that could be adopted in Australia to address such issues:

When compared with the clear rights and protocols that exist in England and Wales, the various Australian systems appear haphazard. Different jurisdictions have different levels of formality and victim engagement in review options. While all provide some avenues for review, all would benefit from clearer procedures. As can be seen from Case Study 15, the existence of procedures itself does not ensure that they will be implemented. A formal review mechanism would be much more likely to achieve compliance. Uniformity across jurisdictions would also be a positive development.¹⁶³⁶

The Australian Lawyers Alliance recommended that:

There is a need for national consistency and merits review of decisions of DPPs not to prosecute historical sexual abuse. The system currently in place in England and Wales presents a useful model to emulate in Australian jurisdictions.¹⁶³⁷

Dr Robyn Holder and Ms Suzanne Whiting submitted that consideration should be given to the adoption of the full range of oversight measures that are in place in England and Wales.¹⁶³⁸ They stated:

We strongly agree that criminal justice should be independent of political and partisan influence. It goes without saying that this is especially so for the judiciary and courts. However, we do not agree with argument that independence necessarily means that only formal and supervisory accountability to the executive should exist.

Our justice system is built around a system of checks and balances where decisions taken at one level of the system can be subject to appeal at a higher level. It is possible for a local Magistrates' or District Court decision to be appealed right up to the High Court of Australia. The exceptions to this rule are decisions made by Directors of Public Prosecutions (DPP). DPPs argue that they have written policies and guidelines about their decision making processes which are readily available. This is not a convincing argument because policies and guidelines are open to interpretation. Simply knowing the broad basis for a decision is not to understand its application to an individual case or circumstance. We agree with the Royal Commission's Consultation Paper which notes, 'requirements in DPP guidelines may be of limited value if decisions are made without complying with the DPP guidelines in circumstances where there is no mechanism for a victim to complain or seek a review and there is no general oversight of DPP decision-making'.¹⁶³⁹

On the adoption of a VRR scheme, they stated:

As we understand the UK CPS VRR, it is essentially a robust and transparent internal process enabling review of prosecution decisions. A VRR should apply to decisions not to prosecute or to withdraw charges, as well as to accept a guilty plea to lesser charges as a result of a plea negotiation. The form and composition of the scheme should be subject to broad public consultation and include a website for information and submissions to be published. Whatever the form of the VRR scheme decided upon, we believe the right to review and the scheme itself should include panel members external to the DPP and be enacted in legislation and not just as guidelines.

We believe that a VRR scheme would reduce the likelihood of victims seeking judicial review of prosecution decisions.¹⁶⁴⁰

A number of interested parties, including a number of DPPs, stated their opposition to complaints and review mechanisms based on the model in England and Wales.

In its submission in response to the Consultation Paper, the Law Society of New South Wales noted features of the VRR scheme that it stated distinguished it from the position in Australia, such as the size of the jurisdiction and the seniority of the initial decision-maker. It also identified difficulties with implementing such processes in Australian jurisdictions as follows:

Necessarily, any review would need to occur before a decision was communicated to the defence or the court. Because of the time limitations, a review mechanism would need to be limited to certain types of cases and decisions. A review mechanism would not be practical in some instances, for example, for pleas negotiated on the eve of a trial. Rather, it would only be workable in circumstances where there is enough time and where the decision was not to prosecute at all, rather than accept a lesser offence. We understand that a review process may necessitate some restructuring for the ODPP, for instance it might be necessary to have an additional Deputy Director to enable the Director to be the final arbiter.¹⁶⁴¹

The New South Wales Government submitted:

NSW notes that a multi-level decision making process currently operates within the ODPP and that complaints about the ODPP can be made directly to the ODPP or to the NSW Attorney General. However, NSW also recognises that transparent decision making processes and accessible complaint mechanisms are important for effective prosecution responses to victims of child sexual abuse and public confidence in decision making.¹⁶⁴²

It also noted that the New South Wales ODPP was making a separate submission in response to the Consultation Paper.

The New South Wales ODPP submitted that the model in England and Wales could not be adopted without significant modification in New South Wales, citing a number of factors:

- The scale of the operations of the CPS in terms of numbers of offices, of cases prosecuted and the fact that they prosecute indictable and summary offences meant the CPS had the resources to set up a separate review section as well as a greater imperative to set up an independent auditor/inspectorate.¹⁶⁴³
- Initial decisions within the New South Wales ODPP already include review elements, such as the two-solicitor rule, under which every submission in the office is reviewed by another lawyer, usually someone who is senior to the first lawyer or who is someone specially designated to provide advice to the Director, and a system of delegations which means only senior personnel can completely terminate a matter.¹⁶⁴⁴
- Unlike in England and Wales, where the Attorney General is not an elected politician, there is a need in New South Wales to ensure that the DPP's decision-making is independent from the Attorney-General.¹⁶⁴⁵
- Constitutional issues in Australia prevent judicial review.¹⁶⁴⁶

- The legislative environment is different in England and Wales, where legislation is more skeletal and less prescriptive than in Australia, so guidelines perform a more substantial role in supplementing legislative provisions in England and Wales.¹⁶⁴⁷

In relation to possible reforms, the New South Wales ODPP submitted:

In response to our strategic planning processes and what we have learnt from external influences, including the Royal Commission, we are actively considering how our processes may be improved. *A key aspect of how we consider we can improve both our accountability and our decision-making is to provide victims and survivors with avenues to seek a review of decisions with which they do not agree, and to inform our processes from those reviews.*

However, it is important not to lose sight of the context of how some prosecutorial decisions are made. In the dynamic environment of the courtroom the need to make a decision is often prompted by a late plea offer or a change in evidence. Currently many factors combine to create a situation where decisions are made on or close to the day on which a matter is listed for trial. We accept that rushed decision-making is not best practice and places victims in the unsatisfactory situation of being asked to agree to plea negotiations or decisions to terminate charges at a late stage.¹⁶⁴⁸ [Emphasis added.]

In relation to its complaints policy, the New South Wales ODPP submitted:

A complaints policy is necessary and important for any organisation that deals with the public. The ODPP Complaints Policy has recently been reviewed and published.

The complaints policy does not address disagreement about a decision but rather conduct that is unacceptable, such as delay, rudeness, conflict of interest or failing to do something that was promised.¹⁶⁴⁹

In relation to developing a 'right to review of decision' policy, the New South Wales ODPP submitted:

A prosecutorial decision to terminate proceedings or not commence proceedings may not be a decision agreed to by a victim or other interested party to the proceedings. The fact that a decision is not welcomed does not necessarily found a ground of complaint if the decision is properly reached and has been communicated sensitively and effectively and in a timely way. However, as a decision is likely to have been made based on numerous competing factors and an assessment of those factors, it is acknowledged that minds might reasonably differ as to the weight that each factor be given in making the decision. *Accordingly, if the complainant or Police request it, a prosecutorial decision to terminate proceedings or not commence proceedings will be reviewed.*¹⁶⁵⁰ [Emphasis added.]

In his submission in response to the Consultation Paper, the Victorian DPP submitted:

In relation to complaints which may be made against the VPPS, the OPP website sets out the OPP Complaints Policy, which includes clear guidance on how a complaint may be made to the OPP. A 'Complaint/Feedback Form' is also provided, to help ensure that complaints are addressed quickly and effectively.

In the 2015–2016 year, the VPPS addressed 14 formal complaints.

With respect to DPP accountability, the VPPS regards its [']Policy in Relation to the Giving of Reasons for Discretionary Decisions' as being one of its most significant policies. Although no current legislation obliges the giving of reasons for decisions, Victoria has led the way by having a published policy allowing for reasons to be given, where appropriate.

With respect to the operation of this Policy, it is the case that if, in the course of articulating reasons for a decision, it becomes apparent that the decision was wrong, the potential exists for the decision to be changed, if there is no legal impediment to doing so. To that extent, this Policy also constitutes a type of review mechanism.¹⁶⁵¹

The Victorian DPP outlined the use of the policy to give reasons and stated:

The combined effect of the VPPS's various formal Policies is that the Director and all of the staff of the VPPS, including the Crown Prosecutors, are accountable to the community, in the sense that they exercise their various prosecutorial discretions according to criteria which are publicly available and thus subject to public scrutiny, and within a procedural framework which allows for complaints to be made and addressed on their merits, and the reasons for discretionary decisions to be given to legitimately interested parties.¹⁶⁵²

The Victorian DPP stated that he does not support the creation of an external oversight body.¹⁶⁵³ The Victorian DPP submitted that an external review body that assessed whether the DPP has acted within its own policies and procedures is unnecessary because of all the accountability mechanisms already in place. He submitted that an external review body that undertook a subjective review role and formed its own view on the correctness of the prosecution decision would undermine the independence of the DPP.¹⁶⁵⁴

Specifically in relation to the VRR scheme, the Victorian DPP stated:

It is noted that the Victims Right to Review process, as now operating in the UK, has given rise to a new category of litigation, in which the validity of the review processes themselves are challenged. I believe that the advent of any similar process in Victoria would be inefficient, resource-intensive and unjustified.¹⁶⁵⁵

The Tasmanian Government expressed its opposition to the formal oversight and accountability processes provided by the VRR scheme and HMCPSI, stating that it does not consider them to be appropriate for Tasmania. It contrasted the delegation of significant prosecutorial decisions to relatively junior prosecutors in regional offices in the CPS with the position in Tasmania, which it described as follows:

In Tasmania prosecutorial decisions are made by the Director of Public Prosecutions or a Review Committee consisting of three senior prosecutors (Deputy Director and Principal Crown Counsel), thereby providing internal oversight of prosecutorial decisions by experienced prosecutors. As a result of the difference in scale, Tasmania does not have the same identified need for extensive and independent review processes as the United Kingdom.¹⁶⁵⁶

In relation to the suggestion in the Consultation Paper that in smaller offices reviews might be conducted by a senior member of the private Bar, the Tasmanian Government submitted:

The Tasmanian Government also considers review of the decisions of the Director of Public Prosecutions by a member of the bar to be potentially problematic. In Tasmania, the 'criminal bar' is not large. Barristers who possess the appropriate expertise to undertake such a role are limited. There is a risk that the credibility and confidence in the Office of the Director of Public Prosecutions may be undermined because of the size of the jurisdiction and the intimacy of the legal fraternity.¹⁶⁵⁷

In his submission in response to the Consultation Paper, the Tasmanian DPP also distinguished between the operation of the CPS and his office:

In Tasmania it is a relatively small Office. Decisions regarding prosecutions are made at a very senior level. As can be seen from the Tasmanian guidelines, there is a right to review with complainant consultation prior to any final decision being made. Unlike the English Crown Prosecution Service, in this Office the prosecutor with conduct of the case does not make the decision to indict or to discharge a person. As can be seen from the guidelines, where the prosecutor with conduct recommends a discharge, two members of the Committee comprising the Deputy Director and the Principal Crown Counsel have to agree to the discharge but in cases where the prosecutor with conduct recommends that a prosecution should proceed, for it to be subsequently discharged three members of the Committee have to agree. Where there is disagreement, the matter has to be referred to the Director. A right of review by the Director is given to a complainant. All this is done before a final decision is made. In that way, a number of senior lawyers look at a matter and there is also complainant input before a discharge is made. In my view, this is far superior to a review system after an accused person has been discharged, like in the system operating in the English Crown Prosecution Service.¹⁶⁵⁸

The Tasmanian DPP also expressed his opposition to review by a member of the Bar, stating that such a review would 'prolong the controversy and attack the credibility of the Office' and noted that in small jurisdictions it was unlikely that a member of the private Bar would have prosecutorial experience comparable to that of the DPP.¹⁶⁵⁹

The DPP for the Australian Capital Territory expressed support for the provision to a complainant of a right to seek a review of any decision at a higher level within the office and for publishing the policies and guidelines that provide this right.¹⁶⁶⁰ However, he also referred to the challenges of providing a right of review in a smaller jurisdiction:

In a small office with a flat structure, the provision of a right of review presents challenges, as decisions to discontinue are already made at a senior level. It is anticipated that in most instances, the Director or Deputy Director will conduct any such review if necessary.¹⁶⁶¹

In her submission in response to the Consultation Paper, the Commonwealth DPP provided a copy of the CDPP's Complaints Policy, which is publicly available online. She stated that the CDPP is currently undertaking a review of the policy in order to improve the effectiveness of the complaints process.¹⁶⁶²

In relation to the suggestion that complainants be given a right to seek an internal merits review of key decisions not to prosecute or to discontinue a prosecution, the Commonwealth DPP submitted:

Unlike in the UK the CDPP consults and seeks the views of complainants/victims at the important stages of the prosecution process when considering whether a prosecution is in the public interest including when commencing a prosecution, when considering discontinuing a prosecution and when considering a charge negotiation. As noted above the CDPP has decided to amend our Decision Making Matrix to require that such prosecution decisions, where there is an identifiable victim of a child sex charge or allegation, be made at Practice Group Leader level. In addition a child complainant (through a parent or legal guardian) will have the option of seeking a review by me as Director of any decision not to commence a prosecution or to wholly discontinue a prosecution. I anticipate this addition to our decision making process will come into operation very shortly, following amendment of our Decision Making Matrices.¹⁶⁶³

21.5.4 Judicial review

We also raised for discussion at the roundtable the option of allowing external judicial review of key decisions, particularly those to do with not commencing or discontinuing a prosecution. Again, this draws on the example of England and Wales.

Contrary to the position in England and Wales, decisions made pursuant to the prosecutorial discretion are not amenable to judicial review in Australia. Originally, this was justified because of how the prosecutorial function was considered to form part of the Attorney-General's prerogative power.¹⁶⁶⁴ However, as DPPs have been given prosecutorial powers by statute, the justification is now said to stem from the administrative law principles regarding the executive decision-making which is justiciable by a court.

The most frequently cited statement is that of Gaudron and Gummow JJ in *Maxwell v The Queen*:

It ought now be accepted, in our view, that certain decisions involved in the prosecution process are, of their nature, unsusceptible of judicial review. They include decisions whether or not to prosecute, to enter a nolle prosequi, to proceed ex officio, whether or not to

present evidence and, which is usually an aspect of one or other of those decisions, decisions as to the particular charge to be laid or prosecuted. The integrity of the judicial process – particularly, its independence and impartiality and the public perception thereof – would be compromised if the courts were to decide or were to be in any way concerned with decisions as to who is to be prosecuted and for what.¹⁶⁶⁵ [References omitted.]

In *Likiardopoulos v The Queen*, French CJ said:

The general unavailability of judicial review in respect of the exercise of prosecutorial discretions rests upon a number of important considerations. One of those considerations ... is the importance of maintaining the reality and perception of the impartiality of the judicial process. A related consideration is the importance of maintaining the separation of the executive power in relation to prosecutorial decisions and the judicial power to hear and determine criminal proceedings. A further consideration is the width of prosecutorial discretions generally and, related to that width, the variety of factors which may legitimately inform the exercise of those discretions. Those factors include policy and public interest considerations which are not susceptible to judicial review, as it is neither within the constitutional function nor the practical competence of the courts to assess their merits. Moreover ... trial judges have available to them sanctions to enforce well-established standards of prosecutorial fairness and to prevent abuses of process. ...

The statutory character of prosecutorial decision-making in Australia today does not lessen the significance of the impediments to judicial review of such decisions, which are created by the constitutional and practical considerations referred to above. However the existence of the jurisdiction conferred upon this Court by s 75(v) of the Constitution in relation to jurisdictional error by Commonwealth officers and the constitutionally-protected supervisory role of the Supreme Courts of the States raise the question whether there is any statutory power or discretion of which it can be said that, as a matter of principle, it is insusceptible of judicial review. That question was not argued in this case and does not need to be answered in order to decide this case.¹⁶⁶⁶ [References omitted.]

However, the other judges in that case (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ) did not express any agreement with the remarks in this latter paragraph, those remarks leaving open the possibility of judicial review of prosecutorial decisions.

In *Magaming v The Queen*,¹⁶⁶⁷ French CJ, Hayne, Crennan, Kiefel and Bell JJ, with Keane J agreeing, citing *Maxwell v The Queen*, *Likiardopoulos v The Queen* and *Elias v The Queen*,¹⁶⁶⁸ stated:

It is well established that it is for the prosecuting authorities, not the courts, to decide who is to be prosecuted and for what offences.¹⁶⁶⁹ [References omitted.]

In the same case, Gageler J (who dissented in the decision on the appeal), stated:

Chapter III of the Constitution therefore reflects and protects a relationship between the individual and the state which treats the deprivation of the individual's life or liberty, consequent on a determination of criminal guilt, as capable of occurring only as a result of adjudication by a court. That adjudication quells a controversy, to which the individual and the state are parties, as to the legal consequences of the operation of the law on the past conduct of the individual. The adjudication quells that controversy by the application of the relevant law and, where appropriate, of judicial discretion to facts ascertained in accordance with the degree of fairness and transparency that is required by adherence to judicial process.

That understanding of the nature and incidents of the determination and punishment of criminal guilt underlies the reasons which have generally been given in Australia for treating executive decisions made in the prosecutorial process as ordinarily unsusceptible of judicial review, an unsusceptibility recently described as having 'a constitutional dimension'¹⁶⁷⁰. Thus, '[i]t has generally been considered to be undesirable that the court, whose ultimate function it is to determine the accused's guilt or innocence, should become too closely involved in the question whether a prosecution should be commenced'¹⁶⁷¹. The same general perception of undesirability of close curial involvement in prosecutorial processes has applied to a question about whether a particular charge is to be laid, as well as to a question about whether a particular charge, having been laid, is to be proceeded with¹⁶⁷². The main reason generally given is that the court's review of such an exercise of prosecutorial discretion would compromise the impartiality of the judicial process by involving a court in an inquiry into a forensic choice made by a participant in a controversy actually or potentially before the court¹⁶⁷³. A complementary reason often given is that a court's control over its own hearing and determination of whatever charge might in fact be laid and proceeded with in the exercise of prosecutorial discretion means that 'the court has other powers to ensure that a person charged with a crime is fairly dealt with'^{1674, 1675}.

It follows that, given the constitutional element that has been articulated regarding the unsusceptibility of prosecutorial decisions to judicial review, there may be constitutional difficulties with trying to make such decisions reviewable, although more so at the federal level than at state level.

In Canada, as in Australia, apart from instances of abuse of process, decisions made pursuant to the prosecutorial discretion are not amenable to judicial review out of separation of powers concerns. In *Krieger v Law Society of Alberta*, Iacobucci and Major JJ, writing for the Supreme Court, said:

The court's acknowledgment of the Attorney General's independence from judicial review in the sphere of prosecutorial discretion has its strongest source in the fundamental principle of the rule of law under our Constitution. Subject to the abuse of process doctrine, supervising one litigant's decision-making process – rather than the conduct of litigants before the court – is beyond the legitimate reach of the court. ... The quasi-judicial function

of the Attorney General cannot be subjected to interference from parties who are not as competent to consider the various factors involved in making a decision to prosecute. To subject such decisions to political interference, or to judicial supervision, could erode the integrity of our system of prosecution. ...

‘Prosecutorial discretion’ is a term of art. It does not simply refer to any discretionary decision made by a Crown prosecutor. Prosecutorial discretion refers to the use of those powers that constitute the core of the Attorney General’s office and which are protected from the influence of improper political and other vitiating factors by the principle of independence.¹⁶⁷⁶

The Hon. Justice Mark Weinberg, Judge of the Court of Appeal of the Supreme Court of Victoria, speaking extrajudicially in October 2015, discussed judicial oversight of prosecutorial discretion. He said:

Those who prosecute are, when exercising that function, discharging core executive responsibilities. Although they are usually experienced, and have specialist knowledge of the criminal law and procedure, they must accept that there comes a point at which their decisions will be subjected to judicial scrutiny.¹⁶⁷⁷

Justice Weinberg discussed problems that emerged during the 1980s after the Commonwealth DPP was established under legislation and judges exercising federal jurisdiction then engaged in judicial review of prosecution decisions, suggesting that this had led to delay and thwarted a significant number of prosecutions in Australia.¹⁶⁷⁸ These problems arose from defendants seeking judicial review which delayed prosecutions, and he identified the High Court’s decision in *Yates v Wilson*,¹⁶⁷⁹ recognising ‘the undesirability of fragmenting the criminal process’ as putting a stop to the problem.¹⁶⁸⁰

Justice Weinberg emphasised the importance of the trial judge ensuring that any trial over which he or she presides is a fair trial and the appellate judges considering whether a trial has miscarried.¹⁶⁸¹ He said that judges must recognise that, ‘short of conducting an unfair trial, there are some matters upon which the prosecutor’s view should prevail’.¹⁶⁸² This suggests that, if there is any role for judicial review of prosecution decisions outside of the trial itself, it should be a very limited role.

A number of those participating in the roundtable, including DPPs, who spoke about the issue were generally not supportive of allowing judicial review of prosecution decisions.¹⁶⁸³

Mr McGrath, then the Western Australian DPP, stated:

Can I say, your Honour, one of the most significant decisions we make is obviously the decision to prosecute, and that is a decision, as we all know, that dramatically changes the lives of the individual, and recognising the enormous significance to victims as well.

My difficulty, obviously, is the separation of powers, the need to have the appearance and the actual reality of that separation and impartiality. The courts ultimately would be deciding who is the litigant, who is brought before the courts and the forensic decisions that would be made.

The other aspect is, on a review, the enormous parts that make up the prosecutorial discretion and the decisions that it would be a difficult task to conduct a review of. So I just see these inherent difficulties. The largest one would be the fragmentation in the criminal process.¹⁶⁸⁴

Mr Alan Sefton, Deputy State Counsel from the State Solicitor's Office of Western Australia, suggested that judicial review may not be as effective as internal review mechanisms or other external merits review mechanisms.¹⁶⁸⁵

More support for judicial review was expressed by some of those representing victims' interests at the roundtable.

Mr O'Connell, the South Australian Commissioner for Victims' Rights, stated that judicial review 'should be an option; no-one should be above the law'.¹⁶⁸⁶ Mr O'Connell suggested that, in the absence of judicial review, a person has nowhere to go if the prosecution decision was illogical, irrational or inconsistent with the DPP's guidelines.¹⁶⁸⁷

Mr Hinchey, the Australian Capital Territory Victims of Crime Commissioner, suggested that the existence of judicial review in England and Wales may give authority to the VRR scheme and stated:

So any review process, therefore, should have some weight behind it and some authority, whether you go for a judicial review process or another form. But there has to be some transparency and accountability around decision-making.¹⁶⁸⁸

Emeritus Professor Mark Aronson told the roundtable that he regarded the value of the English approach as being in forcing the CPS to set up the VRR scheme instead of engaging in judicial review.¹⁶⁸⁹

Mr Cowdery submitted that, in his view, no need for judicial review in Australia has been demonstrated and that DPP decisions are already accountable in many ways.¹⁶⁹⁰

It seems reasonably clear that judicial review is not favoured, either by the High Court or by DPPs.

However, as we suggested in the Consultation Paper, there would seem to be a gap capable of causing real injustice if a prosecutor makes a decision not to prosecute or to discontinue a prosecution without complying with the relevant prosecution guidelines and policies and the affected victim is left with no opportunity to seek judicial review.

While fragmentation in the criminal process might be a real concern where a prosecution is proceeding and it is the defendant who seeks judicial review, this concern does not appear to arise where the DPP decides that no prosecution should proceed and it is the victim who seeks judicial review of that decision. The defendant has the protection of the trial and appellate courts' obligation to ensure a fair trial and the capacity to sue for malicious prosecution. The victim has nothing, other than perhaps the opportunity to seek to bring a private prosecution, although even that may not be effective, as Case Study 15 demonstrated.

The courts have referred to the breadth of the discretion exercised by the DPP, including in relation to the public interest, as being a reason to refuse judicial review. However, it is not clear why this concern would arise where the issue is one of failure to follow the DPP's own guidelines – for example, in consulting the victim. Further, it is not clear why Australian courts would have difficulties in assessing decisions not to prosecute on the grounds of irrationality or unreasonableness which are well understood and developed in administrative law.

In the Consultation Paper, we suggested that, if DPPs introduced an internal complaints mechanism which was robust and effective, it may be that there would be no need for judicial review. This effectively seems to be the position that has developed in England and Wales given the success of the VRR scheme. However, it is not clear whether provision for judicial review might help to ensure that internal complaints mechanisms are robust and effective and are sufficient to protect the interests of victims – and the community – in having key prosecution decisions made in compliance with prosecution guidelines and policies.

In its report on *The role of victims of crime in the criminal trial process*, the VLRC did not support judicial review of prosecution decisions, stating that there was limited support for judicial review but unequivocal opposition from key stakeholders.¹⁶⁹¹ In particular, the VLRC noted the views of the Victorian DPP that introducing judicial review was unnecessary and would have unwelcome consequences for the following reasons:

- It would compromise the Director's independence.
- The courts are not best placed to weigh the factors that need to be considered in making a decision to prosecute or to discontinue a prosecution.
- A system of judicial review would add an additional layer of costs from satellite proceedings and cause delays in the justice system.
- There is no demonstrated need for such a reform and it would be unfair to victims with fewer financial resources than others to pay for lawyers to conduct a judicial review. If applications for review were funded by Victoria Legal Aid, it would be an additional impost on the taxpayer.
- It could create expectations in victims that cannot be realised. Where a judicial review application is successful, the matter is referred back to the original decision-maker to reconsider. The court does not substitute the original decision with a decision of its own.¹⁶⁹²

In submissions in response to the Consultation Paper, some interested parties expressed support for judicial review being available for key prosecution decisions.

Mr O’Connell, South Australian Commissioner for Victims’ Rights, restated his support for judicial review, submitting that a formal internal grievance or complaint process would not undo the injustice arising if a prosecutor decides not to prosecute or to discontinue a prosecution without complying with the relevant guidelines and policies.¹⁶⁹³

Dr Holder and Ms Whiting also expressed support for judicial review, stating that they ‘expect that the power of review would be sparingly used but the bar should not be set so high as to preclude any reasonable prospect of a successful application’.¹⁶⁹⁴

A number of interested parties expressed opposition to judicial review being available for key prosecution decisions.

The Victorian Victims of Crime Commissioner referred to concerns he had expressed previously that judicial review may place further burdens on the criminal justice system and be unnecessarily cumbersome and bureaucratic, although he also acknowledged research suggesting victims seek transparency and accountability in relation to prosecution decisions.¹⁶⁹⁵

The New South Wales ODPP stated that constitutional issues prevent judicial review in Australia and, citing *Maxwell v The Queen*,¹⁶⁹⁶ that the ‘High Court has made it clear that there is a separation of power issue in interfering with prosecution decisions’.¹⁶⁹⁷

The Victorian DPP also stated his opposition to judicial review of prosecution decisions and noted that part of the rationale of *Maxwell v The Queen* was the ‘independence and impartiality’ of the judicial process rather than the independence of the DPP.¹⁶⁹⁸

In its submission in response to the Consultation Paper, the Tasmanian Government stated its opposition to judicial review, citing the views of the High Court in *Maxwell v The Queen*,¹⁶⁹⁹ as well as concerns about the size of the judiciary in Tasmania:

The Tasmanian Government does not consider judicial review of the Director of Public Prosecution’s discretion an appropriate oversight mechanism. In Tasmania there are only six judges which would limit the capacity for the judiciary to undertake such a role because of the resulting limitation to the judges who could ultimately undertake the trial of the matter. This may result in additional court delays.¹⁷⁰⁰

The Tasmanian DPP stated his opposition to judicial review, referring to constitutional concerns and the difficulty courts might experience in reviewing all of the factors that are taken into account in the prosecution decision.¹⁷⁰¹ He also observed that in a small jurisdiction like Tasmania, where there are only six Supreme Court judges, any appeal from a review of a decision not to prosecute would threaten the independence of the court for any criminal proceedings.¹⁷⁰²

The Tasmanian DPP also expressed concerns over the decisions that would be reviewable, and who a prosecution would be conducted by if the DPP was of the view that no prosecution should take place. He stated:

Further, this Office makes numerous decisions during the prosecution process. Such decisions include the number and type of charges, what evidence to call and what facts to state in a plea. All these decisions have a significant impact on the final outcome. Which of these decisions are to be reviewed? There is a difficulty in who would actually conduct the prosecution if the Director of Public Prosecutions was of the view that no prosecution should take place, i.e. who would sign the indictment and who would prosecute it?¹⁷⁰³

The Commonwealth DPP expressed opposition to allowing a complainant to seek judicial review,¹⁷⁰⁴ stating that it would necessarily involve the possibility of fragmenting the criminal justice process.¹⁷⁰⁵ The Commonwealth DPP also referred to the amendments made in 2000 to the *Administrative Decisions (Judicial Review) Act 1977* (Cth) to effectively prohibit the use of the Act to collaterally challenge issues arising from prosecutions for offences against the laws of the Commonwealth or the states and territories.¹⁷⁰⁶ She submitted that allowing judicial review 'is likely to unnecessarily add to costs for the community and may lead to additional trauma for victims, together with burdens upon potential accused'.¹⁷⁰⁷

21.5.5 Audit of compliance

We raised for discussion at the roundtable the option of an internal or external audit of compliance with DPP policies for decision-making and consultation with victims and police and also with any victims' rights legislation.

Internal or external audit should lead to improved decision-making through improved compliance with policies and improved documentation of decisions. It does not offer a right to review what might be a wrong or poor decision, but it might cover a wider range of issues and improve more aspects of decision-making. For example, an audit might identify the need for improvement in decisions relating to charge negotiation, where these decisions might not attract a right to review.

Mr Byrne told the roundtable that the Queensland DPP was currently conducting an internal audit, reviewing 136 files to determine whether correct process had been followed and whether the guidelines had been complied with. Mr Byrne said that the audit would be reported to the executive management team.¹⁷⁰⁸ Mr Byrne also said that he had an open mind as to involving an external person in the audit process once they have developed the process and that publishing the results of the audit should address any public confidence issues.¹⁷⁰⁹ Mr Byrne expressed support for publishing the results, probably through the annual report.¹⁷¹⁰

Mr Kimber told the roundtable that the South Australian DPP was part way through an audit process looking at whether policies are being complied with.¹⁷¹¹ Mr Kimber said that, once they had learned about the process and how best to conduct the audit, he had an open mind about having an external person on the audit committee and that he could see no reason not to publish key findings of the audit process in the annual report.¹⁷¹²

Mr Pedley told the roundtable that the Commonwealth ODPP has an independent audit committee and that he has been giving some thought to asking them to audit ODPP processes, similar to the audits commenced in Queensland and South Australia. Mr Pedley explained that the members of the audit committee are external appointments and are not from within the DPP, and a summary of their report is included in the DPP's annual report.¹⁷¹³

Mr Champion told the roundtable that the Victorian OPP has begun discussions in relation to an internal audit similar to that being conducted in South Australia. Mr Champion said that he did not see a difficulty in making the results of an internal audit public in the DPP's annual report.¹⁷¹⁴

Mr McGrath also expressed a preference for an internal audit process similar to the Queensland and South Australian approaches and said that compliance could be included in the annual report.¹⁷¹⁵

Mr Coates indicated support for an internal audit with public reporting and told the roundtable that the Tasmanian ODPP currently reports on the number of discharges in the annual report.¹⁷¹⁶

Mr White expressed support for better identifying the process to be followed in guidelines concerning consultation with victims and discontinuing matters, with an internal audit of compliance, the results of which could be published in the annual report.¹⁷¹⁷

Mr Hyland told the roundtable that, in New South Wales, new obligations were introduced in relation to audits, with audit committees now required to comprise only external members. He said the New South Wales ODPP had conducted random audits around the state and that the methodology for the audits was being reviewed. He also referred to the performance audit conducted by the New South Wales Auditor-General in 2008.¹⁷¹⁸

Mr Greg Davies APM, the Victorian Victims of Crime Commissioner, expressed some concern at the slow and bureaucratic nature of the audit process conducted by HMCPSP in England and Wales.¹⁷¹⁹

Ms Mahashini Krishna, the New South Wales Commissioner of Victims Rights, told the roundtable:

I think what victims normally want is transparency and accountability, and it doesn't necessarily have to come from an inspectorate, but there has to be just some sort of audit or review system in place. We don't want to make another huge bureaucratic or cumbersome process, as Greg [Davies] has been pointing out, but we need some sort of oversight mechanism that can give confidence to the public and to victims in relation to the decisions that are being made.¹⁷²⁰

In the Consultation Paper, we suggested that, given the expressed support for and current implementation of internal audit processes, these may be a worthwhile way to proceed. It should be in DPPs' interests to ensure that their guidelines and policies for decision-making and requirements for consultation with victims and police are being complied with throughout their respective ODPPs. Importantly, an audit process should help to improve compliance in decision-making generally across the relevant ODPP, without relying only on individual victims' willingness to pursue a complaint.

An external audit might offer additional assurance to the community that guidelines and policies are being followed. However, the smaller size and resources of Australian ODPPs when compared with the CPS in England and Wales suggests that an external audit might not be needed unless internal audits were to prove inadequate. Further, some of the benefits of an external audit might be able to be achieved in an internal audit if persons external to the ODPP were involved in conducting or overseeing the audit – for example, through appointing independent members of audit committees.

In submissions in response to the Consultation Paper, there was limited support for external audit processes.

Dr Holder and Ms Whiting expressed support for a national body to perform the work undertaken by the HMCPSI in England and Wales. They submitted that:

External audit processes are important for ensuring accountability and transparency, but may also identify opportunities to improve processes and outcomes and make better use of resources. There is currently a raft of DPP victim-related policies. These are of little value if compliance with them is not monitored by an external body and there are no remedies in the event that polices [sic] are not followed.¹⁷²¹

Some submissions expressed opposition to external review.

The Law Society of New South Wales opposed external review models, noting the New South Wales ODPP's view that the auditing requirements of the *Government Sector Employment Act 2013* (NSW) were preferable to an external review model and expressing concerns that external review mechanisms may interfere with the independence of the ODPP.¹⁷²²

The Tasmanian Government stated that it did not consider external oversight bodies such as HMCPSI appropriate for Tasmania and that internal audit processes and ensuring compliance with prosecutorial guidelines are matters for the DPP to determine.¹⁷²³

The Tasmanian DPP opposed external oversight for a number of reasons, including the diversion of resources which would be better used for the prosecution of offences.¹⁷²⁴

Some DPPs outlined their current audit and compliance processes.

The New South Wales ODPP outlined a number of processes, including the following:

- The ODPP Executive Board has oversight of the ODPP's managerial functions. It is an advisory board chaired by the DPP and includes the Deputy DPPs, the Solicitor for Public Prosecutions, the Senior Crown Prosecutor, the Director of Corporate Services, and two persons appointed by the DPP with the approval of the Attorney General for, among other things, their financial and/or management expertise. The board does not have any functions in relation to the exercise of the DPP's prosecutorial discretion.
- The Sexual Assault Review Committee is an interagency committee convened by the ODPP since 1989. It aims to improve the prosecution process for sexual assault victims through internal process amendments, training, legislative change and more coordination between relevant agencies. The committee considers issues and complaints raised by victims via the ODPP or other agencies.
- The Audit and Risk Committee is now constituted by three independent members and reports to the DPP annually on a number of issues, including an overall assessment of the ODPP's risk, control and complainant framework, including significant risks or legislative changes impacting on the ODPP.
- The *Annual Reports (Statutory Bodies) Regulation 2015 (NSW)* requires that a 'Consumer Response' be provided describing the extent of consumer complaints and indicating any services improved or changes as a result of complaints or suggestions.
- The NSW Ombudsman has an investigatory oversight function which can include the ODPP. For example, the Ombudsman audited agency responses to the Aboriginal Child Sexual Assault Task Force recommendations.¹⁷²⁵

The New South Wales ODPP also outlined its internal legal audit process, which is overseen by the Audit and Risk Committee, the two independent members of the board and the New South Wales Audit Office. It described the current practice for legal audits, which involves selecting a random sample of files from a particular office and assessing factors such as:

- whether the charges are settled
- whether decisions such as termination, plea negotiation and acceptance of pleas to lesser charges were made in accordance with delegated authority and the prosecution guidelines
- whether work was allocated to a lawyer with appropriate experience
- compliance with policies and procedures such as second lawyers overseeing decisions
- timely completion of work
- adherence to time frames for victim contact, engagement and provision of information.¹⁷²⁶

The New South Wales ODPP stated that audit compliance is reported in its annual report.¹⁷²⁷

The Victorian DPP expressed some support for increased internal audit, submitting:

I acknowledge that it may be desirable to increase and formalise the extent to which OPP prosecution files are subject to internal random audit, to assess compliance with policy and other requirements. That issue is being actively addressed now and would not benefit from any external agency input.¹⁷²⁸

The Victorian DPP outlined two processes which, while not technically ‘audits’, had been operating within the VPPS for many years and which could be regarded as ‘systemic checks of completed prosecution files and appeals, to assess the quality of work done and to detect and remedy possible systemic errors’.¹⁷²⁹

The two processes are:

- **Case completion reports:** These reports are required ‘whether a matter concludes with a sentence, an acquittal, a discontinuance, discharge at committal, or other result’. From 2008 to mid-2015, all case completion reports – averaging around 1,800 per year – were reviewed by the manager of the Policy and Advice Directorate for a range of issues, including possible appeals by the DPP and for any policy or systemic issues that required remedial action to be taken. The process has been amended in the last 12 months. All sex offence-related case completion reports are now examined by the Manager, Deputy Manager and Legal Prosecution Specialist of the Specialist Sex Offences Unit. Also, any policy issues are forwarded to the Policy and Specialist Legal Directorate.¹⁷³⁰
- **Conviction appeal analysis:** Since 2001, the VPPS has conducted an annual analysis of all conviction appeals in the Court of Appeal, particularly to identify matters in which the appeal was allowed as a result of any failure or fault of the Crown, so that corrective steps can be taken. The analyses are provided annually to the VPPS executive. They are also used to detect general trends which might inform internal training and/or law reform.¹⁷³¹

21.5.6 Publication of data

We also raised for discussion at the roundtable the option of publication of data relating to the exercise and outcomes of any complaints or oversight mechanisms.

Publication of audit results, and of the use and outcomes of a complaints mechanism, would help to promote transparency and accountability of DPPs and their offices. Publication can help to drive improvements, with subsequent audits targeting areas identified as needing improvement in earlier audits. This would enable the reporting of changes in compliance over time.

Publication of data from an internal audit process would also be another way of seeking to achieve some of the benefits of an external audit in an internal audit process.

Publication of the use and outcomes of a complaints mechanism would have the additional benefit of publicising the availability of the complaints mechanism.

From the discussion at the roundtable, it seems that data could be published with other performance data that is currently required to be published in the annual reports of the DPPs or ODPPs. It does not appear that publication of data from an audit or a complaints mechanism would be onerous.

In its submission in response to the Consultation Paper, the NSW ODPP stated that audit compliance is reported in its annual report.¹⁷³² It also noted that the ODPP is required by the *Annual Reports (Statutory Bodies) Regulation 2015* (NSW) to include a 'Consumer Response' in its annual reports which describes the extent and main features of consumer complaints and indicates any services improved or changed as a result of the complaints or suggestions made.¹⁷³³ The New South Wales ODPP is currently investigating software to improve ODPP capacity to record and report on complaints.¹⁷³⁴

The Victorian DPP submitted that the VPPS keeps records of the usage of procedures under the *Policy in relation to the giving of reasons for discretionary decisions* and reports those figures in the annual reports.¹⁷³⁵

The Commonwealth DPP submitted that it has recently decided to publish anonymised data regarding complaints on its external website.¹⁷³⁶

21.5.7 Measures not being considered

In the Consultation Paper, we stated that we were not then minded to consider other accountability measures, such as parliamentary committees and the like.

Such measures have been controversial in the past, particularly in New South Wales. In 2001, the New South Wales Attorney-General's Department and the New South Wales shadow Attorney General advanced separate proposals to establish respectively a Public Prosecutions Management Board and a Parliamentary Joint Committee on the Office of the Director of Public Prosecutions.¹⁷³⁷ Both proposals were controversial, with objections raised as to their potential impact on the independence of the DPP.¹⁷³⁸ Neither proposal proceeded.

The proposed Public Prosecutions Management Board would have overseen management, administrative and financial decisions of the ODPP.¹⁷³⁹ It would not have provided any complaints or oversight mechanism in relation to prosecutorial decisions and compliance with prosecution guidelines and policies.

The Director of Public Prosecutions Amendment (Parliamentary Joint Committee) Bill 2001 (NSW) proposed a number of functions for the parliamentary committee, including the power 'to monitor and to review the exercise by the Director of the functions of the Director', and

to require the DPP or a Deputy DPP to give the committee reasons for not proceeding with or appealing a particular case. This contrasts with the New South Wales Parliament's Joint Committees for the Ombudsman and Independent Commission Against Corruption, which cannot investigate decisions of the Ombudman or the Independent Commission Against Corruption in relation to particular investigations or complaints.¹⁷⁴⁰

A parliamentary committee with such powers might provide some form of oversight of prosecutorial decisions and compliance with prosecution guidelines and policies. However, it is not clear that oversight by a parliamentary committee would be a sufficiently effective mechanism to protect the interests of individual complainants or to ensure ongoing oversight of compliance with guidelines and policies.

We remain of the view that we do not need to consider such measures.

21.6 Discussion and conclusions

Having considered submissions in response to the Consultation Paper, we are satisfied that all Australian DPPs should be able to implement the measures we have identified as minimum requirements if they do not already have them in place.

That is, each Australian DPP or ODPP should:

- adopt comprehensive written policies for decision-making and consultation with victims and police
- publish all policies online and ensure that they are publicly available
- provide a right for complainants to seek written reasons for key decisions.

We agree that ODPPs should also provide victims with an opportunity to discuss the reasons in person, before written reasons are provided. This should be done at a time and in a manner that ensures that the victim is provided with appropriate support, whether through Witness Assistance Services or otherwise.

We acknowledge that the provision of reasons, whether in a discussion or in writing, would need to be done in a manner that did not risk contaminating evidence if a prosecution were to proceed.

In relation to a complaints mechanism, we are satisfied that each Australian DPP or ODPP should adopt a formalised internal complaints mechanism which would allow victims to seek an internal merits review of key decisions, particularly decisions that would result in a prosecution not being brought or being discontinued in relation to charges for alleged offending against that victim.

We accept that the form of internal merits review will be quite different from that applying in England and Wales under the VRR scheme. In particular, given the difference in size of the CPS and even the largest Australian ODPPs, decision-making in Australian ODPPs already occurs at a higher level of seniority than in the CPS.

We consider that the VRR scheme provides a good starting point for the materials that should be provided to victims, including setting out a victim's right to seek a review in guidelines and drawing this right to the attention of the victim at the time they are advised of the relevant decision.

We accept that smaller offices may find it more difficult to conduct internal reviews in a manner that is sufficiently arms-length from the original decision-makers, particularly if the DPP was personally involved in the initial decision. We acknowledge concerns expressed about merits reviews being conducted by senior members of the private Bar. However, this concern could be addressed by considering briefing barristers from the larger interstate private Bars rather than briefing locally. Particularly in Melbourne and also in Sydney, a number of senior members of the private Bar conduct prosecutions for the relevant DPP. Particularly where initial decisions are made at very senior levels and in discussion with senior colleagues, the occasions on which a review is sought after reasons are given for initial decisions should be very few.

We remain of the view that a formalised complaints mechanism should not in any way reduce the priority given to consulting victims in the course of preparing a prosecution, including obtaining their views in advance of making any recommendations on key decisions. If victims are consulted and understand the reasons for particular decisions as they are made, it may be that they would be less likely to make use of any complaints mechanism.

As recognised above, conversations with victims are very important, and written reasons or decisions should not replace those conversations.

Ideally, a complaints mechanism would allow for the review decision and reasons to be discussed with a victim, in the presence of an appropriate support person, with a written decision and reasons to be provided at or after the discussion. Written decisions and reasons have the benefit of providing a clear record and may help to reduce any miscommunication or misunderstanding in the discussion. Unless a victim specifically requests not to be given a written decision or reasons, we consider that a written decision and reasons should be provided as a matter of course.

It seems clear that judicial review is not favoured either by the High Court or by DPPs – or, indeed, by a number of other interested parties who made submissions in response to the Consultation Paper.

We remain of the view that the absence of judicial review leaves a gap capable of causing real injustice if a prosecutor makes a decision not to prosecute or to discontinue a prosecution without complying with the relevant prosecution guidelines and policies and the affected victim is left with no opportunity to seek judicial review.

Further, we do not agree that providing victims with the right to seek judicial review of key prosecution decisions would create real risks of fragmentation in the criminal process or that the breadth of the discretion exercised by DPPs, including in relation to the public interest, creates any difficulties when the issue would be one of failure to follow the DPP's own guidelines.

However, in light of the strong opposition to judicial review, we do not consider that our recommending it would be likely to provide an effective means for victims to seek review of prosecution decisions.

In the absence of judicial review, it is critical that DPPs and ODPPs – and relevant governments – ensure that complaints mechanisms providing for internal merits review are robust and effective, both to protect the interests of individual victims and to reassure the broader community that key prosecution decisions are made in compliance with prosecution guidelines and policies.

We are also satisfied that internal audits of compliance with prosecution guidelines and policies are needed. While complaints mechanisms provide an important form of review, they rely on individual victims being willing and able to complain.

It should be in DPPs' interests to ensure that their guidelines and policies for decision-making and requirements for consultation with victims and police are being complied with throughout their respective ODPPs. Importantly, an audit process should help to improve compliance in decision-making generally across the relevant ODPP, without relying only on individual victims' willingness to pursue a complaint.

Although an external audit process might offer additional assurance to the community that DPPs and ODPPs are complying with their guidelines and policies, we accept that an external audit process is not warranted, particularly given the resources that are likely to be required to establish and participate in an external audit process.

We note the examples of internal audit or audit-like processes currently being used or developed by some Australian ODPPs. We also note the benefit of targeting particular areas for examination, as HMCPSI has done in its thematic inspections in relation to RASSOs and communication with victims.

We also note the involvement of persons independent of the ODPP in some of these processes, such as those outlined by the New South Wales ODPP. Some of the benefits of an external audit might be able to be achieved in an internal audit if persons external to the ODPP were involved in conducting or overseeing the audit – for example, through appointing independent members of audit committees.

We are satisfied that each Australian DPP or ODPP should put in place internal audit processes to audit compliance with guidelines and policies for decision-making and requirements for consultation with victims and police. We consider that these internal audit processes should be ongoing, in the sense that compliance is assessed at least annually, and that any areas of noncompliance should be targeted for follow-up audits.

We anticipate that the scale of internal audit processes will differ depending on the size and workload of the relevant ODPP. However, DPPs and ODPPs should ensure that the scale of the internal audit processes are sufficient to enable them to identify and address any areas of noncompliance.

We are also satisfied that publishing the existence of complaints mechanisms and internal audit processes and data on their use and outcomes is an important means of promoting transparency and accountability of DPPs and ODPPs. Publishing data should either reassure the broader community that relevant guidelines and policies are being complied with or drive improvements where areas of noncompliance are identified. We consider that this information should be published online on ODPPs' public websites and in ODPP annual reports.

Recommendations

40. Each Australian Director of Public Prosecutions should:
 - a. have comprehensive written policies for decision-making and consultation with victims and police
 - b. publish all policies online and ensure that they are publicly available
 - c. provide a right for complainants to seek written reasons for key decisions, without detracting from an opportunity to discuss reasons in person before written reasons are provided.
41. Each Australian Director of Public Prosecutions should establish a robust and effective formalised complaints mechanism to allow victims to seek internal merits review of key decisions.
42. Each Australian Director of Public Prosecutions should establish robust and effective internal audit processes to audit their compliance with policies for decision-making and consultation with victims and police.
43. Each Australian Director of Public Prosecutions should publish the existence of their complaints mechanism and internal audit processes and data on their use and outcomes online and in their annual reports.

PART VI
TENDENCY AND
COINCIDENCE
EVIDENCE AND
JOINT TRIALS

22 Introduction

When we published the Consultation Paper, we recognised that the issue of how the criminal justice system deals with allegations against an individual of sexual offending against more than one child was one of the most significant issues we had identified in our criminal justice work. We remain satisfied that this is one of the most significant issue affecting criminal justice in child sexual abuse cases, including those involving abuse in an institutional context.

We are satisfied that current approaches are causing unjust outcomes in the form of unjustified acquittals in institutional child sexual abuse prosecutions. We are satisfied that the current law should change so that it facilitates greater cross-admissibility of evidence and more joint trials in child sexual abuse matters. We are also satisfied that the concerns held by some judges and lawyers that reform will lead to unfair prejudice to those accused of child sexual abuse offences and wrongful convictions are misplaced.

As we discussed in the Consultation Paper and in section 2.4 of this report, child sexual abuse offences, including institutional child sexual abuse offences, are generally committed in private and with no eyewitnesses. In many cases, there will be no medical or scientific evidence capable of confirming the abuse. Unless the perpetrator has retained recorded images of the abuse – which sometimes happens – or admits the abuse, it is likely that the only direct evidence of abuse will come from the complainant.

Where the only evidence of the abuse is the complainant's evidence, it can be difficult for the jury to be satisfied beyond reasonable doubt that the alleged offence occurred. There may be evidence that confirms some of the surrounding circumstances or evidence of first complaint, but the jury is effectively considering the account of one person against the account of another.

We have heard of many cases where a single offender has offended against multiple victims. Particularly in institutional contexts, a perpetrator may have access to a number of vulnerable children. In these cases, there may be evidence available from other complainants or witnesses who allege that the accused also sexually abused them. The question is whether that 'other evidence' should be admitted in the trial.

This issue was the focus of the first week of Case Study 38 in relation to criminal justice issues. It can have a significant effect on whether and how prosecutions for child sexual abuse, including institutional child sexual abuse, are conducted.

In the first week of Case Study 38, we considered the issues of:

- when may a joint trial be held to determine charges against an accused made by multiple complainants of child sexual abuse
- when may other allegations against an accused or evidence of the accused's 'bad character' be admitted in evidence to help a jury to determine whether the accused is guilty of the particular charges being tried.

Before the public hearing in Case Study 38, we commissioned and published a number of papers to help inform our understanding of these issues, including:

- an opinion of Mr Tim Game SC, Ms Julia Roy and Ms Georgia Huxley of the New South Wales Bar regarding tendency and coincidence evidence and joint trials
- a literature review by Associate Professor David Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, which considers the legal treatment of tendency, coincidence and relationship evidence applicable in sexual assault prosecutions in England and Wales, New Zealand, Canada and the United States.

In May 2016, after the public hearing in Case Study 38, we published a significant research study in relation to jury reasoning, which is particularly relevant to our understanding of these issues. The research report by Professor Jane Goodman-Delahunty, Professor Annie Cossins and Ms Natalie Martschuk, *Jury reasoning in joint and separate trials of institutional child sexual abuse: An empirical study* (Jury Reasoning Research), examines how juries reason when deliberating on multiple counts of child sexual abuse. Using mock juries and a trial involving charges of child sexual abuse in an institutional context, the report investigates whether conducting joint trials and admitting tendency evidence infringe on a defendant's right to a fair trial.

We also received an opinion from Counsel Assisting the Royal Commission in Case Study 38, Mr Jeremy Kirk SC and Mr David Barrow, on the issues examined in the first week of the public hearing. This opinion is published on the Royal Commission's website.

Our discussion of this issue in the Consultation Paper received considerable attention in submissions responding to the Consultation Paper. We also released a model Bill setting out possible amendments to the Uniform Evidence Act provisions on tendency and coincidence evidence for consultation during and after the public hearing in Case Study 46, which inquired into issues raised in the Consultation Paper.

The issue of tendency and coincidence evidence and joint trials, and the provisions in the model Bill, were the subject of considerable discussion in Case Study 46. We heard evidence from a survivor who had been affected by a decision to order separate trials in a series of prosecutions in relation to institutional child sexual abuse. A number of witnesses also gave expert evidence about the issue and possible reforms, including the model Bill.

These are a complex and technical issues. They have troubled the courts for many years. The recent Victorian report on jury directions suggests they have caused problems for more than 100 years.¹⁷⁴¹ In the High Court decision in 1995 in *Pfennig v The Queen*¹⁷⁴² (*Pfennig*), McHugh J spoke of 'the vexed question as to the circumstances in which the prosecution may prove a criminal charge by tendering evidence that the accused has engaged in criminal conduct on occasions other than that which is the subject of the charge before the court'.¹⁷⁴³

The discussions in the first week of our public hearing in Case Study 38 and in Case Study 46 indicate that this question remains vexed, even in those jurisdictions that have adopted the Uniform Evidence Act.

In this part, we have retained the material set out in the Consultation Paper and we have added discussion of what we have been told in submissions in response to the Consultation Paper and in evidence in Case Study 46. In this part, we outline:

- tendency and coincidence reasoning and the current law in Australian jurisdictions – in Chapter 23
- the examples of prosecutions we examined in the first week of Case Study 38; and the relevant prosecutions we examined in Case Study 46 and in another one of our public hearings – in Chapter 24
- the concerns expressed by the courts about unfair prejudice to the accused and key findings of the Jury Reasoning Research we commissioned and discussion of the Jury Reasoning Research in submissions in response to the Consultation Paper – in Chapter 25
- approaches adopted in overseas jurisdictions, particularly in England and Wales and also in Canada, New Zealand and the United States – in Chapter 26
- opinions on the law and options for reform, including those expressed in the first week of Case Study 38, as outlined in the Consultation Paper, and what we have been told about the law and options for reform through submissions in response to the Consultation Paper, evidence in Case Study 46 and comments provided on the model Bill – in Chapter 27.

In Chapter 28, we set out our evaluation of the issues and competing concerns and the reforms we recommend should be adopted to prevent further injustice to victims through wrongful acquittals, while still enabling the accused to receive a fair trial.

On 14 June 2017, as this report was being finalised for printing, the High Court gave judgment in *Hughes v The Queen* [2017] HCA 20. This case is significant in relation to tendency evidence, particularly in terms of resolving some of the differences in approach adopted by the appellate courts in New South Wales and Victoria. We discuss the trial and the decision of the New South Wales Court of Criminal Appeal in section 23.2.3. We have also added a discussion of the High Court's decision at the end of Chapter 28.

23 Outline of the current law

23.1 Tendency and coincidence reasoning

23.1.1 Admissibility and cross-admissibility of evidence

Where a single accused is charged with having offended against multiple complainants, it may be possible to support the allegations of one complainant by relying on evidence from other complainants who say that the accused also sexually abused them – that is, each complainant's evidence might be 'cross-admissible' in relation to the other complainants.

However, a complainant's allegations may also be supported by relying on evidence from other witnesses who are not complainants but who say that the accused also sexually abused them. The other witnesses might not be complainants for a variety of reasons. For example, they might have been abused in a different state or territory, so any charges in relation to that abuse would have to be prosecuted in that other state or territory; or the accused might already have been prosecuted for the abuse of them.

Evidence that an accused committed an offence on one occasion is not direct evidence that the accused committed an offence on a different occasion; rather, it is circumstantial evidence. However, circumstantial evidence can still be significant – even crucial – in proving guilt.

The law has described at least two ways in which evidence of the commission of other offences by an accused may be relevant in determining whether the accused committed the particular offence in question. They are described as tendency or propensity evidence and reasoning; and coincidence or similar fact evidence and reasoning.

23.1.2 Tendency or propensity reasoning

'Tendency evidence' is the term used in the Uniform Evidence Act. This evidence is called 'propensity evidence' at common law.

If a jury accepts that the accused committed the other offence or offences, the law has accepted that the evidence may be capable of proving the accused has some tendency or propensity to act in a particular way – for example, to be sexually attracted to young boys and to act on that attraction. The jury may then reason that this makes it more likely that the accused acted on this tendency or propensity and committed the particular offence of abusing a young boy whose complaint is the subject of the trial.

In trials for child sexual abuse offences, the main issue is usually whether or not the abuse occurred. Typically, the complainant can identify the alleged perpetrator. This is often the case in institutional contexts, where there has been a lengthy relationship between the complainant and the accused – for example, pupil and teacher or parishioner and priest. This can be

contrasted with a typical burglary case, where there is no doubt that the offence has occurred but the question is whether the accused was the person who committed the offence. It may also be contrasted with adult sexual assault charges, where the issue of consent, and the accused's knowledge of lack of consent, are often in issue.

23.1.3 Coincidence or similar fact reasoning

'Coincidence evidence' is the term used in the Uniform Evidence Act. This evidence is called 'similar fact evidence' at common law.

Coincidence reasoning invites a jury to reason that similarities in two or more events or circumstances make it improbable that the events occurred coincidentally.

The law accepts that, if it is established that the accused committed another offence in a sufficiently similar manner or in sufficiently similar circumstances, it can then be reasoned that, if a number of complainants allege that the accused abused them in similar circumstances:

- it is improbable that the similar allegations are a coincidence
- it is improbable that the complainants are all lying or mistaken.

That makes it more probable that the accused also committed the particular offences in issue.

Coincidence evidence may be used to support the credibility or reliability of a complainant, which is often in issue in child sexual abuse prosecutions. In many cases, the credibility or reliability of the complainant is the main issue, particularly where the only direct evidence of the offence is the complainant's evidence and the accused denies that the abuse occurred. Juries can use coincidence evidence from multiple complainants to reason that, given the similarities in the complaints, it is improbable that the complainants are all telling lies or are all mistaken.

Coincidence evidence may also support a tendency, in that evidence of having regularly engaged in some particular type of conduct will also show a tendency to engage in that type of conduct. Coincidence evidence can be particularly powerful evidence, because the similarity of the conduct is significant in reinforcing the claim that the complainant makes.

23.1.4 Tendency and coincidence evidence and joint trials

Tendency and coincidence evidence can take different forms. As discussed above in relation to cross-admissible evidence, it may be the evidence of other complainants alleging criminal offences. It may be behaviour which is criminal in nature but which has never been the subject of a charge. It is not even necessarily limited to other criminal behaviour.

In the context of child sexual abuse cases, the evidence typically takes the form of allegations of other behaviour which itself would constitute an offence. That behaviour may be the subject of other charges brought in a joint trial. It may be the subject of a past conviction or possibly even a past acquittal. In institutional child sexual abuse cases, this may arise because a number of complainants have previously made allegations against the accused and those allegations have already been successfully prosecuted.

The prosecution will often seek to have allegations by multiple complainants against a single accused heard in a joint trial of all the charges before one jury. Whether a joint trial will be allowed usually depends upon whether the tendency or coincidence evidence is cross-admissible; that is, whether the jury will be allowed to use tendency or coincidence reasoning in considering the evidence on some or all counts in relation to each or some of the other counts. The cross-admissibility of tendency and coincidence evidence essentially determines whether allegations by multiple complainants against a single accused can be tried together. The approach of courts to questions of admissibility differ across different Australian jurisdictions.

23.1.5 Relationship or context evidence

There is another category of evidence that often arises, and is often discussed, with tendency and coincidence evidence.

Relationship or context evidence is led by the prosecution to explain the circumstances surrounding the charged offences. Relationship or context evidence is given by the complainant and it is likely to be about events or occurrences between the accused and the complainant that are not the subject of the charges.

Often relationship or context evidence can involve allegations of other criminal conduct that has not been charged – for example, other occasions of sexual abuse. In these circumstances, it might be called evidence of ‘uncharged acts’. Relationship or context evidence can also involve evidence about how the accused and the complainant met and the development of any relationship between them, including any grooming behaviour by the accused.

This evidence is commonly admitted because it is believed to put the charged offence in context and to explain why the accused and the complainant behaved or reacted in the manner the prosecution alleges.

23.2 The current law in Australian jurisdictions

23.2.1 Introduction

The law about when tendency and coincidence evidence can be admitted to provide support to a complainant who alleges he or she was sexually assaulted has developed in different ways across Australia.

The threshold test for admissibility of all evidence in all types of cases is relevance: if evidence is relevant to the facts in issue in the trial, it should be admitted, subject to any applicable exclusions. If it is not relevant, it should be excluded.

Traditionally, the common law has been cautious in allowing tendency or coincidence evidence, including evidence of the accused's prior convictions or other allegations against the accused, to be admitted and in allowing juries to be invited to use tendency or coincidence reasoning.

This is not because tendency and coincidence evidence is considered irrelevant in determining whether the accused is guilty of the offences charged. Rather, it reflects a concern that the jury will consider it to be *too* relevant and will give it a greater weight than it deserves. That is, the common law considers the evidence to be highly, and often unfairly, prejudicial to the accused. It is thought that the process of reasoning may be no more than 'well, he committed the other acts, so he must be guilty of this one too'. This reasoning is built on assumptions about how juries will view such evidence.

The common law has also long considered 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.¹⁷⁴⁴

We discuss these issues further in Chapter 25.

23.2.2 Queensland – common law

Queensland is the only Australian jurisdiction where the common law continues to apply, albeit with some modification.

The common law test for the admissibility of propensity or similar fact evidence is that stated by the High Court in 1995 in *Pfennig*.¹⁷⁴⁵ It allows for the admission of propensity and similar fact evidence only if it possesses 'a particular probative value or cogency such that, if accepted, it bears no reasonable explanation other than the inculcation of the accused in the offence charged'.¹⁷⁴⁶

That is, propensity or similar fact evidence is admissible only where there is no rational view of the evidence that is consistent with the innocence of the accused.

In 1988, in *Hoch v The Queen*¹⁷⁴⁷ (*Hoch*), Mason CJ and Wilson and Gaudron JJ said of similar fact evidence:

the criterion of its admissibility is the strength of its probative force ... That strength lies in the fact that the evidence reveals 'striking similarities, 'unusual features', 'underlying unity', 'system' or 'pattern' such that it raises, as a matter of common sense and experience, the objective improbability of some event having occurred other than as alleged by the prosecution.¹⁷⁴⁸

While *Pfennig* establishes that 'striking similarity' is not necessarily essential, evidence that lacks striking similarity may not have sufficient probative value to meet the *Pfennig* test.

The decision in *Hoch* also makes clear that, if there is a possibility of collusion, concoction or contamination of evidence between multiple complainants, the propensity or similar fact evidence will lose its probative value. This is because there will then be a reasonable explanation for the evidence consistent with the innocence of the accused: namely, that the evidence has been concocted or contaminated or is the result of collusion.

The common law requires that the possibility of collusion, concoction or contamination be considered by the judge in determining admissibility of the evidence rather than being left to the jury to determine.

In *Hoch*, the accused was convicted following a joint trial of allegations that he had sexually abused three boys. The accused was a recreation officer at a boys' home in Brisbane, and the complainants were residents at the home. The High Court held that the boys had a close relationship and the opportunity to concoct their accounts of the offences and that one of the complainants was ill-disposed towards the accused before the offences were alleged to have occurred. The trial judge warned the jury of 'the danger of conspiracy between boys', but the jury presumably accepted the complainants' accounts and convicted the accused. The High Court quashed the convictions and ordered that the accused be acquitted of each charge.

Queensland has passed legislation that has modified the common law position in relation to the possibility of collusion, concoction or contamination. The Queensland legislation prohibits the exclusion by a trial judge of propensity or similar fact evidence because of the possibility of collusion, concoction or contamination. The issue of possible contamination is a matter to be left for the jury's consideration.¹⁷⁴⁹

This Australian common law test imposes a very high threshold for admitting tendency or coincidence evidence. The Australian Law Reform Commission (ALRC), the New South Wales Law Reform Commission (NSW LRC) and the Victorian Law Reform Commission (VLRC)

described it as ‘extremely stringent’. It is more stringent than the test previously imposed under the modern common law in England and Wales, before those jurisdictions adopted a quite different approach to these issues in a statute enacted in 2003. We discuss the current approach in England and Wales in section 26.2.

In Case Study 38, we examined the common law approach in Queensland, including through the example of the prosecutions of Graham Noyes. This is discussed in section 24.6.

23.2.3 Commonwealth, New South Wales, Victoria, Tasmania, Australian Capital Territory and Northern Territory – Uniform Evidence Acts

Most Australian jurisdictions have now enacted the Uniform Evidence legislation. The Commonwealth, New South Wales, Victoria, Tasmania, the Australia Capital Territory and the Northern Territory are Uniform Evidence Act jurisdictions.

Uniform Evidence Act rules

The tendency rule is set out in section 97 of the Uniform Evidence Act. Under section 97, tendency evidence is ‘evidence of the character, reputation or conduct of a person, or a tendency that a person has or had’ that is used to prove that the person has or had a tendency to act in a particular way or to have a particular state of mind.

Section 97 provides that tendency evidence is not admissible unless, in addition to reasonable notice being given, ‘the court thinks that the evidence will, either by itself or having regard to other evidence ... have significant probative value’. An additional requirement applies under section 101 in criminal proceedings: tendency evidence about a defendant cannot be used against the defendant ‘unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant’.

The coincidence rule is set out in section 98 of the Uniform Evidence Act. Under section 98, coincidence evidence is evidence of two or more events that is used to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to any similarities in the events or the circumstances in which they occurred or any similarities in both the events and the circumstances in which they occurred, it is improbable that the events occurred coincidentally.

Similarly to section 97 in relation to tendency evidence, section 98 requires reasonable notice to be given and for the coincidence evidence to have significant probative value. The additional requirement in section 101 also applies to coincidence evidence: its probative value must substantially outweigh its prejudicial effect.

Thus, in criminal proceedings in the Uniform Evidence Act jurisdictions, tendency or coincidence evidence will only be admissible if:

- notice is given
- the court considers that the evidence has significant probative value in the prosecution's case
- the probative value of the evidence substantially outweighs any prejudicial effect it may have on the accused.

Differences between New South Wales and Victoria

Despite the fact that uniform legislation applies in New South Wales and Victoria, differences have emerged between the two jurisdictions in how the provisions governing the admissibility of tendency and coincidence evidence are interpreted and applied. These differences have emerged in decisions of the appellate courts in child sexual abuse offence cases.

The decision of the Victorian Court of Appeal in 2014 in *Velkoski v The Queen*¹⁷⁵⁰ (*Velkoski*) drew together and discussed the different lines of authority in Victoria and New South Wales and identified New South Wales cases that it did not consider to be consistent with the Victorian approach. *Velkoski* involved charges of child sexual abuse in an institutional context, and a number of the decisions it discussed also involved child sexual abuse in an institutional context.

There are two notable areas of difference between New South Wales and Victoria that are of particular significance in the prosecution of charges involving child sexual abuse in an institutional context:

- Particularly in relation to tendency evidence, there are differences as to whether and to what extent similarity in the nature of the sexual abuse is required for evidence to be admissible as tendency evidence.

In New South Wales, while similarity is acknowledged to assist in establishing significant probative value, it is not essential. In Victoria, following *Velkoski*, common or similar features or an underlying unity or pattern in the sexual offending is required.

A related question is how restrictive the statutory requirement for significant probative value is understood to be.

- There are differences as to whether features of the institutional context are relevant in determining similarity and the probative value of tendency or coincidence evidence.

New South Wales courts have found similarities in circumstances of institutional offending that would be regarded in Victoria as unremarkable circumstances that are not within the control of the accused.

For example, in *PNJ v DPP*¹⁷⁵¹ (*PNJ*), the Victorian Court of Appeal did not regard the institutional location of a boys' detention centre where the offences occurred as indicating similarity because it held that the choice of location was outside the accused's control.

In contrast, in *R v PWD*¹⁷⁵² (*PWD*), the New South Wales Court of Criminal Appeal accepted that the institutional setting of the boarding school was relevant to considering admissibility of the tendency evidence.

Until the High Court's decision in 2016 in *IMM v The Queen*¹⁷⁵³ (*IMM*), there were also differences between New South Wales and Victoria as to whether the reliability of the evidence, particularly in relation to issues of possible collusion, concoction or contamination, should be determined by the judge or the jury.

In New South Wales, issues of reliability and credibility generally did not play any role in assessing the probative value of evidence, so collusion, concoction and contamination are matters for the jury to resolve. Victoria had rejected the New South Wales position and maintained the common law position that the reliability of and weight a jury might give to evidence affects the probative value of the evidence; therefore, it is to be determined by the judge and not the jury.

In *IMM*, the High Court considered the issue of whether reliability and credibility of the evidence are relevant to the judge's assessment of the probative value of the evidence. The majority of the High Court effectively favoured the New South Wales approach. However, as the High Court divided 4:3 on the issue, *IMM* is discussed in more detail below.

The High Court has also recently determined an appeal in a case that raises issues of the meaning of significant probative value and the degree of similarity, if any, required for the admissibility of tendency evidence under section 97 of the Uniform Evidence Acts as it is applied by the courts in New South Wales and Victoria. Argument in *Hughes v The Queen* was heard in February 2017 and judgment was given on 14 June 2017.¹⁷⁵⁴ The prosecution of Hughes is discussed in more detail below.

Tasmanian and the Australian Capital Territory have tended to follow New South Wales rather than Victoria in the areas of difference between them. There has been little case law in the Northern Territory, apart from the Northern Territory Court of Criminal Appeal's decision which was the subject of appeal to the High Court in *IMM*.

In Case Study 38, we particularly examined the differences between New South Wales and Victoria in the application of the tendency and coincidence rules, including through the examples of:

- the prosecutions in New South Wales of John Maguire, Philip Doyle and Francis Cable
- the prosecutions in Victoria of Mr Norman Poulter (which is the case of *PNJ*) and David Rapson.

These prosecutions are discussed in sections 24.1 to 24.5. Further examples of prosecutions involving tendency and coincidence evidence are discussed in:

- sections 24.8 and 24.10 concerning the prosecutions in New South Wales of FAD and John Rolleston
- section 24.9 concerning the prosecution in Victoria of 'Alexander'.

Counsel Assisting also sought comment from the Australian expert witnesses, who gave evidence in the first week of the public hearing in Case Study 38 about cases such as *Velkoski*, *PNJ* and *PWD* and in the public hearing in Case Study 46, including about the decision in 'Alexander'.

IMM v The Queen

In *IMM*, the High Court determined an appeal from the Northern Territory Court of Criminal Appeal.

One of the issues the High Court considered was the correct approach for determining the probative value of tendency evidence where issues of reliability or credibility arise.

On this issue, the court split 4:3 as follows:

- The majority (French CJ, Kiefel, Bell and Keane JJ) held that, in assessing the probative value of evidence, the trial judge should assume that the jury will accept the evidence; the trial judge should not have regard to the credibility or reliability of that evidence.
- The minority (Nettle and Gordon JJ and Gageler J) took a different view.

The majority held:

The same construction must be given to the words 'could rationally affect [...] the assessment of the probability of the existence of a fact in issue' where they appear in the definition of 'probative value' as is given to those words in s 55. This requires an assessment of the capability of the evidence to have the stated effect. And because the question to which those words give rise remains the same for the passages of the definition of probative value, that enquiry must be approached in the same way as s 55 requires: on the assumption that the jury will accept the evidence. The words 'if it were accepted' which appear in s 55, should be understood also to qualify the evidence to which the Dictionary definition refers. It is an approach dictated by the language of the provisions and the nature of the task to be undertaken.¹⁷⁵⁵

Both logical and practical considerations supported this reasoning.

The logical consideration was that identified by Gaudron J in *Adam v The Queen*.¹⁷⁵⁶ In that case her Honour said:

evidence can rationally affect the assessment of the probability of a fact in issue only if it is accepted. Accordingly, the assumption that it will be accepted must be read into the dictionary definition.¹⁷⁵⁷

The practical consideration was that identified by Simpson J in *R v XY*:¹⁷⁵⁸ that the determination of the weight to be given to the evidence, by reference to its credibility and reliability, depends both on its place in the evidence as a whole and on an assessment of witnesses after examination and cross-examination and after weighing the account of each witness against each other.¹⁷⁵⁹

In the minority in *IMM* on this issue, Nettle and Gordon JJ wrote joint reasons and Gageler J wrote separately.

Justices Nettle and Gordon relied on the omission of the words ‘if it were accepted’ from the definition of probative value¹⁷⁶⁰ and the ALRC material.¹⁷⁶¹ Justices Nettle and Gordon found additional support for their reading in the common law background against which the Act was enacted.¹⁷⁶² That common law background includes ‘accrued corporate judicial knowledge and experience of the inherent potential for unreliability’ of particular types of evidence.¹⁷⁶³ This includes tendency evidence, to which ‘special dangers’ attach.¹⁷⁶⁴

In *Bayley v The Queen*,¹⁷⁶⁵ the Victorian Court of Appeal (Warren CJ, Weinberg and Priest JJA) has since described as important the following passage from the majority judgment in *IMM*:

It must also be understood that the basis upon which a trial judge proceeds, that the jury will accept the evidence taken at its highest, does not distort a finding as to the real probative value of the evidence. *The circumstances surrounding the evidence may indicate that its highest level is not very high at all.* The example given by J D Heydon QC¹⁷⁶⁶ was of an identification made very briefly in foggy conditions and in bad light by a witness who did not know the person identified. As he points out, on one approach it is possible to say that taken at its highest it is as high as any other identification, and then look for particular weaknesses in the evidence (which would include reliability). *On another approach, it is an identification, but a weak one because it is simply unconvincing.* The former is the approach undertaken by the Victorian Court of Appeal; the latter by the New South Wales Court of Criminal Appeal. *The point presently to be made is that it is the latter approach which the statute requires. This is the assessment undertaken by the trial judge of the probative value of the evidence.*¹⁷⁶⁷ [Emphasis added by Victorian Court of Appeal.]

The Victorian Court of Appeal suggests that the majority in *IMM* seemingly endorsed the approach described by JD Heydon QC,¹⁷⁶⁸ who, in delivering the 2014 Paul Byrne SC Memorial Lecture, had observed that the ‘disputation between and within the intermediate appellate courts of New South Wales and Victoria is detailed’ on this issue, but the ‘detail may obscure the possible fact that the gap is narrow’.¹⁷⁶⁹ That is, the evidence in issue before the Victorian Court of Appeal should not be ruled inadmissible for concerns about reliability but could be ruled inadmissible for lack of significant probative value.¹⁷⁷⁰

In *IMM*, the High Court also considered the issue of the probative value of the evidence that had been admitted as tendency evidence in the trial.¹⁷⁷¹

The appellant had been convicted of two counts of indecent dealing with a child and one count of sexual intercourse with a child under the age of 16. The complainant was the step-granddaughter of the appellant.¹⁷⁷²

The complainant alleged a course of sexual abuse which began when she was four years old and ended when her grandmother and the appellant separated when she was 12.¹⁷⁷³

The complainant gave evidence at trial that while she and another girl were giving the appellant a back massage he ran his hand up her leg ('the massage incident'). That evidence was admitted as tendency evidence. The trial judge considered that it was capable of demonstrating that the appellant had a sexual interest in the complainant and that there was a strong temporal nexus between the massage incident and the charged acts.¹⁷⁷⁴

On the admissibility of the complainant's evidence of the massage incident as tendency evidence, the High Court split 5:2 as follows:

- Chief Justice French and Kiefel, Bell and Keane JJ and Gageler J held that the evidence did not have significant probative value sufficient to allow its admissibility as tendency evidence.
- Justices Nettle and Gordon held there was sufficient probative value to justify its admission as tendency evidence.

For French CJ, Kiefel, Bell and Keane JJ, their starting point was that 'In a case of this kind, the probative value of this evidence lies in its capacity to support the credibility of a complainant's account'.¹⁷⁷⁵

Where there is evidence from an independent source, the threshold for admissibility is likely to be met. It is possible that the complainant's account alone may contain some 'special features' to make its probative value significant, '[b]ut without more, it is difficult to see how a complainant's evidence of conduct of a sexual kind from an occasion other than the charged acts can be regarded as having the requisite degree of probative value'.¹⁷⁷⁶

They continued:

Evidence from a complainant adduced to show an accused's sexual interest can generally have limited, if any, capacity to rationally affect the probability that the complainant's account of the charged offences is true. It is difficult to see that one might rationally conclude that X's account of charged acts of sexual misconduct is truthful because X gives an account that on another occasion the accused exhibited sexual interest in him or her.¹⁷⁷⁷

The joint reasons suggest that, where tendency evidence is adduced solely from the complainant and is without other supporting evidence, it must contain ‘special features’ in order for it to have significant probative value. What these special features might be is not discussed in the judgment.

Justice Gageler considered that tendency evidence is ‘evidence the relevance of which lies in its capacity indirectly to affect the assessment of the probability of the existence of the fact in issue of the accused’s action or state of mind at the time or in the circumstances of the alleged offence’.¹⁷⁷⁸

Justice Gageler stated that there was no general rule that the uncorroborated tendency evidence of a complainant is inadmissible.¹⁷⁷⁹ In this case, provided the jury found the complainant credible, her tendency evidence had probative value. The real issue was whether the probative value was significant.¹⁷⁸⁰

Justice Gageler said that the difficulty with the complainant’s evidence in this case was not that it was uncorroborated; it was that it was uncorroborated within a context in which the credibility of the whole of her evidence was in issue. His Honour held that:

There was nothing to make her uncorroborated testimony about that incident more credible than her uncorroborated testimony about the occasions of the offences charged. There was no rational basis for the jury to accept one part of the complainant’s testimony but to reject the other. The increased probability of the appellant having committed the offences which would follow from the jury accepting that part of the complainant’s testimony which constituted tendency evidence could in those circumstances add nothing of consequence to the jury’s assessment of that probability based on its consideration of that part of the complainant’s testimony which constituted direct testimony about what the appellant in fact did on the occasions of the offences. The probative value of the tendency evidence could not be regarded as significant.¹⁷⁸¹

Turning to the minority, Nettle and Gordon JJ held that the complainant’s evidence about the massage incident did have significant probative value, and that justified its admission as tendency evidence.

Relying on the judgment of Heydon J in *HML v The Queen*,¹⁷⁸² Nettle and Gordon JJ stated that the combination of evidence of uncharged acts with evidence of charged acts may serve to establish the existence of a sexual attraction and a willingness to act on it. The issue to be grappled with is ‘the contribution which the evidence of the uncharged sexual acts might make, if accepted, to whether the sexual acts to be proved are more likely to have occurred’.¹⁷⁸³

On the issue of the probative value of uncharged acts, Nettle and Gordon JJ observed that, unlike at common law, where, in order to justify admissibility as tendency evidence, uncharged acts must exhibit ‘unusual features’ or ‘striking similarities’ to the charged acts, the Act mandates that the evidence only need have significant probative value.¹⁷⁸⁴

Justices Nettle and Gordon stated:

where, as here, the evidence of the uncharged acts taken with the evidence of the charged acts is capable of establishing that the accused sought to gratify his sexual attraction to the complainant in a variety of ways on different occasions, in circumstances where he might have been interrupted or detected by others close by, it is capable of having significant probative value.¹⁷⁸⁵

In many trials, evidence such as ‘the massage incident’ might more commonly be led as relationship or context evidence rather than tendency evidence.

Hughes v The Queen

As noted above, the High Court granted special leave to appeal in a case that raises issues of the meaning of significant probative value and the degree of similarity, if any, required for the admissibility of tendency evidence under section 97 of the Uniform Evidence Acts as it is applied by the courts in New South Wales and Victoria. Argument in *Hughes v The Queen*¹⁷⁸⁶ was heard in February 2017. Judgment was given on 14 June 2017, as this report was being finalised for printing. We have added a discussion of the High Court’s decision at the end of Chapter 28.¹⁷⁸⁷

In 2014, Robert Hughes was tried in the New South Wales District Court on 11 counts involving child sexual abuse offences. In May 2014, Hughes was convicted by a jury of 10 offences against four victims. The jury was unable to reach a verdict in relation to another count involving a fifth victim. The offences for which Hughes was convicted included penetrative and non-penetrative offending against girls ranging from six to eight years of age to 15 years of age.¹⁷⁸⁸

The offending occurred between 1984 and 1990, during the period when Hughes was the leading actor in the Australian television series *Hey Dad..!*¹⁷⁸⁹ One of the victims had played the role of Hughes’ daughter in that series.¹⁷⁹⁰ Another victim and her family were friends with Hughes and his family. Another victim was a neighbour who played with Hughes’ daughter. Another victim was a school friend of Hughes’ daughter. The jury was unable to reach a verdict in respect of the count relating to the fifth victim, whose uncle was a friend of Hughes’ wife.

The Crown sought to rely on tendency evidence. It particularised the tendency as follows:

The tendency sought to be proved is [the applicant’s] tendency to act in a particular way, and to have a particular state of mind, namely:

- (i) To having a sexual interest in female children under 16 years of age;
- (ii) To use his social and familial relationships with the families to obtain access to female children under 16 years of age so that he could engage in sexual activities with them;
- (iii) To use his daughter’s relationship with female children to obtain access to them so that he could engage in sexual activities with them;

- (iv) To use his working relationship with females to utilise an opportunity to engage in sexual activities;
- (v) To engage in sexual conduct with females aged under 16 years of age by either:
 - a. touching in an inappropriate sexual way but maintaining the contact was inadvertent or accidental;
 - b. by exposing his naked penis / genitalia;
 - c. by making the child come into contact with his penis / genitalia;
 - d. touching the child's vaginal area;
 - e. by carrying out sexual acts upon the complainants when they were within the vicinity of another person.¹⁷⁹¹

In a pre-trial judgment on tendency evidence, Zahra DCJ ordered that the tendency evidence from 11 tendency witnesses be admitted and that the trial relating to each of the complainants be heard together.¹⁷⁹²

The 11 tendency witnesses were:

- the five complainants, each of whose evidence was cross-admissible in relation to the counts concerning the other complainants
- three witnesses who gave evidence that Hughes engaged in conduct with them while they were at his home when they were girls that was similar to some of the conduct alleged by some of the complainants – the evidence of these tendency witnesses was admitted in relation to all counts but it could not be used to prove the alleged tendency of the accused to ‘use his working relationship with females to utilise an opportunity to engage in sexual activities’
- three witnesses who had worked as a costume designer, in the wardrobe department and as a wardrobe assistant respectively on *Hey Dad..!* and who gave evidence of sexualised conduct by Hughes towards them at work – the evidence of these tendency witnesses was admitted only in relation to the count concerning an act of indecency towards the victim who had played the role of Hughes’ daughter in *Hey Dad..!* and only in relation to the alleged tendencies of the accused to:
 - take advantage of his working relationship with females to utilise an opportunity to engage in sexual activities
 - engage in touching in an inappropriate sexual way but maintaining that the contact was inadvertent or accidental
 - expose his naked penis/genitalia.¹⁷⁹³

In December 2015, the New South Wales Court of Criminal Appeal dismissed Hughes' appeal against conviction.¹⁷⁹⁴ Hughes appealed on a number of grounds, including that Zahra DCJ had erred in ruling that all the tendency evidence was admissible and, consequently, in refusing Hughes' application for separate trials of the counts in respect of each victim.¹⁷⁹⁵

Hughes' submissions on appeal in relation to the tendency evidence included the following:

- The tendency of 'having a sexual interest in female children under 16 years of age' was so broad as to encompass all the evidence in relation to each complainant and was insufficient for the tendency evidence to have significant probative value.
- Not every alleged tendency was relevant to each count, particularly distinguishing between the tendencies based on social and familial relationships and his daughter's relationship with female children (on the one hand) and the tendency based on Hughes' working relationship with females (on the other hand).
- The type of sexual conduct alleged in the tendencies related to different counts in different ways:
 - evidence of touching in an inappropriate but allegedly accidental way only related to one count and to the evidence of three tendency witnesses
 - evidence that he made a complainant come into contact with his penis/genitalia did not relate to two counts
 - evidence that he touched a complainant's vaginal area did not relate to five counts
 - carrying out sexual acts on the complainants when they were in the vicinity of another person did not relate to one count.

In relation to the differences in the sexual acts and the surrounding circumstances, the New South Wales Court of Criminal Appeal stated:

The applicant [that is, Hughes] submitted that when properly analysed, both the circumstances surrounding the sexual acts, and the acts themselves, were different in nature and not capable of being the subject of any alleged tendency.¹⁷⁹⁶

The New South Wales Court of Criminal Appeal discussed the legal principles and relevant New South Wales case law at some length.¹⁷⁹⁷ The court also discussed Hughes' reference to the Victorian Court of Appeal's decision in *Velkoski* in support of his submissions that the tendency evidence did not satisfy the requirements of section 97. It quoted the Victorian Court of Appeal's statement that:

In order to determine whether the features of the acts relied upon permit tendency reasoning, it remains apposite and desirable to assess whether those features reveal '*underlying unity*', a '*pattern of conduct*', '*modus operandi*', or *such similarity as logically and cogently implies that the particular features of those previous acts renders the*

occurrence of the act to be proved more likely. It is the degree of similarity of the operative features that gives the tendency evidence its relative strength. [Emphasis added by the New South Wales Court of Criminal Appeal.]¹⁷⁹⁸

The New South Wales Court of Criminal Appeal continued:

For the reasons we have given, we do not accept that the language used by the Victorian Court of Appeal represents the law in New South Wales. We recognise, however, that although s97, unlike s98, does not use the language of similarity, the greater the similarities, the more readily will a court find that the evidence has significant probative value. Nor, as we have already examined above, does s97 require that there be an ‘underlying unity’, a ‘pattern of conduct’, or the like. That is the language of the common law relating to similar fact evidence.¹⁷⁹⁹

The New South Wales Court of Criminal Appeal referred to the tendency evidence in *Hughes* being admitted on a basis that allowed dissimilar circumstances and dissimilar acts to be used in respect of different counts and stated that the fact of dissimilarity itself may not be determinative.¹⁸⁰⁰

The court stated:

The Crown’s case on tendency contended that there were two essential tendencies: to have a sexual interest in female children under 16 years of age; and to engage in sexual conduct with female children under 16 years of age. Those tendencies were exhibited in three different, but not significantly disassociated, contexts: of social and familial relationships; his daughter’s relationships with her young friends; and the work environment.

These dissimilarities are obvious on their face. However, what was common to them all was that they represented occasions on which young females were present and the applicant used those occasions for the purpose of engaging in sexual activities with them.

The same may be said of the dissimilarity in sexual conduct alleged in the various counts. However, notwithstanding the dissimilarities, the conduct alleged was sexual in nature, directed towards young females, on occasions that presented themselves to the applicant. Underlying the similarity was that the conduct was, in effect, referable to the circumstances as they presented to the applicant. In short, the conduct occurred opportunistically, as and when young female persons were in the applicant’s company.¹⁸⁰¹

The New South Wales Court of Criminal Appeal concluded on this point that the evidence underpinning the prosecution’s tendency notice was correctly assessed as having significant probative value.¹⁸⁰²

As noted above, the High Court gave judgment in *Hughes v The Queen* on 14 June 2017, as this report was being finalised for printing. We have added a discussion of the High Court's decision at the end of Chapter 28.

23.2.4 South Australia

South Australia enacted new rules for the admissibility of evidence of 'discreditable conduct' which commenced in June 2012.

Under section 34P of the *Evidence Act 1929 (SA)*, evidence of a defendant's discreditable conduct may be admitted if its probative value substantially outweighs any prejudicial effect it may have on the defendant and, if it is used for propensity (or tendency) reasoning, it has 'strong probative value' having regard to the particular issues arising at trial. Section 34P also requires reasonable notice to be given.

The South Australian test for admissibility of evidence of discreditable conduct is similar to the tests for admissibility of tendency and coincidence evidence under the Uniform Evidence Act.

The South Australian legislation overrides the common law and prohibits the exclusion of discreditable conduct evidence only because of the possibility of collusion, concoction or contamination. Any such possibility is a matter to be left for the jury's consideration.

23.2.5 Western Australia

In January 2005 Western Australia enacted new rules for the admissibility of propensity evidence, including tendency and similar fact evidence.

Under section 31A of the *Evidence Act 1906 (WA)*, propensity evidence is admissible if the court considers that it would have significant probative value and 'that the probative value of the evidence compared to the degree of risk of an unfair trial, is such that fair-minded people would think that the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial'.

This public interest test adopts the wording of McHugh J's minority approach in *Pfennig*.¹⁸⁰³

It is probably the most liberal test for admitting tendency and coincidence evidence in Australia, particularly taking into account how it is applied by the Western Australian courts.

The Western Australian legislation overrides the common law and prohibits the exclusion of propensity evidence only because of the possibility of collusion, concoction or contamination. As with Queensland and South Australian, any such possibility is a matter to be left for the jury's consideration.

In Case Study 38, we examined the approach in Western Australia, including through the example of the prosecutions of CDV, which are discussed in section 24.7.

24 Examples from our case studies

In this chapter, we summarise a number of prosecutions in which issues of tendency and coincidence evidence and joint trials have arisen. The first seven examples were considered in the first week of Case Study 38. The eighth and ninth examples were considered in Case Study 46. The tenth example was considered in Case Study 27, which examined the experiences of a number of patients in healthcare services in New South Wales and Victoria.

24.1 Prosecutions of John Maguire – New South Wales

The prosecutions of John Dennis Maguire in New South Wales particularly illustrate the circumstances in which possibilities of alleged contamination or collusion may arise in relation to child sexual abuse in an institutional context.

In 2002, Maguire was charged with child sexual abuse offences against eight complainants. The sexual offences were alleged to have been committed during the years 1983 to 1985, when Maguire was a housemaster at St Joseph's College in Hunters Hill, Sydney, and the complainants were boarders in the year 7 dormitory at the college.

Following the committal hearing, in August 2003 Maguire was indicted on 17 counts in respect of six complainants. The Crown proposed that there be a joint trial, with evidence of the six complainants to be cross-admissible.

In November 2003, Maguire sought orders that there be separate trials in respect of each of the six complainants and that the Crown not be permitted to rely upon tendency or coincidence evidence in the different trials. The trial judge granted Maguire's application on the basis that the possibility of contamination or concoction meant that the evidence could not have significant probative value.

The possibility of contamination or concoction was found to have arisen from most complainants having attended school reunions or rugby matches since leaving school. There was no actual evidence of contamination or concoction, as the complainants could not recall any talk of Maguire at these events. The trial judge found that simply the possibility of contamination or concoction was enough to require separate trials. It may be noted that these orders might not have been made under the current legislation in Queensland, South Australia and Western Australia.

The trials proceeded from late 2003 to mid-2004. Two trials resulted in hung juries, and these matters were retried. Ultimately, following six trials and two retrials, Maguire was found not guilty of all charges.

In Case Study 38, we heard evidence from CDR, who was one of the complainants. The charges relating to CDR were heard in the eighth and last trial. CDR gave evidence about the abuse he suffered in 1984 as a year 7 boarder at St Joseph's College. He also gave evidence about his experience of reporting his abuse to police, the impact of the trials being separated and his experiences in giving evidence in the trial, including the restrictions placed on the evidence he was allowed to give.

CDR gave evidence that finding out from police that other men had reported abuse by Maguire was a turning point in his life:

Prior to knowing of other victims, I felt isolated and alone. I felt like it was my word against Maguire's and this put me into a deep hole. Once I discovered that Maguire had abused others, I suddenly realised it just wasn't me and I stopped blaming myself.¹⁸⁰⁴

Upon hearing that the trials would be held separately, CDR gave evidence that he 'once again felt isolated and alone. I was also confused by why we, as victims, were the ones having to defend ourselves'.¹⁸⁰⁵

CDR felt that separating the trials was unfair as, until he was served with a subpoena that contained the other complainants' names, he had not known who they were.

He also spoke about how he felt sorry for the jury when the full story was made public after the last trial: 'I would hate to have delivered a not guilty verdict only to discover through the media that there were in fact more complainants that I was unaware of'.¹⁸⁰⁶

Reflecting on the trial process, and the fact that his statements had to be edited to avoid any reference to the fact that there were other complainants and other trials, CDR said:

To this day, I cannot understand why there were eight separate trials against Maguire when all complainants were from the same school, all abused within a three-year period, most of whom were abused in the same year.

I found the separate trial process disappointing because it protected the offender over the complainants. Maguire's word against one victim is very different to Maguire's word against eight victims. Had it been a joint trial, there would have been less restrictions on evidence and the case against Maguire would have been more convincing. I genuinely believe that the outcome of Maguire's trials would have been different if they were heard jointly.¹⁸⁰⁷

Some eight years later, in 2012, another man, CDS, reported to the police about Maguire's abuse of him when he was a year 7 boarder at St Joseph's College in 1983. Maguire was charged with eight child sexual abuse offences against CDS. In November 2014, the jury found Maguire guilty of six counts and not guilty of two counts. In March 2015, Maguire was sentenced to a total of three years imprisonment with a non-parole period of one year and nine months.

We heard evidence from CDS about the abuse he suffered in 1983, his disclosure of the abuse to two school friends the following year, his awareness of the earlier trials, his decision to report the abuse to police in 2012 and his experiences in participating in the trial of Maguire. No tendency or coincidence evidence was used in the 2014 trial, but evidence of the disclosures he made to his two friends the year after the abuse was admitted.

We heard from Ms Nanette Williams, the Crown prosecutor who conducted the eight trials of Maguire in 2003 and 2004. Ms Williams noted that the reason the trials were separated was because of the mere possibility that the accounts of the different complainants could be concocted, solely on the basis that there had been opportunities for such collusion or contamination to occur.¹⁸⁰⁸ This reflected the common law view that prevailed before the introduction of the Uniform Evidence legislation, following the High Court's decision in *Hoch*.

Ms Williams outlined her view that the severance of the trials had a catastrophic impact on the prosecutions, as it left each complainant telling their story by themselves, against a priest, without the support of any other complainants.¹⁸⁰⁹

Ms Williams also suggested that the severance issue may not be decided the same way in New South Wales if the matter arose today, as matters of concoction or contamination would be matters for the jury.¹⁸¹⁰ Decisions such as *PWD* have also meant that there is a reduced need to identify similarities in the alleged conduct before tendency evidence can be admitted, so that matters of varying degrees of seriousness – for example, indecent assault and buggery – can be heard in the same trial.¹⁸¹¹ Moreover, changes to the Longman direction (discussed further in section 31.3) and in relation to evidence of complaint to a third party have recognised the particular circumstances of child sexual assault, making prosecutions more likely to succeed now than at the time of the Maguire trials in 2004.¹⁸¹²

When asked whether, in her experience, she has found tendency and coincidence evidence to be powerful and persuasive, Ms Williams stated:

Very powerful, very persuasive, very compelling. I recently did a matter which involved very similar allegations to what this Royal Commission is dealing with, and the receipt of the tendency and coincidence evidence was powerful and involved. Even though it was a historical sexual matter going back many, many years, there were convictions on most of the charges in that indictment involving multiple complainants, because they were heard together.¹⁸¹³

We also heard evidence from Mr Huw Baker, the Crown prosecutor who prosecuted Maguire in 2014. Mr Baker noted that, as CDS was a very convincing witness and there was the evidence of the relatively contemporaneous disclosures he had made the year after the abuse, he did not consider calling the complainants in the 2003 and 2004 prosecutions to give tendency evidence.¹⁸¹⁴

24.2 Prosecutions of Philip Doyle – New South Wales

The prosecutions of Philip William Doyle illustrate the different approaches of New South Wales and Victoria in relation to tendency evidence, applying the same statutory provisions. In *Velkoski*, the Victorian Court of Appeal referred to one of Doyle's trials and suggested that the evidence would not have been cross-admissible in Victoria because of the dissimilarity between the offences and the period of time between offences.¹⁸¹⁵

Doyle was charged on one indictment with 39 child sexual abuse offences against five complainants in the period from 1980 to 2003 and, on another indictment, with 21 child sexual abuse offences against two complainants in the 1960s. The offences were alleged to have occurred in connection with the complainants' part-time employment in a cinema owned and operated by Doyle in Sydney's southern suburbs. The complainants were boys who were between nine and 16 years of age when the alleged offending occurred.

In September and October 2011, in the trial involving five complainants, Doyle objected to the admissibility of tendency evidence and sought to have the trials separated. The trial judge rejected the application and allowed the joint trial to proceed. It resulted in a hung jury on all counts except one, for which the court directed a not guilty verdict.

The trial involving two complainants then proceeded in April 2012; however, the jury was discharged on the second day. A new trial commenced at the end of April and Doyle was acquitted on all counts in May 2012.

The retrial involving five complainants then took place from May to July 2012, and the jury convicted on all 38 counts. Doyle was sentenced to an overall term of seven years imprisonment with a non-parole period of four years and six months.

Doyle appealed against his conviction and the Crown appealed against the sentence. The New South Wales Court of Criminal Appeal dismissed Doyle's appeal against his conviction and granted the Crown's appeal on sentence. The Court of Criminal Appeal re-sentenced Doyle to an overall term of nine years imprisonment with a non-parole period of six years and six months. The High Court refused Doyle's application for special leave to appeal in September 2014.

In Case Study 38, we heard evidence from Mr Mark Lawrence, who was one of the five complainants in respect of whom Doyle was convicted. Mr Lawrence gave evidence about the impact of the abuse he suffered from 1980 to 1982, his experience of reporting to police in 1999 and the reopening of the police investigation in 2008 when another victim came forward. Mr Lawrence gave evidence about his experiences in participating in the prosecution of Doyle through the trial, retrial and appeal. Mr Lawrence participated in the trial and retrial with five complainants and he gave evidence that he was glad to be part of that group, as he felt the jury were more likely to believe the case if there were more complainants participating.¹⁸¹⁶

We also heard evidence from Mr Kevin Whitley, who was one of the two complainants in respect of whom Doyle was acquitted. Mr Whitley gave evidence about the abuse he suffered in the 1960s, his experience of reporting to police in 2008 and his participation in the prosecution of Doyle. Mr Whitley's evidence showed his mixed feelings about the fact that his trial was split from the other:

In one way, I'm thankful that the trials were split. If there was only one trial and Doyle was found not guilty, it would have been game over. Having split trials meant that, even though we lost the first trial, at least Doyle was convicted at the second trial. On the other hand, if Doyle had been convicted after a single trial, for seven victims, then the sentence probably would have been greater because it was a greater number of victims over a longer period of time. It disappoints me that the juries in both trials didn't get to hear about the additional victims.¹⁸¹⁷

We heard evidence from Ms Siobhan Herbert, the Crown prosecutor who conducted the trials of Doyle. Ms Herbert gave evidence about the prosecutions of Doyle, particularly in relation to tendency evidence, and the reasons for decisions made about joint trials and the division of offences between two trials.

Ms Herbert noted that, when considering how to proceed with the prosecution of Doyle, she was confronted with 60 charges covering a period of 40 years. She was not aware of any sexual assault trial that had been run with that many charges or that length of period of offending.¹⁸¹⁸ The larger of the split trials, involving 39 counts, was still more counts than any sexual assault trial she was aware of.¹⁸¹⁹ In considering whether to split the matter into more than one trial, she and her team considered possible prejudice to the offender and whether there were common factors lending themselves to tendency evidence, which would militate in favour of a joint trial.¹⁸²⁰

Ms Herbert noted that an application by the defence to separate the larger trial into five separate trials was rejected on the basis that the trial judge found that, although there was not a 'striking pattern of similarity', there was an identifiable modus operandi and, consistent with *PWD*, this allowed the charges to proceed together.¹⁸²¹

24.3 Prosecutions of Francis Cable – New South Wales

The prosecutions of Francis William Cable provide a very recent illustration of the New South Wales approach to similarity and the nature of the prejudice that may be considered to arise from charges of varying seriousness being tried together.

In 2012, Cable, also known as Brother Romuald, was charged with child sex offences alleged to have occurred when he was a teacher in Marist Brothers schools in Maitland, Hamilton and Pagewood over a period of 15 years from 1959 to 1974. Ultimately, he faced 40 child sex offence charges relating to 21 complainants.

The Crown split the indictment so that the charges could be heard across three separate trials. The first trial was to involve 18 counts in relation to five complainants and contained the most serious matters.

At the commencement of this trial in March 2015, the defence objected to the admissibility of tendency evidence and submitted that those charges should be split into five separate trials – one for each complainant. The judge ruled that the trial should be split into two, with the first trial for the buggery charges relating to two complainants and the second trial for indecent assault charges relating to three complainants. The judge also ruled that the three complainants who alleged indecent assault could give tendency evidence in the first trial, as prejudice was said to flow only one way and evidence of these offences could not be unfairly prejudicial in the trial of the most serious offences. Cable was convicted of all 13 counts relating to the two complainants.

Cable then pleaded guilty to a range of charges relating to 17 other complainants. The prosecution withdrew charges involving two further complainants. In June 2015, Cable was sentenced to 16 years imprisonment with a non-parole period of eight years.

In Case Study 38, we heard evidence from Mr Peter Henry, who was one of the two complainants in the first trial. Mr Henry gave evidence about the abuse he suffered in 1965 and his experiences of reporting to police and participating in the prosecution of Cable, including on the restrictions on the evidence he was allowed to give. Mr Henry gave evidence that, when he arrived at the court for the committal, ‘it really dawned on me that I wasn’t alone. It was comforting knowing there were others like me out there’.¹⁸²²

Mr Henry had thought his trial would involve seven complainants. When he discovered, after giving his evidence, that there was only one other complainant in the trial, he was shocked:

I was expecting at least another five complainants to give evidence after me. I don’t know why I wasn’t told this before the trial started. I think there would have been a greater impact if the jury saw that there were 22 of us coming forward, or even seven. Having only two of us doesn’t reflect the truth in my opinion.¹⁸²³

We also heard evidence from Mr John Dunn, who was one of the complainants in respect of whom Cable pleaded guilty following the initial trial. Mr Dunn gave evidence about the abuse he suffered in 1974 and his experiences of reporting to police and participating in the prosecution of Cable, including the decision to accept a guilty plea in relation to Cable’s abuse of him. Mr Dunn explained that, in reporting to police, ‘My primary driver was to support the other victims he had abused that had come forward so that people knew they weren’t on their own’.¹⁸²⁴

When he found out about the defence application to split the matter into a separate trial for each complainant, Mr Dunn was angry because ‘It was clear to me that 19 separate trials would not have the same impact as any joint trial’.¹⁸²⁵

Mr Dunn also gave evidence that, when the Director of Public Prosecutions (DPP) applied to split the matters into three separate trials, they explained that this was to avoid the offending becoming 'a blur' for the jury, which would have sat through 19 separate testimonies of abuse. They also explained that the complainants were grouped according to the similarities in their stories and according to the time frames within which the abuse happened.¹⁸²⁶

We heard evidence from Mr Richard Herps, the deputy senior Crown prosecutor who conducted the trial of Cable. Mr Herps gave evidence about the prosecution of Cable, particularly in relation to the Crown decision to pursue three separate trials. Mr Herps noted that there were 40 counts relating to 21 complainants over a period of 15 years but with a hiatus of five years in the middle, and it was never proposed that all of the counts proceed in one trial.¹⁸²⁷

In proposing the first trial involving two complainants, Mr Herps explained that key similarities included the similarity in time periods and the fact that the offending occurred in the context of school swimming outings.¹⁸²⁸

Mr Herps outlined his understanding of the trial judge's decision to split the first trial into two, with the two complainants with the more serious matters in the first trial and three complainants with matters that were regarded as being less serious in a second trial. However, the trial judge allowed the three complainants with less serious matters to give tendency evidence in the first trial:

he was suggesting that people would not reason that because a sexual assault had been committed, a charge of buggery had also been committed, because they were two different sorts of charges, but if they'd come to the conclusion that a buggery count had been committed, they might illogically reason the other way and say, 'Well, that must have occurred, because it was less serious.' That's what I think he meant by the view that the prejudice only flows one way.¹⁸²⁹

Mr Herps also contrasted his experience of dealing with tendency evidence in the Cable trials with his experience of running child sexual abuse trials at Penrith in the 1990s:

My experience at that point [in the 1990s] is that complainants were almost always severed. You were always presenting a single complainant without anyone being able to buttress or support their evidence in the circumstances and you were, in a sense, putting an unreal view to a jury about this almost being an isolated incident, when, in fact, it wasn't a lot of the time.

Applications to join complainants were routinely refused and the idea that there might have been some concoction or talking between complainants was itself a routine bar to that sort of thing happening.

The situation is now quite different. With the way the law stands now, being able to call a number of complainants in the one trial, it changes the dynamics of the situation. It gives a jury a more realistic view of what's going on, and it connects some complainants with others, indicating that certain things were happening at the school at that time, even if the complainants didn't know one another and had never spoken. So it's a completely different situation now.¹⁸³⁰

24.4 Prosecutions of Mr Norman Poulter – Victoria

The prosecutions of Mr Norman John Poulter illustrate the Victorian approach to the admissibility of coincidence evidence and, in particular, whether features of the institutional setting could be taken into account in determining whether the complainants' allegations were sufficiently similar to be cross-admissible in a joint trial.

Mr Poulter was an officer at the Bayswater Youth Training Centre, The Basin, which was part of the Salvation Army's Bayswater Boys Home. Mr Poulter's offending was previously examined by the Royal Commission in Case Study 33 on The Salvation Army (Southern Territory).

In 2008 and 2009, Mr Poulter was charged with 14 counts of child sexual abuse in relation to four complainants, along with three counts of assault in relation to one of the four complainants and a fifth complainant. All of the assaults were said to have occurred between 1965 and 1967.

At the start of the trial in February 2010, the trial judge ruled that coincidence evidence was cross-admissible, but the tendency evidence was not. The Crown then intended to proceed with a joint trial relating to three of the complainants, but the defence appealed the trial judge's ruling that the coincidence evidence was cross-admissible.

In March 2010, the Victorian Court of Appeal ruled that the evidence was not cross-admissible and ordered separate trials for each complainant. This is the decision *PNJ*¹⁸³¹ that we referred to in section 23.2.3.

Mr Poulter was acquitted in the first two separate trials in April 2010. The Crown then withdrew the remaining charges in relation to the other three complainants.

In Case Study 38, we heard evidence from CDT, who was the complainant in the first separate trial following the decision of the Court of Appeal. CDT also gave evidence in Case Study 33. CDT gave evidence about the abuse he suffered in 1965 and his experiences of reporting to police and participating in the prosecution of Mr Poulter.

CDT said that he thought the trial would involve all five victims and that this gave him confidence that their story would be believed.¹⁸³² Describing how he felt when he found out the trials would be separated, CDT said:

I was shattered. From my prior experience with the criminal justice system, I knew that separate trials would reduce the likelihood of Poulter's conviction. Without the other victims giving evidence in the same trial, I knew that it would be a matter of Poulter's word against mine. I thought it would be useless going to trial on my own and wanted to throw in the towel.¹⁸³³

CDT also gave evidence that he had been convicted of multiple offences during his life. When questioned about whether it would have been fair for the jury to hear about his prior convictions if he was being charged for a further one, he stated that juries are intelligent enough to know that, just because you have committed five crimes, it does not mean that you are guilty of the next one and that juries should have access to that background.¹⁸³⁴ He also noted that he had been found not guilty by a jury in one trial where the jury knew that he had a criminal record.¹⁸³⁵

We also heard evidence from Mr John Champion SC, the Victorian DPP, about the prosecution of Mr Poulter. Although Mr Champion was not personally involved in the case, he gave evidence about the prosecution, particularly issues in relation to the admissibility of coincidence evidence and the decision to separate the trials.

In their decision in *PNJ*, the Victorian Court of Appeal (Maxwell P, Buchanan and Bongiorno JJA) stated:

It is, in our view, a mistake to treat as relevant similarities for this purpose features of the alleged offending which reflect circumstances outside the accused's control. In this case, a number of the asserted similarities simply reflected the setting in which the offending occurred. Each of the complainants was detained in the Centre. The limited age range of those eligible for such detention accounts for the similarity in ages ... Likewise, the location of the alleged offending – either in the bedroom of the complainant or in the applicant's bedroom – reflected the custodial setting ...

To qualify as a relevant similarity in circumstances such as these, there must be something distinctive about the way in which the accused allegedly took advantage of the setting or context. In the present case, senior counsel for the Crown did not seek to identify any such distinctive behaviour, and we were not persuaded that there was any.¹⁸³⁶

The court attached to its reasons a 'Table of Similarities and Dissimilarities' prepared by Mr Poulter's lawyers. The court referred to it as an 'exemplary analysis, of the kind which is likely to be of great assistance' to courts deciding these issues.¹⁸³⁷

The court referred to the fact that each complainant had alleged that the accused committed the same three types of sexual acts on them (requiring the complainant to masturbate the accused, the accused masturbating the complainant and the accused requiring the complainant to perform oral sex on the accused) and continued:

The allegation that such acts were committed is, sadly, unremarkable. It is a commonplace in sexual offending of this kind, and cannot be said to distinguish the applicant's offending from that of any other such offender. The position might have been different if the evidence had disclosed surrounding circumstances which could be seen to be distinctive and which were common to the accounts given by the various complainants ... There is no distinctive feature which can be seen to recur. There is no 'pattern'.¹⁸³⁸

Mr Champion gave evidence that, in his opinion, the points of similarity arising from the institutional context of the abuse were relevant points of similarity because an offender chooses to offend in a particular environment and thus, contrary to the Victorian Court of Appeal's decision, these matters are within the offender's control.¹⁸³⁹

Counsel Assisting summarised Mr Champion's further evidence in relation to the decision in *PNJ* as follows:

He agreed that the power of the evidence of the various complainants was that each was a similar age, each had been in the institution and each had complained of being sexually abused by the same man. It was the implausibility of the various complainants all making the same complaint against the same person that gave the evidence its probative force. He agreed that it did not matter on this analysis whether or not there was something distinctive about the setting or the context of the offending (T17553). The approach of the Court of Appeal tends to exclude features of the institutional setting as being relevant to assessing similarity.¹⁸⁴⁰

Mr Champion also gave evidence that he wrote to the Victorian Attorney-General in 2015 outlining his concerns that, despite the presumption in section 194(2) of the *Criminal Procedure Act 2009* (Vic) that two or more charges for sexual offences are to be tried together, too many trials are split to become single-complainant trials, with an adverse impact on the conviction rate.¹⁸⁴¹

24.5 Prosecutions of David Rapson – Victoria

The prosecutions of David Edward Rapson illustrate the Victorian approach to tendency evidence. The case is also noteworthy because of the period of time over which the offences occurred – 1975 to 1990 – and the age range of the complainants, being from 11–12 to 16–17 years old.

Rapson was a teacher at the Salesian College, Rupertswood. In 1992, he had pleaded guilty to five charges of indecent assault that occurred in 1975 and received an 18-month community correction order.

In August 2013, Rapson was convicted in a joint trial of five charges of rape and eight charges of indecent assault relating to eight complainants. The offences were committed between 1975 and 1977 and between 1987 and 1990. The complainant involved in the 1992 prosecution gave tendency evidence at the trial. Rapson was sentenced to 13 years imprisonment with a non-parole period of 10 years.

Rapson lodged an appeal against his conviction, and both the Crown and defence had made their submissions before the decision in *Velkoski* was handed down. *Velkoski* had significant implications for Rapson's appeal, and the Crown filed revised submissions conceding that some of the charges were not cross-admissible, particularly as between the charges of rape and the charges of indecent assault.

The Victorian Court of Appeal identified three groupings of complainants where evidence would be cross-admissible. Ultimately, four retrials were held in February and March in 2015 involving a total of seven complainants. Rapson was convicted of 11 offences in relation to six complainants, and he was acquitted in relation to the seventh complainant. The 1992 complainant's tendency evidence was used in one of the retrials. Rapson was sentenced to 12 years and six months imprisonment with a non-parole period of nine years and four months.

In Case Study 38, we heard evidence from Mr James Brandt, who was the complainant with respect to whom Rapson was acquitted in the 2015 retrial. Mr Brandt gave evidence about the abuse he suffered in 1989 and the response to his immediate disclosure of the abuse; his family's discussions in response to the media reports of Rapson's convictions in 1992; and his experiences of reporting to police in 2012 and participating in the prosecution of Rapson. Mr Brandt also gave evidence about the difficulty he and his mother experienced in giving evidence when they were not allowed to mention their knowledge and discussion of Rapson's prior convictions in front of the jury.

We also heard evidence from CDU. CDU was the victim of the offences to which Rapson pleaded guilty in 1992, and he gave tendency evidence at the 2013 and 2015 trials. CDU gave evidence about the abuse he suffered in 1988 and 1989 and his experiences of reporting to police, the proceedings in 1992 and his further participation in the trials and retrials of Rapson in 2013 and 2015. CDU gave evidence about the restrictions placed on the evidence he could give in 2013 about Rapson's prior convictions for abusing him.

Mr Champion, the Victorian DPP, gave evidence about the prosecution of Rapson, particularly in relation to tendency evidence, the effect of the decision in *Velkoski* and the joint and separate trials. Mr Champion said that the decision in *Velkoski* explicitly considered the authorities in New South Wales and Victoria and delivered a ruling that, in his view, made it clear that greater 'distinctiveness' of behaviour was required to establish cross-admissibility in Victoria, essentially making it more difficult to run joint trials.¹⁸⁴²

Counsel Assisting discussed the Victorian Court of Appeal's decision in *Rapson v The Queen*¹⁸⁴³ as follows:

The case provides a useful analysis of the significance of institutional features in the offending conduct, particularly the use by Rapson of his office, a place that 'embodied and reinforced his authority'. The Court observed at [34]–[35] that the fact the accused used his office, as opposed to other locations, was a very significant common feature in the allegations. The office was convenient because invitations to a teacher's office are commonplace and provide obvious advantages where the objective is to lure an intended victim into close proximity. This decision thus arguably stands in some contrast to the earlier Victorian decision in *PNJ v DPP (Vic)* [2010] VSCA 88; 156 A Crim R 308, in relation to the significance of an institutional setting, although *PNJ* related to coincidence evidence, whilst *Rapson* was directed to tendency evidence.

The case also illustrates the emphasis given by the Victorian Court of Appeal – in contrast to the NSW Court of Appeal – to requiring 'sufficient similarity or commonality of features, between the other conduct and the charged conduct', as manifest by some "underlying unity", a "pattern of conduct", "modus operandi", or such similarity as logically and cogently implies that the particular features of those previous acts renders the occurrence of the act to be proved more likely' (*Rapson* at [16]).¹⁸⁴⁴

24.6 Prosecutions of Graham Noyes – Queensland

The prosecutions of Graham Noyes in Queensland illustrate the common law approach to tendency and coincidence evidence which applies in that state.

Noyes, a trainee police officer, was a volunteer at the Enoggera Boys' Home in Brisbane in the 1960s. In September 1999 he was indicted in respect of 53 child sexual abuse offences involving 10 complainants. A separate indictment on five counts in respect of another complainant was also presented. In January 2000, the defence successfully applied to separate the 53-count indictment and 10 separate trials were ordered, one for each complainant. The trial judge found that the evidence of the complainants did not meet the common law test for admissibility of propensity and similar fact evidence in *Pfennig*.

The first three trials took place from 2000 to 2002. Each resulted in an acquittal. In the fourth trial in August 2002, the Crown successfully applied to call two similar fact witnesses, neither of whom were on the original indictment which had been severed in 2000. In March 2003, Noyes was convicted of three counts of indecent dealing with a child under 14 and three counts of sodomy. He was sentenced to seven years imprisonment.

Noyes appealed his conviction, but in December 2003 the Queensland Court of Appeal dismissed the appeal, finding that the similar fact evidence was correctly admitted, as there was a strong underlying pattern in the accounts of the complainant and the two similar fact witnesses. Special leave to appeal to the High Court was refused in November 2004.

The Crown discontinued the outstanding charges against Noyes following his conviction in the fourth trial.

In Case Study 38, we heard evidence from Mr Dennis Dodt, who was one of the complainants whose matter was discontinued after the conviction of Noyes. Mr Dodt gave evidence about the abuse he suffered in 1967 and 1968; his experiences of reporting to police and participating in the prosecution of Noyes; and the impacts of separating the trials and having the charges relating to the abuse he suffered withdrawn by the prosecution. Mr Dodt gave evidence about how he felt after hearing that Noyes had been committed for trial on numerous charges involving 10 complainants:

I felt we had a very strong case against Noyes. I was told there was a suspicion that Noyes was abusing others and I thought that the best chance of stopping the abuse was for me to be part of the joint trial and to share my experience.¹⁸⁴⁵

Upon hearing that the trials were to be split, Mr Dodt was shocked and disappointed. He said, 'In my mind the splitting up into separate trials made it very hard to achieve a guilty verdict against Noyes. I was right'.¹⁸⁴⁶

Mr Dodt gave evidence that he feels no jury ever got to hear the full picture about Noyes's offending and that splitting the trials significantly weakened the prospect of Noyes being convicted.¹⁸⁴⁷ As his charges were discontinued, Mr Dodt never had the chance to tell a jury what Noyes did to him.¹⁸⁴⁸

Mr Michael Byrne QC, the Queensland DPP, gave evidence about the prosecution of Noyes, particularly in relation to propensity and similar fact evidence, the separation of the trials and the decision not to pursue the outstanding charges against Noyes.

Mr Byrne noted that the trial judge's conclusion when separating the counts on the original indictment was that the allegations failed to meet the *Pfennig* test, as they were not so strikingly similar that there was no reasonable view of them other than supporting an inference that the accused was guilty of another set or sets of offences.¹⁸⁴⁹ He accepted that this was a restrictive view of when such multi-complainant cases can be heard together and treated as cross-admissible.¹⁸⁵⁰

Mr Byrne considered that a similar result to the original separation order in the Noyes prosecution could still occur today in Queensland and would not be overturned on appeal, although he thought if the trial was heard today there would probably be a joint trial.¹⁸⁵¹

24.7 Prosecutions of CDV – Western Australia

The prosecutions of CDV illustrate the Western Australia approach to the admissibility of propensity evidence and joint trials.

CDV was a teacher at an independent school in Perth. The Royal Commission considered his offending in Case Study 12.

In 2009 CDV was charged with 18 child sexual abuse offences involving five complainants. Each complainant was a boy taught by CDV. All offences except one were committed in the classroom. The propensity evidence included grooming, special attention, presents and help with homework. The defence did not make an application to sever the counts, and evidence of uncharged acts was also led without objection. In June 2010, a joint trial on 17 counts took place, and CDV was convicted of 13 counts. He was sentenced to imprisonment for five years with a non-parole period of three years.

In September 2010, CDV appealed his conviction and sentence. In December 2011, the Western Australian Court of Appeal set aside the convictions for six counts due to the trial judge's deficient Longman direction to the jury concerning delay in the earlier complaints. One of the grounds of appeal was that the directions on propensity evidence at the trial had been inadequate, but the Court of Appeal dismissed this ground.

In August 2012 there was a retrial on the six counts and the convictions that had not been overturned on appeal were led unopposed as propensity evidence. CDV was again convicted at the retrial, and his original sentence was not altered.

In Case Study 38, we heard evidence from CDW, the mother of CDX, who was one of the complainants in the trials of CDV. CDW also gave evidence in Case Study 12.¹⁸⁵² CDW gave evidence about the abuse her son suffered, her son's experience of participating in the trial and retrial of CDV and her own experience of the criminal justice system through the prosecution of CDV. CDW stated that:

I felt very positive about the joint trial process. Joint trials make it possible to create unity and support for the victims and their families in circumstances where child sexual abuse normally creates isolation. This allows victims and witnesses to speak out because they don't feel so alone.

Similarly, offenders should not be afforded the protection of separate trials. It is important that the jury is exposed to their full pattern of offending, especially in cases of persistent and calculated sexual abuse of children.¹⁸⁵³

Mr Justin Whalley, Consultant State Prosecutor with the Office of the Director of Public Prosecutions (ODPP) for Western Australia, was file manager for the prosecution of CDV and lead trial counsel in the first and second trials, and he represented the state in CDV's appeal. Mr Whalley gave evidence about the prosecution of CDV, particularly in relation to the admissibility of propensity evidence, including the admissibility of evidence of CDV's convictions in the retrial and the conduct of joint trials.

Mr Whalley noted that the commonality, or lack thereof, of the sexual offending against each child was not a significant factor in running the matters jointly; rather, it was the reality that a schoolteacher had sexually interfered with boys under his care and in his class, and this, in his view, had significant probative value sufficient to justify its admission under the relevant Western Australian provision – section 31A of the *Evidence Act 1906* (WA).¹⁸⁵⁴ He explained the benefits of running the matters together as follows:

I think the proof of the pudding was in the trial, because if each individual complainant had given evidence in a single trial, notwithstanding they were all, by and large, compelling, it would have been unsurprising had there been acquittals. With all five together, the whole became greater than the sum of its parts, and I think we were able to present a fairly compelling narrative of what had occurred in the years the subject of the charges.¹⁸⁵⁵

Counsel Assisting summarised Mr Whalley's evidence in relation to the requirement for significant probative value as follows:

Mr Whalley gave evidence that s.31A's requirement that the evidence have significant probative value has been interpreted broadly in WA, to the point that if the evidence sustained the conclusion that an accused had a sexual interest in young children, and a propensity to act on that interest when circumstances permitted it, the evidence would be admitted (T17682).¹⁸⁵⁶

Counsel Assisting commented on that evidence as follows:

If Mr Whalley's assessment of the way the legislation is applied is correct, the approach to admissibility in Western Australia is, in practical terms, far less exacting than [sic] in any of the Uniform Evidence Act jurisdictions.¹⁸⁵⁷

Counsel Assisting stated in relation to the Western Australian approach:

The barriers to admissibility for evidence that under the Uniform Evidence Acts would be defined as tendency or coincidence evidence appear to be lower in Western Australia than any other Australian jurisdiction. Unlike the Evidence Act jurisdictions, there is no barrier to adducing evidence that an accused had previously been convicted of similar offences, plus the provision of evidence relied on in support of those convictions (T17685).¹⁸⁵⁸

Mr Whalley also gave his opinion that the current provision in Western Australia is fair. It is significant, as he emphasised, that in CDV's joint trial he was acquitted of four counts even though the jury heard the propensity evidence.¹⁸⁵⁹

24.8 Prosecutions of FAD – New South Wales

The prosecutions of FAD provide a recent illustration of a series of prosecutions in New South Wales that were affected by decisions about cross-admissibility of tendency and coincidence evidence and joint trials. They illustrate the impact on a survivor of the separation of his allegations from those of other complainants and of a decision not to allow a joint trial in his case.

FAD was sentenced recently following a series of prosecutions in New South Wales. He was given a pseudonym in Case Study 46 because he had filed a notice of intention to appeal against his convictions and sentence.

FAD was a Catholic priest. A total of 13 complainants alleged that FAD had sexually abused them when they were boys. The abuse was alleged to have occurred in the 1980s and 1990s. At the time, the complainants were parishioners and altar boys.

The prosecutions of FAD occurred over a number of years, involving a number of trials, an interlocutory appeal and an appeal against convictions. Ultimately, FAD was convicted of 44 offences committed against six boys from the mid-1980s to the early 1990s in a number of trials in 2015 and 2016. He was sentenced for these offences in August 2016.

Given the possibility of an appeal, we did not hear evidence from any of the survivors in respect of whom FAD has been convicted. In Case Study 46, we heard evidence from FAA, a survivor who was a complainant against FAD and in respect of whom FAD was acquitted.

FAA gave evidence that he was sexually abused by FAD in the mid-1980s. FAD was charged with three offences against FAA arising from a single occasion.

The Crown sought to include the charges relating to FAA in a trial with a number of other complainants who alleged that FAD had abused them in similar circumstances. However, the trial judge severed the counts relating to FAA and they were heard in a separate trial, with FAA as the sole complainant.

This trial was separated because, before making his complaint to police, FAA had viewed a number of media articles about a previous trial of FAD. FAD was not named in the articles, but FAA recognised the type of behaviour that FAD had engaged in with him, and this prompted FAA to approach police.

The trial judge found that the prosecution had not excluded the possibility that FAA's evidence, perhaps innocently, had been affected or contaminated by the material which he had been exposed to in the press.

No other witnesses were allowed to give tendency evidence in the separate trial relating to FAA. The jury in the separate trial found FAD not guilty of the three charges he faced in relation to FAA.

FAD was convicted of 31 charges relating to four other complainants who were abused by FAD at a similar time, and in similar circumstances, to those alleged by FAA. The counts relating to those four other complainants were all heard in a joint trial. The other 13 charges for which FAD was convicted related to two of three complainants in another joint trial.

FAA is the only complainant against FAD whose counts were heard in a separate trial with only one complainant. One witness gave tendency evidence. That witness was not a complainant in any of the earlier trials and no evidence of the verdicts in the earlier trials was admitted. This was the last of FAD's trials.

FAA gave evidence about the trauma he experienced in reporting to police about the detail of the sexual abuse he suffered, particularly going back to the hall where the abuse took place.¹⁸⁶⁰ He also gave evidence about the anxiety created by the delays in the criminal justice process, as he would prepare for a court date that kept getting postponed.¹⁸⁶¹

FAA gave evidence that, when he was told that he would be in a separate trial by himself after the first two joint trials had finished:

I couldn't believe it. I felt angry and abandoned. When I came forward to report to the police, I did it because I wanted justice and I wanted to make sure I did everything I could to stop [FAD] from doing it again. When I learned that I would be by myself, I felt like it was not worth continuing. I didn't want to go through all the anxiety again, but the detective convinced me to hang in there and see what happens.¹⁸⁶²

FAA gave the following evidence:

After the two trials had finished, the detective informed me that [FAD] had been found guilty of the offences against the other complainants. I was relieved and it encouraged me to continue with my trial.¹⁸⁶³

FAA gave evidence in the separate trial of FAD. FAA told the public hearing in Case Study 46:

At the conclusion of the trial, I was informed by the detective that [FAD] was found not guilty. I just cried. I was devastated.¹⁸⁶⁴

FAA told the public hearing:

I felt let down and abandoned when I was separated from the other complainants. If I had been part of their trial, I would have felt supported and could have helped and supported each of the other complainants. Even if I wasn't allowed to talk to them about the abuse, the opportunity to be with them and support them and to be supported would have helped me immensely.

I believe that if I wasn't separated from the other trials and included with some of the other complainants who were abused by [FAD] at the local church, [FAD] may have been convicted of the offences against me.

I was upset that the jury were not aware that [FAD] had been convicted in relation to two separate trials that took place before mine and that he had been accused of similar acts against young boys.

I've lost faith in the legal system.¹⁸⁶⁵

FAA concluded his evidence in the public hearing in Case Study 46 by saying:

I don't believe that the trials should be separated, particularly if all a complainant does is read an article in the paper. While I accept that complainants should not be allowed to talk about the abuse to each other, knowing that you have other complainants in the same trial as you to provide support makes a big difference. I believe this would have helped me greatly in dealing with my anxiety and I would not have felt abandoned.¹⁸⁶⁶

24.9 Prosecutions of 'Alexander' – Victoria

The prosecutions of 'Alexander' provide a recent illustration of the nature of tendency and coincidence reasoning and the extent to which similarity is required for admissibility in Victoria.

An offender was sentenced recently following a series of prosecutions in Victoria. He was not named in Case Study 46 because of how recently he was sentenced. We adopted the pseudonym 'Alexander' for him, which was the pseudonym used by the Victorian Court of Appeal.¹⁸⁶⁷

A total of 21 complainants alleged that Alexander had sexually abused them as children. The alleged abuse covered a period of nearly 40 years, from the 1970s through to 2012. Eighteen of the complainants were men. Three of the complainants were women.

The alleged abuse of 13 or 14 of the complainants occurred in an institutional context within the meaning of the Royal Commission's Terms of Reference. The other seven or eight complainants had been neighbours of the offender. The alleged abuse in an institutional context occurred in connection with two homes operated by the Salvation Army in Victoria.

Some complainants withdrew at the committal stage and some indictments were discontinued before trial. Ultimately, after 13 trials, Alexander was convicted of abusing seven boys, with the offences committed during a period of more than 25 years.

In relation to the six complainants who were residents of a particular Salvation Army boys' home in the 1970s through to 1980, the prosecution sought to have the 18 counts relating to these six complainants heard together in a joint trial. In January 2016, the trial judge ordered that there be six separate trials so that each complainant's allegations would be heard in a separate trial. The DPP appealed against the trial judge's decision to order six separate trials.

The Victorian Court of Appeal's decision was handed down in May 2016, after the public hearing in Case Study 38 in relation to criminal justice issues.

The Court of Appeal allowed counts relating to three complainants to proceed to a joint trial. It ordered a separate trial in respect of each of the other three complainants. That is, the Court of Appeal ordered four separate trials instead of the six separate trials ordered by the trial judge.

For the three complainants whose counts were heard together in a joint trial, a jury found Alexander guilty of seven of the nine counts. The jury was hung on the other two counts. This meant that convictions were recorded in respect of offending against two of the three complainants in the joint trial.

For the three complainants whose counts were heard in three separate trials, each jury returned verdicts of not guilty.

In Case Study 46, we did not hear evidence from any survivors in relation to this series of prosecutions given the possibility of an appeal. Rather, we focused on the Victorian Court of Appeal's reasons for allowing counts relating to three complainants to proceed in a joint trial while requiring counts relating to the other three complainants to proceed in three separate trials.

The decision is instructive because it is a recent example of how the Victorian Court of Appeal has determined the issue of 'significant probative value' for the purposes of admissibility of tendency and coincidence evidence in a case involving charges for child sexual abuse offences in an institutional context.

The decision suggests that, while not requiring 'striking similarity', the Victorian Court of Appeal will look for distinctive features in the circumstances of alleged abuse that suggest an 'underlying unity'. Features that led the court to order a separate trial in respect of the counts relating to one complainant included the nature of the alleged abuse and the fact that he was a year or two older than the other complainants.¹⁸⁶⁸ It appears that separate trials were ordered for two other complainants in part because the alleged abuse occurred in the institution and not on weekends away from the institution.¹⁸⁶⁹

The Victorian DPP had submitted to the court, amongst other matters, that the probative value arose in this case from the sheer number of complainants who gave broadly similar accounts of sexual abuse.¹⁸⁷⁰

The decision assisted us during Case Study 46 in examining the nature of tendency and coincidence reasoning and the extent to which the test for the admissibility of tendency or coincidence evidence in child sexual abuse cases should require that there be *any* similarity beyond the key fact that each complainant alleges that the accused sexually abused them as a child.

24.10 Prosecutions of John Rolleston – New South Wales

In Case Study 27, the Royal Commission examined the experiences of a number of patients in health care services in New South Wales and Victoria.

One part of the public hearing examined the experiences of seven patients who were abused by a medical practitioner, John Rolleston, in private medical practices or at the Royal North Shore Hospital in New South Wales (RNSH).¹⁸⁷¹ The public hearing examined the response of the relevant healthcare regulators and of RNSH to allegations of child sexual abuse made against Rolleston.

The prosecutions of Rolleston are relevant to the Royal Commission's criminal justice work because they provide an example of reliance on coincidence reasoning in New South Wales.

In 1969, Rolleston started working as a general practitioner in a private practice in St Ives, Sydney (the St Ives practice). He left private practice in late 1979 to work as the Medical Director of the Accident and Emergency Department at the RNSH.¹⁸⁷²

Between 1983 and early 1987, Rolleston moved into private practice again at Whalan in western Sydney (the Whalan practice). Between October 1990 and February 1993, Rolleston was employed in various hospitals in Sydney. After that he worked in Broken Hill in New South Wales.¹⁸⁷³

Between 1993 and early 1997, Rolleston was the Director of Medical Services at the Broken Hill Hospital. From 1997, he established and worked as a principal in the Broken Hill Medical Centre.¹⁸⁷⁴

In 2009, Rolleston was arrested and in 2011 he was convicted of offences relating to the period when he worked at the St Ives practice, the RNSH and the Whalan practice.¹⁸⁷⁵

Seven former patients of Rolleston gave evidence before the Royal Commission of their experiences of child sexual abuse and having their complaints dealt with by New South Wales healthcare regulators (the Health Care Complaints Commission (HCCC) and the Medical Board). We also heard of the impacts of the abuse on their lives, including serious effects on their mental health, employment and relationships. Rolleston was convicted of offences in relation to each of these seven former patients.¹⁸⁷⁶

The evidence of each of the seven former patients is set out in some detail in the report of Case Study 27, as are the responses of the Medical Council (the successor to the Medical Board), the HCCC and RNSH.¹⁸⁷⁷ The detail of the prosecutions of Rolleston was not the focus of Case Study 27.

On 3 July 2009, Rolleston was arrested by police and charged with 11 counts of indecent assault in the 1970s against four males between 11 and 15 years of age.¹⁸⁷⁸

On 21 February 2011, Rolleston stood trial in the District Court of New South Wales on 11 counts of indecently assaulting male patients below the age of 18 years.¹⁸⁷⁹

On 8 March 2011, Rolleston was convicted on 10 of those 11 counts. Included in those counts were the indecent assaults perpetrated upon three of the former patients who gave evidence in Case Study 27.¹⁸⁸⁰

Rolleston faced a further indictment and pleaded guilty on 5 May 2011. The indictment contained seven counts of indecently assaulting a male below the age of 18 years. The assaults perpetrated upon two of the former patients who gave evidence in Case Study 27 were included in this indictment.¹⁸⁸¹

On 6 July 2011, Rolleston was convicted in relation to each of the 17 offences and sentenced to a total of four years imprisonment with a non-parole period of 18 months.¹⁸⁸²

At this time, Rolleston admitted an additional 10 offences in a 'Form 1' and these were taken into account under section 33 of the *Crimes (Sentencing Procedure) Act 1999* (NSW). Those additional offences included assaults perpetrated upon two of the former patients who gave evidence in Case Study 27.¹⁸⁸³

On 2 November 2012 in the District Court of New South Wales, Rolleston pleaded guilty to a further four counts of indecently assaulting a male below the age of 18 years. On 9 November 2012, Rolleston was convicted in relation to each of the four offences and sentenced to a total of 14 months imprisonment.¹⁸⁸⁴

At this time, Rolleston admitted additional offences in a 'Form 1', which included an offence perpetrated against one of the former patients who gave evidence in Case Study 27.¹⁸⁸⁵

In 2013, an additional charge was laid under section 78Q of the *Crimes Act 1900* (NSW), being an act of gross indecency with a male under 18 years. The offence had been committed upon one of the former patients who gave evidence in Case Study 27. Rolleston was convicted of this offence and sentenced on 17 December 2013.¹⁸⁸⁶

The issue of the admissibility of tendency and coincidence evidence was addressed in a pre-trial judgment by Flannery DCJ on 22 October 2010.¹⁸⁸⁷ The following information is taken from that judgment.

The Crown had originally presented an indictment containing 33 counts alleging indecent assaults against 14 complainants. The Crown sought leave to present an amended indictment which contained 32 counts in respect of the same 14 complainants. Judge Flannery indicated that she did not see how the trial could proceed in relation to 14 separate complainants without prejudice to the accused where she was not persuaded that each complainant's evidence would be cross-admissible as tendency or coincidence evidence in relation to the other complainants. The Crown then indicated that it proposed to present a new indictment containing 11 counts in relation to five of the 14 original complainants.

The Crown sought to rely on both tendency and coincidence reasoning. In relation to coincidence evidence, the Crown sought to rely on the evidence of each of the complainants to the effect that the accused manipulated their penises to support the evidence of each other complainant that the accused manipulated that complainant's penis on the basis that it is objectively improbable that similar allegations would be independently made by such witnesses unless they were true.

In relation to tendency evidence, the Crown sought to rely on the same evidence of each complainant to prove that the accused has a tendency to manipulate the penises of teenage boys in particular circumstances.

The Crown pointed to the following similarities in the complainants' evidence:

- the attendances by all of the complainants as young boys upon the accused in his consulting rooms at one of his surgeries for minor medical procedures
- the taking by the accused of each of the complainants into his room on their own with no other person but the accused present
- the age and experience of each of the complainants, making them vulnerable to the authority of the accused
- an indication by the accused, either in expressed words or by his actions, that he needed to test the respective complainant's ejaculate as part of his medical examination (except in relation to count three), the actions by the accused masturbating each complainant (except in relation to count three) and the actions of the accused in collecting and then purporting to examine and/or test the respective complainant's ejaculate (except in relation to count three).

Judge Flannery found that, in light of the similarities in the accounts of each of the complainants, the evidence had significant probative value.

Judge Flannery stated:

I must then consider whether the probative value of the evidence substantially outweighs any prejudicial effect it may have on the accused.

There is no doubt that the evidence is prejudicial, as the jury may be overwhelmed by the number of complainants making similar allegations and may fail to apply the directions that I would give them about the limited way in which they are to use the evidence. They may be distracted from considering whether they accept the evidence of each of the complainants. They may over-estimate the probative force of the evidence and may too readily accept it. They may well reason that, because the accused has committed one crime or has been guilty of one piece of misconduct, he is therefore generally a person of bad character and for that reason must have committed all of the offences.

I am conscious of all of these matters, but as I intend to carefully direct the jury about the need to be scrupulous in their use of the evidence and the reasoning processes they must avoid, and as I consider that the evidence of each of the complainants is strikingly similar, I am satisfied that the probative value of the evidence substantially outweighs any prejudicial effect it may have on the accused and so I propose to admit the evidence as coincidence evidence.

I will consider at a later time whether to also leave the evidence as tendency evidence.¹⁸⁸⁸

Ultimately, it appears that only coincidence reasoning was relied upon. As noted above, Rolleston was convicted on 10 of those 11 counts, including counts relating to three of the former patients who gave evidence in Case Study 27.¹⁸⁸⁹

25 Unfair prejudice and the Jury Reasoning Research

25.1 The concerns of the courts

In the Consultation Paper, we outlined the concerns of the courts as follows.

Courts have expressed concerns about admitting evidence of bad character against an accused for well over 100 years. The 1894 case of *Makin v Attorney General for New South Wales*¹⁸⁹⁰ is often cited as a significant starting point for tracing the courts' concerns that propensity and similar fact evidence must be kept from jurors.¹⁸⁹¹

The concern is not that tendency and coincidence evidence is not relevant – rather, the jury may regard it as 'too relevant'. In the 1975 decision of the House of Lords in *Boardman v DPP*¹⁸⁹² (*Boardman*), Lord Cross of Chelsea observed that:

the reason for this general rule [excluding similar fact evidence] is not that the law regards such evidence as inherently irrelevant but that it is believed that if it were generally admitted jurors would in many cases think that it was more relevant than it was, so that ... its prejudicial effect would outweigh its probative value. Circumstances, however, may arise in which such evidence is so very relevant that to exclude it would be an affront to common sense.¹⁸⁹³

In *IMM v The Queen*¹⁸⁹⁴ (*IMM*), Nettle and Gordon JJ referred to the common law background to the Uniform Evidence Act, including 'accrued corporate judicial knowledge and experience of the inherent potential for unreliability' of particular types of evidence.¹⁸⁹⁵ This includes tendency evidence, to which 'special dangers' attach.¹⁸⁹⁶ They stated:

Common law rules of evidence developed out of a desire to keep from the jury that which a preliminary judicial assessment may determine to be so unreliable or lacking in credibility that it has minimal capacity to bear on the facts in issue ...

Similarly under the Act, the rules of admissibility and exclusion are based on the understanding that some evidence may be so unreliable as to have minimal capacity to bear on the facts. Just as at common law, so too under the Act it is recognised that particular categories of evidence – including hearsay evidence, identification evidence and evidence of bad character (of an accused or witness) – can be and sometimes are so unreliable as to make the evidence unsuitable for the jury's consideration.

At common law, the established categories of exclusion are grounded in accrued corporate judicial knowledge and experience of the inherent potential for unreliability of evidence of that kind. Likewise, under the Act, the point of Ch 3 and its structure is to repose responsibility in the judge for enforcing the statutory rules of admissibility and exclusion in a manner calculated to withhold otherwise relevant evidence from the jury's consideration of reliability

...

Such an assessment is not in any sense a usurpation of the jury's function. It is the discharge of the long recognised duty of a trial judge to exclude evidence that, because of its nature or inherent frailties, could cause a jury to act irrationally either in the sense of attributing greater weight to the evidence than it is rationally capable of bearing or because its admission would otherwise be productive of unfair prejudice which exceeds its probative value.¹⁸⁹⁷ [References omitted.]

In *Pfennig v The Queen*¹⁸⁹⁸ (*Pfennig*), McHugh J listed a number of reasons for restricting the admissibility of tendency and coincidence evidence as follows:

- it will create 'undue suspicion against the accused [which] undermines the presumption of innocence'¹⁸⁹⁹
- juries 'tend to assume too readily that behavioural patterns are constant and that past behaviour is an accurate guide to contemporary conduct'¹⁹⁰⁰
- "(c)ommon assumptions about improbability of sequences are often wrong" ... and when the accused is associated with a sequence of deaths, injuries or losses, a jury may too readily infer that the association "is unlikely to be innocent"¹⁹⁰¹ (references omitted)
- 'in many cases the [shocking] facts of the other misconduct may cause a jury to be biased against the accused'¹⁹⁰²
- '[t]rials would be lengthened and expense incurred, often disproportionately so, in litigating the acts of other misconduct; law enforcement officers might be tempted to rely on a suspect's antecedents rather than investigating the facts of the matter; rehabilitation schemes might be undermined if the accused's criminal record could be used in evidence against him or her'.¹⁹⁰³

Concerns about tendency and coincidence evidence have also been expressed in different terms by other judges over time, including as follows:

- Questions about whether the accused was in fact guilty of the other offences will distract the jury's attention from focusing on the real issues in the trial.¹⁹⁰⁴
- The jury will be persuaded of the accused's guilt for the current charge if previous misconduct shows the accused to be a bad person who therefore should be punished.¹⁹⁰⁵
- The jury will ignore the presumption of innocence and replace it with a presumption of guilt.¹⁹⁰⁶
- The jury will become confused and substitute an element from the other alleged misconduct for an unproven element in the present charge.¹⁹⁰⁷

In essence, the courts' concerns about admitting tendency and coincidence evidence stem from the risk of such evidence causing unfair prejudice to the accused so that the accused does not receive a fair trial.

Discussing the meaning of prejudicial or unfairly prejudicial evidence in their report on the Uniform Evidence Act, the Australian Law Reform Commission (ALRC), the New South Wales Law Reform Commission (NSW LRC) and the Victorian Law Reform Commission (VLRC) stated:

There is some uncertainty over the meaning of ‘prejudice’ ... It means damage to the accused’s case in some unacceptable way, by provoking some irrational, emotional response, or giving the evidence more weight than it should have.¹⁹⁰⁸

The term ‘unfair prejudice’ is not defined under the Uniform Evidence Act. In *Dupas v The Queen*,¹⁹⁰⁹ the Victorian Court of Appeal stated that:

[c]onsistently with the common law, it has been interpreted to mean that there is a real risk that the evidence will be misused by the jury in some unfair way. It may arise where there is a danger that the jury will adopt ‘an illegitimate form of reasoning’ or ‘misjudge’ the weight to be given to particular evidence.¹⁹¹⁰ [References omitted.]

The ALRC, NSW LRC and VLRC stated in relation to the general discretion to exclude unfairly prejudicial evidence under section 135(1) of the Uniform Evidence Act:

The risk of unfair prejudice is ... the danger that the fact-finder may use the evidence to make a decision on an improper, perhaps emotional, basis, ie on a basis logically unconnected with the issues in the case. Thus evidence that appeals to the fact-finder’s sympathies, arouses a sense of horror, provokes an instinct to punish, or triggers other mainsprings of human action may cause the fact-finder to base his decision on something other than the established propositions in the case. Similarly, on hearing the evidence the fact-finder may be satisfied with a lower degree of probability than would otherwise be required.¹⁹¹¹ [Reference omitted.]

However, unfairly prejudicial evidence is not merely evidence that makes the accused more likely to be convicted.¹⁹¹² If the evidence is logically probative of guilt and the jury uses it to reason in permissible ways, the evidence will not be unfairly prejudicial.

While issues of the admissibility of tendency and coincidence evidence can arise in relation to any criminal offences – and in civil litigation – they have particular prominence in sexual offences, including child sexual offences.

The common law has also long considered 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.¹⁹¹³ In the High Court’s decision in 2001 in *KRM v The Queen*,¹⁹¹⁴ 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. Those difficulties increase substantially where there are multiple counts involving numerous events and especially where there is more than one complainant. Statute apart, such circumstances oblige judges to act affirmatively to protect the accused against the risks of unfairness in the trial.¹⁹¹⁵ [References omitted.]

In the report *Jury reasoning in joint and separate trials of institutional child sexual abuse: An empirical study* (Jury Reasoning Research), the researchers drew on a 1976 decision of the US Fourth Circuit Court of Appeal summarising the three ways in which the courts consider joint trials risk causing unfair prejudice to the accused to identify the following three types of unfair prejudice:¹⁹¹⁶

- **Inter-case conflation prejudice:** Juries will confuse or conflate the evidence led to support different charges in a joint trial, so that they will wrongly use evidence relating to one charge in considering another charge. Because joint trials only occur where the charges are similar, it can be argued that juries in joint trials may be particularly susceptible to this kind of reasoning.
- **Accumulation prejudice:** Juries will assume the accused is guilty due to the number of charges against him or the number of prosecution witnesses, regardless of the strength of the evidence. The impermissible reasoning would be to place greater weight on a particular item of evidence merely because it is presented along with other evidence that is not probative of the defendant's guilt in its own right.
- **Character prejudice:** Juries will use evidence about the accused's other criminal misconduct and find guilt by reasoning if 'he did it once, he will do it again'.¹⁹¹⁷ Character prejudice can arise from the severity or number of allegations against an accused if juries use this information to reason that the accused is a person of bad character and is therefore probably guilty of the charges.

These concerns overlap to some extent, but it is these three types of unfair prejudice that were tested in the Jury Reasoning Research, discussed in section 25.3.

25.2 Absence of evidence of unfair prejudice

In the Consultation Paper, we noted that the concerns of the courts have been stated repeatedly for so long, and in such strong terms, that it may seem difficult to question them. They may take on the air of incontrovertible truth by their widespread acceptance and repetition throughout common law jurisdictions.

However, even without undertaking empirical research such as the Jury Reasoning Research we commissioned, we stated that there may be reasons to doubt at least the strength, and possibly also the validity, of the concerns.

As outlined in Chapter 2, prosecution rates for child sexual abuse offences are low, indicating that perhaps it is only the very strongest of cases that proceed. If there was some unfair prejudice at play, and convictions were somehow easy to obtain as a result, one would expect a higher prosecution rate.

Also, for those child sexual abuse offences that are prosecuted, the conviction rate is low. If the mere accusation of child sexual abuse was enough to prejudice juries against an accused, the conviction rate should be high, not low. The fact that many juries acquit those accused of child sexual abuse offences suggests that juries are not prejudiced by the heinous nature of the crimes in question.

As discussed in Chapter 2, recently we obtained further analyses of rates of conviction and acquittal for child sexual abuse offences prosecuted in New South Wales from the New South Wales Bureau of Crime Statistics and Research (BOCSAR). These confirm the comparatively low conviction rates for child sexual abuse offences. We discussed some of these analyses in Chapter 2. We discuss additional analyses that are particularly relevant to the issue of tendency and coincidence evidence in section 28.1.5.

In relation to particular prejudice that may come from multiple complainants in a joint trial, there are many examples of cases where juries have acquitted on all counts. One example we considered in Case Study 38 was the prosecution of Philip Doyle involving two complainants, one of whom was Mr Kevin Whitley. This is discussed in section 24.2. As a further example, the jury in the joint trial that was held following the New South Wales Court of Criminal Appeal's decision in *R v PWD*¹⁹¹⁸ acquitted the accused on all counts.

There are also many examples of joint trials where juries have convicted on some charges and acquitted on others. In Case Study 38, we heard evidence in relation to two such cases: the prosecutions of David Rapson, discussed in section 24.5; and the prosecutions of CDV, discussed in section 24.7. Such verdicts indicate that juries are capable of considering the charges separately and on their own merits.

This view is also supported by considering appeals in relation to what are said to be 'inconsistent verdicts'.¹⁹¹⁹ Those charged with multiple counts of child sexual abuse against a particular complainant may appeal if the jury convicts on some counts and acquits on others. The argument on appeal is broadly that, if the jury did not believe the complainant on one or more counts and acquitted, they should not have believed the complainant on the other count or counts.

However, in rejecting many of these appeals, the appellate courts have made it clear that there were rational reasons for the juries to convict on some counts and acquit on others and that the juries were following the directions they were given to consider each count, and the evidence on it, separately.¹⁹²⁰ This is further illustration of the capacity of juries to consider the charges separately and to deliver verdicts unaffected by any unfair prejudice arising from the nature or number of the charges.

We discuss the issue of unfair prejudice further in section 28.1.5.

25.3 Jury Reasoning Research

25.3.1 Purpose

We engaged Professor Jane Goodman-Delahunty, Professor Annie Cossins and Ms Natalie Martschuk to conduct the Jury Reasoning Research to examine how juries reason when deliberating on multiple counts of child sexual abuse.

Using mock juries and a trial involving charges of child sexual abuse in an institutional context, the report investigates whether conducting joint trials and admitting tendency evidence infringe on a defendant's right to a fair trial.

The researchers sought to answer the following questions to determine whether the ways in which the courts consider joint trials risk causing unfair prejudice to the accused occur:

- Are juries capable of separating the counts against the accused in reaching their verdicts in a joint trial?
- Because of the number of charges against the accused in a joint trial, will juries deliver similar conviction rates for counts based on weak compared with stronger case evidence?
- Are juries in joint trials more prone than those in separate trials to convict on the basis that the accused has a 'criminal disposition'?

25.3.2 Prior jury research

In relation to prior jury research studies examining the effect of joining multiple counts in a joint trial, the Jury Reasoning Research reported:

- There were no experimental studies of joinder in relation to child sexual abuse trials and only one archival study in New South Wales.
- The archival research showed that there was a 9 per cent higher conviction rate in joint trials than in separate trials.¹⁹²¹
- In controlled trial simulations, 10 studies yielded mixed results.
- Prior studies showed that three or more similar offences needed to be joined to produce a 'joinder effect'.¹⁹²²

The Jury Reasoning Research identified the following significant limitations with prior jury research studies:

- They studied verdicts from individual mock jurors and not from mock juries.
- They focused on conviction rates.
- They did not study jury deliberation or jury reasoning.
- They did not assess whether verdicts were reached using permissible reasoning.
- They did not assess whether verdicts involved unfair prejudice to the accused.¹⁹²³

Past studies had identified a ‘joinder effect’ in that the conviction rate was higher when at least three similar crimes were joined in a single trial compared with when they were tried separately. However, these studies were unable to test whether the ‘joinder effect’ was the result of impermissible reasoning based on the types of unfair prejudice outlined in section 25.1 or whether it was a result of using additional evidence and permissible reasoning in a logical and fair way.

25.3.3 Methodology

The Jury Reasoning Research used a scenario involving allegations of institutional child sexual abuse made against a soccer coach. The joint trial involved three male complainants who had been coached at different times by the soccer coach in the 1990s. Each complainant alleged that the accused had sexually abused him, and the sexual abuse involved either or both indecent assault and penetrative sexual assault. The complainants did not know each other and there was no issue of collusion or contamination.

The evidence and witnesses in relation to the three complainants were varied to produce a weak, moderately strong and strong case. A summary of the ‘facts’ of the joint trial is published in the Jury Reasoning Research,¹⁹²⁴ and the full transcripts of the different forms of trial are published on the Royal Commission’s website. Different versions of the trial were video recorded using actors to play the various witnesses, with barristers participating as the prosecutor and defence counsel and a District Court judge participating as the trial judge.

The Jury Reasoning Research was conducted in two stages:

- An online mock juror pilot study involved 300 participants and used written case summaries to test the case strength of the weak, moderate and strong cases.
- An in-person jury simulation involved 1,029 jury-eligible citizens who served on 90 mock juries. They watched video trials of one of the various trial types, including separate and joint trials. The jury deliberations were assessed by the researchers, and pre- and post-trial questionnaires were used to obtain data from individual jurors.

The 90 mock juries were spread across 10 different variations of the trial. The variations included:

- a separate trial involving the complainant with the moderately strong case

- a separate trial involving the complainant with the moderately strong case, plus relationship evidence to give context to the offending. This trial was also varied to test the effect of jury directions and a question trail
- a separate trial involving the complainant with the moderately strong case, plus tendency evidence from two witnesses – being the two men who were the additional complainants in the joint trial. This trial was also varied to test the effect of jury directions
- a joint trial involving all three complainants. This trial was also varied to test the effect of jury directions, the effect of having more or fewer witnesses and the effect of a question trail.

25.3.4 Key findings on unfair prejudice

In the Consultation Paper, we outlined the findings of the Jury Reasoning Research as follows.

The key outcome of the Jury Reasoning Research was that the researchers found no evidence of unfair prejudice to the accused. The Jury Reasoning Research’s general conclusions about unfair prejudice in joint trials are as follows:

Although the expectation was that more complex trials with tendency evidence would result in more unfair prejudice to the defendant, we found more evidence of impermissible reasoning in the basic separate trial and in the relationship evidence trial than in the more complex trials. For example, in the separate trials, juries were more likely to believe that there was an onus on the defendant to prove his innocence.

This finding is a crucial outcome of this study. Overall, the results show that it is unlikely that a defendant will be unfairly prejudiced in the form of impermissible reasoning as a consequence of joinder of counts or the admission of tendency evidence. Given the low probability, we found there is negligible risk to the defendant of a conviction based on reasoning logically unrelated to the evidence ...¹⁹²⁵

The major findings of the Jury Reasoning Research in relation to unfair prejudice are outlined briefly below. The research also examined a number of other issues, including the impact of jury directions and question trails, which are not outlined here.

The researchers found that no jury verdict was based on impermissible reasoning. Where impermissible reasoning might have occurred in jury deliberations, it was more likely to occur in the separate trials without tendency evidence than in the separate or joint trials with tendency evidence. The Jury Reasoning Research states:

the low frequency and isolated examples of reasoning in deliberations involving inter-case conflation of the evidence, accumulation prejudice, or character prejudice suggests that the likelihood of impermissible reasoning, whether in joint or separate trials, is exceedingly low. This low probability suggests that there was negligible unfair prejudice to the defendant in joint trials or trials where tendency evidence was admitted.¹⁹²⁶

The researchers found that jury verdicts were logically related to the probative value of the evidence. That is, as more inculpatory evidence against the accused was added to the trials (through relationship evidence from the complainant with the moderately strong case and through tendency evidence from the two additional witnesses in the separate trial and the two additional complainants in the joint trial), conviction rates for both the penetrative and non-penetrative offences against the complainant with the moderately strong case increased.

The researchers found that there was no significant difference between conviction rates in the tendency evidence trial and the joint trial, so there was no 'joinder effect'.¹⁹²⁷ The Jury Reasoning Research states:

Although the conviction rates by juries and individual jurors in the joint trial were, on average, higher than those in the tendency evidence trial, these increases were not statistically significant, and were not due to the type of trial; that is, they were not due to the joinder of counts in the joint trial. In other words, we did not find a significant joinder effect.

Importantly, we did not find that the verdicts rendered were based on impermissible or prejudicial jury reasoning. Our analysis of credibility ratings confirmed that juries were sensitive to the source of additional prosecution evidence in assessing witness credibility. We can attribute increases in credibility ratings to systematic and permissible reasoning based on the probative value of the tendency evidence.

Multiple convergent findings showed that jury decision making in the tendency evidence trial was similar to that in a joint trial, indicating that the juries were not reasoning in an illogical and superficial manner in the joint trial when given cross-admissible tendency evidence, compared to the tendency evidence trial ... The admission of the tendency evidence, whether in the context of a separate or a joint trial, did not lead to impermissible reasoning.¹⁹²⁸

The researchers found that the credibility of the complainants was enhanced by evidence from independent witnesses. In particular, the credibility of the complainant with the moderately strong case – and the culpability of the accused – increased the most in response to evidence from witnesses other than the complainant with the moderately strong case himself.

Adding more evidence from the complainant through relationship evidence had less effect on his credibility or the culpability of the accused. Relationship evidence increased the plausibility of the account of the complainant with the moderately strong case and his evidence was rated as significantly more convincing, but mock jurors identified that the relationship evidence trial remained a case of one person's word against another.

The researchers found that juries distinguished between penetrative and non-penetrative counts, which confirmed that they reasoned separately about each count, even where the counts related to the same complainant. They were more reluctant to convict for the more serious offence – the penetrative count – without tendency evidence, and convictions for both the penetrative and non-penetrative counts increased in the separate trial with tendency evidence and the joint trial.

The researchers’ analysis of the questionnaires completed by mock jurors after the trial produced ratings for mock jurors’ assessment of the ‘factual culpability’ of the accused. That is, jurors were asked to rate how likely it is that the defendant did the acts that constituted the penetrative and non-penetrative offences on a scale of one (very unlikely) to seven (very likely).

Figure 25.1 shows the conviction rate for the offences against the complainant with the moderately strong case across the four different trial types and the mean factual culpability score assessed by mock jurors.

Figure 25.1: Verdict and factual culpability by type of trial for the moderately strong case¹⁹²⁹

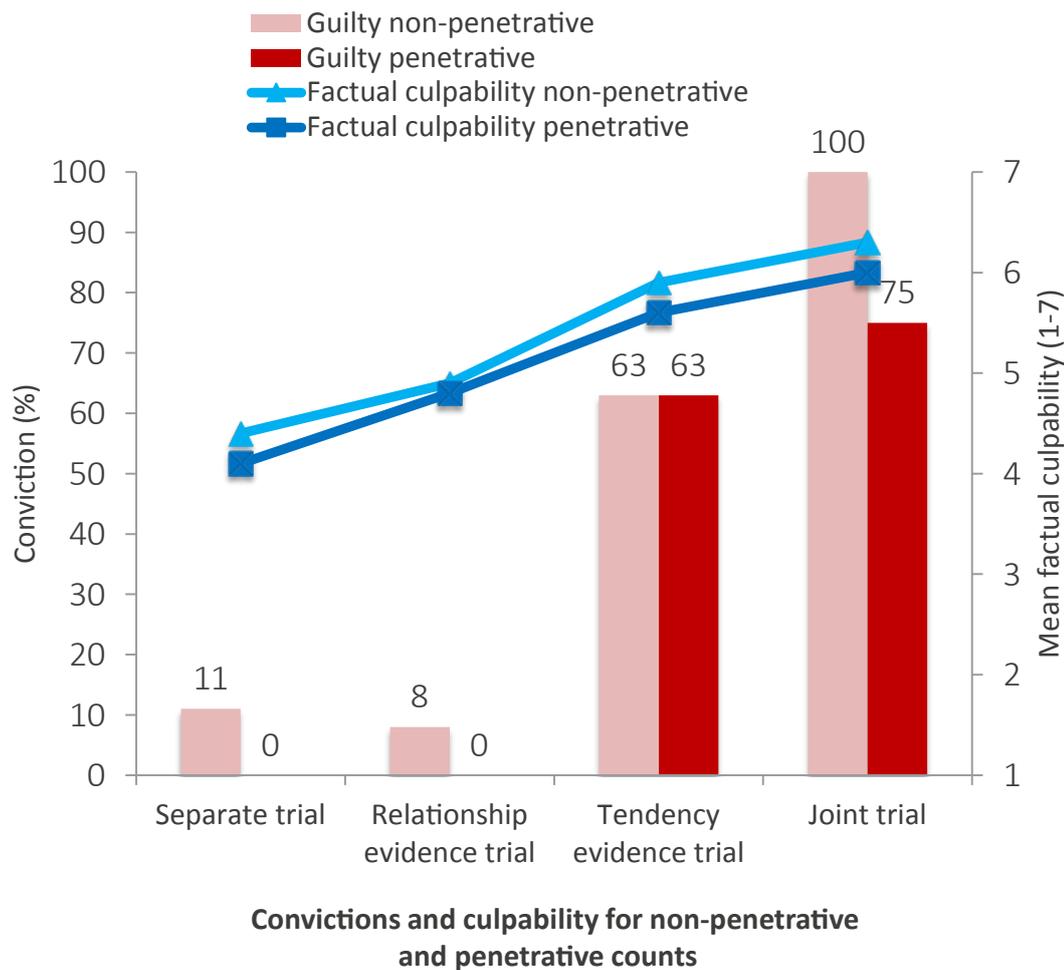


Figure 25.1 shows that, in the separate trial, while the mean factual culpability rating is above four out of seven for the penetrative and non-penetrative offences, the conviction rate is low – 11 per cent for the non-penetrative offence and no convictions for the penetrative offence. This suggests that juries take seriously the requirement that the prosecution prove guilt beyond reasonable doubt.

In the questionnaires completed after the trial, mock jurors were asked to identify what number between 0 per cent and 100 per cent represents ‘beyond reasonable doubt’. The overall average quantitative definition was 88.8 per cent.¹⁹³⁰ The Jury Reasoning Research states:

There were significant differences between trial types, showing that the threshold for ‘beyond reasonable doubt’ increased as more inculpatory evidence against the defendant was admitted at trial. Whereas the threshold was below 90 per cent in the basic separate and relationship evidence trials, the threshold exceeded 90 per cent in the joint trial. Compared to the separate trial (85.2 per cent), mock jurors’ definition of ‘beyond reasonable doubt’ was significantly more stringent when tendency evidence was admitted, whether in a separate trial (88.0 per cent) or a joint trial (92.1 per cent). Differences in the threshold in the basic separate trial (85.2 per cent) and relationship evidence trial (88.0 per cent) were not significant ...

These findings were unexpected, and contradicted concern among judges and practitioners that jurors would apply a lower threshold of proof in a joint trial than in a separate trial, due to the higher number of counts and witnesses in a joint trial.¹⁹³¹ [References omitted.]

The researchers found that jurors were more likely to make errors within a case rather than between cases, suggesting little ‘inter-case conflation’ prejudice. Also, these errors were corrected by other jurors in the course of the jury’s deliberation. No verdicts were based on persistent uncorrected errors or inter-case conflation of the evidence.¹⁹³²

The trial variations allowed the researchers to measure the effect of different numbers of charges and witnesses. Quantitative and qualitative analyses confirmed that jurors and juries appropriately distinguished between the same types of offence alleged by different complainants based on the strength of their evidence. There was no significant increase in conviction rates or in the defendant’s factual culpability for allegations by the complainant with the moderately strong case in trials with six counts (the joint trial) compared with trials with two counts (the separate trial with tendency evidence) – again suggesting no reliance on reasoning by accumulation of the counts.

Most significantly, in relation to the risk of unfair prejudice from accumulation prejudice, the researchers found that conviction rates for the weakest case did not increase significantly with extra witnesses or charges, thus showing no accumulation prejudice.¹⁹³³ The Jury Reasoning Research states:

A case study of deliberations in a joint trial showed that juries in trials with six counts devoted most available deliberation time to the weak claim where the disparities in evidence were greatest, controverting the view that juries would gloss over these differences in a joint trial.¹⁹³⁴

The researchers found that the convincingness of the defendant was rated consistently by jurors across the different trial variations, suggesting that there was no character prejudice.¹⁹³⁵ The Jury Reasoning Research states:

Thematic evaluation of the jury deliberations revealed that no juries in either the tendency evidence or joint trials impermissibly used the tendency evidence to conclude that the defendant was guilty because of the number of allegations of prior misconduct made. Furthermore, there was no evidence of verdicts motivated by emotional reactions to the severity of the allegations, such as a sense of horror regarding the allegations, or a desire to punish the defendant.¹⁹³⁶

The researchers' analysis of individual mock jurors' main reasons for their verdict showed that 90 per cent of the decisions to convict were based on the consistency of evidence from multiple witnesses, the credibility of the witnesses and the pattern of grooming behaviour. Fewer than 3 per cent of jurors gave reasons for conviction that might indicate character prejudice. The Jury Reasoning Research states:

Overall, our analyses of the reasons for decisions to convict provided negligible support for the notion that joint trials produce verdicts based on inter-case conflation of the evidence, character prejudice or accumulation prejudice. As instructed by the trial judge, mock jurors used their common knowledge and experience of the world in understanding the behaviours of the complainants and the defendant. Together, these findings provided no support for the hypothesis that joint trials lead to impermissible reasoning.¹⁹³⁷

The researchers analysed the questionnaires completed by mock jurors after the trial to identify their expectations of the information they would be given at a trial in relation to the accused's other misconduct. The results are in Table 25.1.¹⁹³⁸

Table 25.1: Mock juror expectations of information they would receive at trial (per cent agreeing)

| We would have been informed if ... | Overall | Separate trial | Relationship evidence trial | Tendency evidence trial | Joint trial |
|---|---------|----------------|-----------------------------|-------------------------|-------------|
| Other charges were made against the defendant | 58.3 | 61.9 | 63.2 | 63.6 | 54.6 |
| The defendant was sexually abusive on other occasions | 60.2 | 59.0 | 63.4 | 58.7 | 58.5 |
| The defendant had a prior conviction for child sexual abuse | 59.7 | 62.9 | 62.7 | 56.6 | 57.8 |
| The defendant had a prior conviction for any other crime | 45.9 | 48.6 | 45.8 | 41.3 | 47.6 |

Table 25.1 shows that roughly 60 per cent of mock jurors expected that they would be informed at a trial of any prior child sexual abuse incident or conviction involving the accused.

25.3.5 Submissions and evidence in relation to the Jury Reasoning Research

A number of submissions in response to the Consultation Paper and a number of witnesses who gave evidence in Case Study 46 commented on the Jury Reasoning Research.

We focus here on submissions and evidence that raised concerns or criticisms about the Jury Reasoning Research, including how it was conducted and its findings. After the public hearing in Case Study 46, we extracted the relevant passages of submissions and evidence and sought responses to the concerns and criticisms from the researchers. Our request and the researchers' responses are published on the Royal Commission's website.

We set out at length below the relevant passages of submissions and evidence so that the particular comments and concerns can be understood in context. We then identify the issues raised in the submissions and evidence and outline the researchers' responses to them.

Submissions in relation to the Jury Reasoning Research

Law Council of Australia

In its submission in response to the Consultation Paper, the Law Council of Australia stated:

No inference can be drawn that juries are giving fair consideration to each count merely because they convict on some counts and acquit on others. There may be other reasons than lack of unfair prejudice why a jury might give an accused the benefit of the doubt in relation to some charges.

The Law Council has significant reservations with respect to the conclusions drawn by the researchers. In that regard, the following comments with respect to that research should be noted.

One form of ‘unfair prejudice’ is what the researchers call ‘character prejudice’ – a juror considers the accused a person of bad character and for that reason applies a lesser standard of proof. Such bad character might be established by previous incidents that the accused has admitted, or does not dispute. The evidence used in the mock jury research was not of that kind. There were simply multiple complainants. The fact that the mock juries do not appear to have adopted a lower standard of proof in those cases does not disprove the unfair prejudice hypothesis. Equally, the prejudice that a jury will over-value tendency evidence could not realistically be measured for the same reason – it is unlikely the jury were satisfied of one allegation and then used it to infer guilt in respect of others. It is more likely they engaged in coincidence reasoning (‘it is more likely one allegation is true because an independent person has made a very similar allegation’). As regards the danger of the jury over-valuing the evidence for coincidence reasoning, it is not apparent whether the research would be able to measure that. A juror saying, as some apparently did, that they needed more for proof beyond reasonable doubt in cases where tendency evidence was admitted may simply reflect the juror considering that there was in fact more evidence of guilt (because of the tendency evidence) and rationalising accordingly.¹⁹³⁹

Law Society of New South Wales

In its submission in response to the Consultation Paper, the Law Society of New South Wales stated:

The Law Society urges caution with respect to reliance on the Jury Reasoning Study (JRS) report to justify reform, particularly with respect to joinder of counts and the reduction or removal of barriers to admissibility for tendency and coincidence evidence. For reasons we detail below, we strongly recommend the Royal Commission engage in significant peer review to allow legal and psychology experts to evaluate the findings of the JRS. The Royal Commission should take into account the large body of research within cognitive psychology relating to unconsciously biased reasoning. The absence of consideration of this research in the JRS is one of a number of reasons which calls for a broader review of this area of law.

...

The Jury Reasoning Study Report

The assertions made in the JRS report about a failure of justice because of failures in prosecutions raise questions about the utility of the JRS report referring to acquittals, convictions and the factual culpability of the defendant. This is because with no ground truth (because the mock trials are based on illustrative scripts) acquittals, convictions and culpability are potentially misleading indicators of efficacy. Even when used to measure comparative difference (whether a direction is given, a question trail is adopted, joinder or tendency appear etc.), these measures show a trend, but not whether support or otherwise for the trend has integrity.

No doubt a significant matter is the finding in the JRS ‘that verdicts were not based on impermissible reasoning or unfair prejudice to the defendant. These outcomes suggest that any fears or perceptions that tendency evidence – whether presented in a separate trial or a joint trial – is unfairly prejudicial to the defendant are unfounded’. However, as factual culpability is a measure considered in relation to the dangers of impermissible reasoning, the Law Society raises a concern that this measure may need further interrogation before reliance is placed on it.

Furthermore, the arguably narrow definitions of ‘impermissible reasoning’ and ‘unfairness to the defendant’ which the study adopts, create further concern in relation to the validity of the strong conclusions made in relation to the implications for the criminal justice system. Impermissible reasoning and unfair prejudice are much wider concepts.

Simplicity of case study trials

The Law Society notes that in each of the trials used in the JRS, the transcripts are very short, and do not reflect the actual length (and complexity) of many jury trials.

The Law Society notes that in the ‘limitations of the study’ at p268 the authors state:

‘Although the experiment was designed to replicate as closely as possible the experience and tasks of actual juries, we cannot exclude the possibility that the results obtained from this abbreviated experience may differ from those obtained in a real trial. For example, compared to the time available for juries to absorb, consider and discuss the evidence in a real trial, the mock jurors in this study performed under conditions that may have increased their cognitive load and made them more vulnerable to heuristic reasoning, confusion and errors than would be likely in a real trial, where the presentation of the evidence and deliberation typically proceed at a slower pace. Moreover, in an actual trial, a jury would have the opportunity to seek further direction or clarification from the judge, whereas that opportunity was not available in this trial simulation’

The Law Society is concerned that inadequate attention is paid to the impact of the abbreviated nature of the mock trials in the comments relating to the limitations of the study (i.e. significantly shorter, less complex and less emotionally charged than an actual trial). Given the relative brevity and mock conditions of the trials, the statements that the mock trials may have led to increased cognitive load and vulnerability to errors of confusion require peer review. We also note that the JRS's literature review omits reference to significant research by Louise Ellison and Vanessa Munro, which focuses on jury reasoning issues in mock trial scenarios.

In addition, there appears to be an absence of acknowledging the effect of 'unconscious bias'. Jury reasoning towards 'factual culpability' is treated as an indicator of a good strategy and underpins the authors' conclusions on 'impermissible reasoning'. This seems to differ from 'unconscious bias', which arguably is the basis for the laws' resistance to admitting evidence of uncharged criminal allegations or joining charges.

It is for these reasons that the Law Society encourages caution with respect to changes to the law of evidence that challenge an accused's protections. There is a need to be alert to unintended consequences. Guidance on the effects of impermissible reasoning and unconscious biases within a ground truth environment would be particularly beneficial. Similarly, with respect to the operation of the presumption of innocence, we would encourage a study that could evaluate the impact of a defendant being from a particular category (e.g. priest) prominently featured in the Royal Commission.

Question Trails

We note the finding from the JRS that the use of question trails in the relationship evidence trial meant that 'the defendant was rated significantly less factually culpable'. However, the JRS indicates that the counts and the judges' instructions took over 'a significantly greater proportion of deliberation time' and 'the mock jurors perceived that they required less cognitive effort to evaluate the defence case'. These are encouraging signs and we urge the Royal Commission to explore further the benefits available through question trails, appropriately supported by judicial education. We understand that they have been used quite extensively in other jurisdictions, chiefly in New Zealand. If they improve jurors' ability to apply the presumption of innocence and reduce jurors' cognitive effort, they will be an asset.

However, we consider that any peer review should also address the implications of the finding that 'mock juries reported significantly more difficulty in understanding the charges in a joint trial when given a question trail than when they deliberated without one'; and that '[m]ock jurors who deliberated with the assistance of a question trail reported requiring significantly more cognitive effort to understand the charges than those jurors who deliberated without a question trail'. Question trails direct jurors to apply the prosecution's burden of proof to elements of the offence and focus on appropriate

reasoning limitations. Self-reported indicators of increased cognitive effort by jurors given question trails raises a question as to whether there is an unidentified problem in the mock trials, given that normally we would expect that the use of question trails would improve understanding by jurors. We consider that a response to this from a peer review would be valuable.

...

Conclusion

...

The Law Society strongly urges a peer reviewed interdisciplinary report from legal and psychology experts who are disassociated from the researchers within or related to the Royal Commission to address:

- The strengths and limitations of the JRS' design, especially in terms of a ground truth basis;
- The strength and limitations of the JRS' assumptions;
- The strength and limitations of the conclusions, but also addressing specific questions, including:
 - the relationship of factual culpability to conclusions recommending, or founding recommendations for procedural or evidentiary change;
 - the relationship of unconscious bias to impermissible reasoning, and the extent to which the conclusions of the JRS acknowledge and address this;
 - the extent to which jurors' expressed assumptions or views may impact on their unconscious thoughts and impact on their deliberations and verdict;
 - whether the findings could be applicable to a trial in which the defendant did not give evidence, and
 - whether the conclusions would be valid in relation to trials where the plausibility of the defendant varied from that of the mock study.¹⁹⁴⁰ [References omitted.]

Bar Association of Queensland

In its submission in response to the Consultation Paper, the Bar Association of Queensland stated:

The [Royal] Commission argues that the results of the jury reasoning research offer strong support for the view that the long held fears of prejudice to defendants from the admission of tendency evidence, or of allowing joint trials, is unfounded. We respectfully disagree. To the contrary, we contend that the results of the research demonstrate the opposite.

The results shown in the discussion paper at Figure 10.1 [now Figure 25.1] record the conviction rates for the four different trial types. The trial types were:

- (a) separate trial (where only a single complainant gave evidence)
- (b) relationship evidence (where a single complainant gave evidence but also gave evidence of uncharged acts)
- (c) tendency evidence (where the charge related only to a single complainant but evidence of other alleged victims was admitted), and
- (d) joint trial (where multiple charges relating to different complainants were tried together).

The results are recorded for the different types of offences, namely, non-penetrative offences and penetrative offences.

The results demonstrate that, where the jury considered only the evidence of the complainant, i.e., in the separate trial and relationship evidence trial, the conviction rates were low, namely: 11% (non-penetrative) and 0% (penetrative) in the separate trial; and 8% (non-penetrative) and 0% (penetrative) in the relationship evidence trial. The inescapable conclusion is that this resulted because of focus upon whether specific acts were proved beyond reasonable doubt.

By contrast, the conviction rates in cases where the jury heard evidence of the allegations of other complainants was high: 63% (non-penetrative) and 63% (penetrative) in the tendency.

In the tendency evidence trial, the charges considered by the jury remained the same as for the separate trial and relationship evidence trial. The tendency evidence (of similar conduct against two other boys) was not capable of proving the specific acts charged. The juries were instructed they could only use that evidence, if accepted, to reason that the defendant had a tendency to have a sexual interest in young boys, had a tendency to engage in sexual activity with young boys, and had a tendency to use his position of authority to access young boys in order to engage in sexual activity with them.

The inescapable conclusion is that the higher conviction rate was influenced by the other similar allegations led in evidence. Not unexpectedly, the conviction rates in the joint trials were similar. It is our view these results vindicate the fears of unfair prejudice to defendants expressed in the examples from the High Court set out above.

The discussion paper records the view of the researchers that the jury verdicts were logically related to the probative value of the evidence, that, as the inculpatory evidence was increased, conviction rates did too, that the credibility of complainants was enhanced by evidence from independent witnesses, and that little evidence was found that verdicts were based on impermissible or prejudicial jury reasoning. The additional evidence referred to was of course the evidence of other similar complaints against other

complainants. As explained above, it is our view that, where none of the additional evidence could logically help prove the specific acts alleged by other complainants, it was simply the tendency reasoning which drove the convictions. That is, because they believed the defendant to be sexually attracted to boys, they were prepared to find specific acts were proved whereas, without knowledge of that attraction, the same allegations were not proved.¹⁹⁴¹ [References omitted.]

Law Society of New South Wales Young Lawyers Criminal Law Committee

In its submission responding to the Consultation Paper, the Law Society of New South Wales Young Lawyers Criminal Law Committee stated:

Jury Reasoning Research

One of the assumptions underpinning our legal system is that jurors obey directions. It is apparent from the research conducted by Goodman, Delahunty, Cossins and Martschuk for the Royal Commission that courts and legislators have consistently underestimated the ability of jurors to separate counts and evaluate evidence. While the Committee recognises the special dangers attaching to tendency and coincidence evidence, this research suggests that these dangers have been perhaps overstated. However, the Committee submits that further research in this area, and in particular a thorough peer review of the study, is appropriate to ensure that any changes to the law in this respect have a sound empirical basis.

Of particular interest are the findings by the study on the insignificance of the ‘joinder effect’. That the mock jurors’ definition of ‘beyond reasonable doubt’ was a certainty of under 90% in separate trials and over 90% in joint trials indicates that rather than lowering the threshold for conviction, joint trials increase the difficulty for the prosecution of securing a conviction. Of further note was the finding that jurors were more likely to engage in impermissible reasoning in separate trials without tendency evidence, than they were in separate or joint trials with tendency evidence. In light of this, the Committee agrees with Counsel Assisting that there may be opportunities for reform in this area. The Committee notes that this is a complex area of law and recommends that any proposals to amend the Evidence Act be referred to the Australian Law Reform Commission.¹⁹⁴² [References omitted.]

Confidential submission

One confidential submission responding to the Consultation Paper commented in detail on the Jury Reasoning Research. The concerns can be summarised as follows:

- The accumulation prejudice or effect arises from the effect of the jury being made aware of multiple allegations, not simply how many charges or counts there are or the number of witnesses called. Comparing trials with the same evidence but different numbers of charges (the tendency trials with two counts and the joint trials with six counts) and versions of the joint trial with different numbers of witnesses (four or six) does not test this.

- The Jury Reasoning Research report states that ‘the factual culpability and conviction rates for the count based on the weakest evidence were not significantly elevated in the joint trial compared to the tendency evidence trial’, but there were no conviction rates in the tendency trial for the weakest claim, as it was not the subject of a charge. Factual culpability ratings were obtained in the post-trial survey of jurors. It is not surprising that there was little difference in the ratings relating to the ‘weak’ complainant between the two trials because there was no difference between the evidence in the different trials other than the leading of some further witnesses relating to another complainant in one version of the joint trial. There was no separate trial data for the ‘weak case’ to provide a valid point of comparison.
- The findings in relation to character prejudice are based on responses to the question in the post-trial questionnaire about how convincing the defendant was. The mean response in the basic, tendency and joint trials was the same and the authors conclude that this suggests the jurors were not engaging in impermissible reasoning on the basis of character prejudice, although the results cannot rule out this possibility. The result is surprising given the significant differences in conviction rates between the trials. One possibility is that the question was perceived to be about presentation rather than the weight the juror gave to the defendant’s evidence.
- In relation to the analysis of juror comments and deliberations, the study found no juries in the tendency or joint trials impermissibly reasoned on the basis of character evidence. There is a severe limitation in the analysis because it considers only statements made during the course of deliberations. It was not uncommon for the jury to take an initial vote on each charge and, where there was unanimity, there was no deliberation and the reasoning process was not exposed. The study also found few instances of explicit permissible tendency reasoning, indicating that the analysis of the deliberations is not revealing the reasoning process.
- While the question asked of jurors as to the main reason for their verdict is designed to counter the limitations of the analysis of deliberations, a single quick response to the open-ended question is unlikely to reveal a prejudicial reasoning process. The underlying rationale for the limits on the admission to tendency and coincidence evidence are the potential unconscious effects which are difficult to consciously correct for. While the findings clearly show the lack of an overt impermissible reasoning process in most cases, they do not provide evidence about the risk of impermissible reasoning processes at the level they are generally considered to occur.

Evidence in relation to the Jury Reasoning Research

A number of expert witnesses gave evidence in relation to concerns or queries about the Jury Reasoning Research.

Mr Tim Game SC and Mr Peter Morrissey SC

Mr Tim Game SC and Mr Peter Morrissey SC gave evidence concurrently in Case Study 46 on 29 November 2016.

The following exchange occurred between Mr Game and the Chair:

- MR GAME: Can I ask a question? I'm asking you a question, Commissioner. How does one test, in an exercise like that, the dangers of impermissible reasoning without feeding something in to the study that involves impermissible reasoning?
- THE CHAIR: What was done was that their reasoning was analysed, and it was done, as you know, very thoroughly, and it didn't show problems. And I don't know how you would do the other.
- MR GAME: But as I understand it, the distinction was between introduction of tendency evidence and introduction of other counts. That can be material of the same kind, but how do you test feeding in material that involves impermissible – that is to say, wrong – reasoning and then test that?
- THE CHAIR: You mean irrelevant material?
- MR GAME: Material that involves an impermissible train of thought towards reasoning as to guilt, because you have to test the false reasoning.
- THE CHAIR: I'm not sure I'm understanding you.
- MR GAME: Well, the assumption behind the questioning is that the tendency evidence all involves permissible reasoning. I'm positing the position that one introduces something that involves impermissible reasoning, that is to say, that doesn't pass the test.¹⁹⁴³

Mr Morrissey said:

I wanted to add – if I may take 30 seconds on this? The efficiency issues are one thing. The prejudice is another. What you can't test for in a mock trial where they know that they're not actually dealing with a real, damaged individual or a potentially dangerous accused is that you'll never get that emotional hijacking, which is what we're concerned about, because they will just simply know: I know I'm doing an intellectual exercise and that's what I'll do. Their heart will never be troubled by the realities of a courtroom, which can be harrowing, and, if not properly managed, hijacking.¹⁹⁴⁴

Mr Stephen Odgers SC

Mr Stephen Odgers SC gave evidence concurrently with Mr Arthur Moses SC in Case Study 46 on 2 December 2016.

Mr Odgers said:

I would make the observation that it seems to me that one has to approach that research with some caution. For example, as I understand it, the research that was done with mock juries involved multiple allegations of child sexual abuse. I'm not aware that in any of the scenarios mock juries were actually informed that, for example, the accused had been convicted of an earlier offence or admitted that he had committed or that it was not in dispute.

So that highlights one point, which is that in those research scenarios, one of the greatest concerns about tendency evidence – that is, that a jury will be informed that the accused has, in fact, done that kind of act before – was not present in these scenarios, so that one risk of prejudice was not present. It was much more likely that the jury would be engaging in coincidence reasoning rather than in what I will call tendency reasoning. So that is an important qualification to the conclusions that have been drawn from that research report.

Another point to be made is – and I think Mr Morrissey made this on Tuesday – that the mock juries would have known that these were not real people; that, in fact, when they were being told about allegations it was a situation where it was unlikely that it would generate a kind of emotional response from awareness that a real person in front of you was in fact somebody who had engaged in child sexual abuse undoubtedly in the past.

So the concerns about emotional reactions, about undercutting the standard of proof as a result of awareness of somebody's previous significant misconduct, concerns about tendency to overweigh or give too much weight to such material – I have great concerns that the research would not, in the way it was conducted, have thoroughly elucidated those issues and that great caution should be taken in relying on the conclusions from that.¹⁹⁴⁵

Mr Odgers also said:

I am sorry, I accept that nothing was disclosed in the way they reasoned to show those kinds of prejudice. But what I'm saying to you is the information they were given was of a certain kind which, necessarily, in my view, meant that you wouldn't expect certain kinds of prejudice, because, for example, they were not told that the accused had, in fact, engaged in child sexual abuse on other occasions, which is one of the greatest concerns in this area; secondly, they weren't confronted by real world, as I've already pointed out and Mr Morrissey pointed out, so, therefore, you wouldn't expect an emotional response generated by such information; thirdly, just because juries don't, when they reason, appear to be engaged in prejudicial thinking or giving too much weight to material – one should be careful about this. One of the concerns is subconscious responses to information and that a

juror might, with the best will in the world, be affected in a way which is prejudiced by information but then, in order to justify their conclusion that the person should be convicted, will advance reasons explaining it which seem, on the face of it, entirely appropriate, and may not even be aware of the extent to which they've been prejudiced. I don't think studies of this kind will necessarily reveal those kinds of concerns.¹⁹⁴⁶

Researchers' response to comments and concerns

We have identified the following main issues raised in the submissions and evidence, and the researchers' response to them. The submissions and evidence, and the researchers' response, are available on the Royal Commission's website and should be read in full for a complete understanding of the issues.

Peer review

Some submissions raised concerns that the Jury Reasoning Research should be subjected to peer review.

The Jury Reasoning Research was peer reviewed by three eminent law and social science academics, two of whom are from outside Australia. All three have published works on jury decision-making and jury reform and were selected to provide a robust critique of both the study design and its findings.

All three assessed the research as suitable for publication. One reviewer noted that there are other ways of examining jury decision-making, and the limitations involved in only testing decision-making in the specific context of child sexual abuse offences, but accepted that the report's approach was a valid one. All comments received were passed onto the researchers, including on issues such as:

- more comprehensively reflecting the results of prior research on the topic
- better defining key terms, such as inter-case evidentiary conflation and character prejudice
- more clearly defining the different assessments of juror responses, such as self-reported cognitive effort
- adding some relevant references to case law and other academic writings
- typographical and formatting issues.

The researchers amended the final report of the Jury Reasoning Research to reflect these comments where they considered it appropriate and provided the Royal Commission with a response where they did not agree with the comments or did not consider amendments were appropriate. The quantitative methods and conclusions in the Jury Reasoning Research were also reviewed by the Royal Commission's internal research team.

We note that this process of peer review for the Jury Reasoning Research is consistent with the peer review process the Royal Commission adopted for its research program generally.

Study design

A number of submissions and witnesses raised concerns that research with mock juries cannot replicate the real world of a jury trial. Particular concerns were raised about the shortness of the trial and the lack of complexity compared to real trials; and the absence of emotional engagement that may arise in a real trial, particularly as mock jurors knew they were participating in a research experiment and not in a real trial.

The limitations of mock jury research are acknowledged in the Jury Reasoning Research.¹⁹⁴⁷ The researchers also responded in relation to the ecological validity of the research, and they responded in detail in relation to the particular concerns expressed in submissions and by some witnesses.¹⁹⁴⁸

We note that, before filming the mock trials, feedback on the realism and complexity of the scripts was sought from senior barristers and a judge of the New South Wales District Court. The mock trials in the Jury Reasoning Research were more realistic than most mock trials (this can be illustrated by comparing them to the mock trials used in the jury research cited by the ALRC and summarised in Appendix J).

Further, professional actors played the witnesses and accused, showing a variety of emotions when giving evidence, and the legal roles were played by experienced criminal law barristers and a District Court Judge. As to the emotional engagement, the researchers responded that the analysis of the deliberations showed that the mock jurors took their task seriously and were engaged by the trial materials and that the jury deliberations were often intense.

Some submissions raised concerns about unconsciously biased reasoning or the unconscious effects of tendency evidence. One submission suggested that the research relevant to this issue was not considered in the Jury Reasoning Research.

The researchers responded that the purpose of the scientific experimental design and random assignment of mock jurors to different experimental conditions, as occurred in the Jury Reasoning Research, is explicitly to take unconscious bias into account and expose it. One week before the mock trials, individual mock-jurors' pre-trial attitudinal biases were assessed with three validated psychometric scales to test the likelihood that their reasoning and verdicts would be motivated by character prejudice. The reporting of related effects sizes, significance tests and multi-level modelling also address unconscious bias.¹⁹⁴⁹

One submission raised concerns about the absence of a 'ground truth', which appears to be a concern that it is not known whether the accused in the mock trials committed the offences with which he was charged or which were the subject of tendency evidence.

The researchers responded that in real trials there is no ground truth, and ground truth is not established by a conviction or an acquittal. In mock trials, as in real trials, the jury performance is not assessed in light of ground truth. The researchers suggested that the submission might be referring to a 'detection of deception' research paradigm where ground truth is an issue, but the Jury Reasoning Research was not a detection of deception study.¹⁹⁵⁰

In relation to Mr Game's suggestion to the effect that impermissible reasoning should have been tested,¹⁹⁵¹ the researchers set out the passage from the transcript and responded:

The suggestion in the above comment is to test susceptibility to impermissible reasoning using another research method, for example, by placing a research confederate on the jury who deliberately engages in impermissible reasoning, to test whether other jurors resist or follow suit, and whether this impacts the ultimate jury verdict.

We agree that there are many different methodological approaches that can be used to assess the presence of or resistance to impermissible reasoning, each of which has its own advantages and disadvantages. Perhaps future researchers may adopt the type of approach proposed in the above comment. The approach we opted for was to provide juries with information about multiple allegations against the defendant, and observe how they responded, without contriving to mislead them; in other words, to assess jury decision-making in trials with different types of evidence, rather than placing jurors with different social persuasion strategies in the jury room, which is a factor outside the control of the court. In some juries in the JRR [Jury Reasoning Research], the events suggested by this comment arose spontaneously. In those deliberations, when one juror made a comment that reflected prejudicial reasoning, other jurors corrected this.¹⁹⁵²

Literature review

The Law Society of New South Wales raised concerns that the 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' (references omitted).¹⁹⁵³

The researchers responded that Professors Ellison and Munro have not studied jury reasoning in joint versus separate trials. The researchers state that Professors Ellison and Munro conducted non-experimental qualitative studies of mock jury decisions in adult sexual assault cases, and their work is not significant in the field of quantitative mock jury research because none of their findings is tested by the complex statistical analyses typically used in experimental jury research.¹⁹⁵⁴

The Law Society of New South Wales did not cite any particular publications by Professors Ellison and Munro. The Royal Commission obtained and reviewed six publications written by them, and the abstracts of those publications are set out in Appendix I.

Three articles reported on different aspects of a mock jury study involving 160 mock jurors. The other three articles reported on different aspects of a different mock jury study involving 216 mock jurors.

Each of the two mock jury studies conducted by Professors Ellison and Munro tested mock trials involving a charge of adult sexual assault, with a single complainant and a single accused. In each case, the accused admitted that sexual intercourse had occurred and the issue was the presence or absence of consent. In the mock jury study involving 160 mock jurors, the complainant and accused had previously been in an intimate relationship. In the mock jury study involving 216 mock jurors, the complainant and the accused were work colleagues.

These mock jury studies did not consider child sexual abuse offences, and they did not consider joint and separate trials or issues of tendency or coincidence evidence. Further, as the Jury Reasoning Research authors responded, Professors Ellison and Munro conducted non-experimental qualitative studies, not quantitative research employing the complex statistical analyses typically used in experimental jury research.

Professors Ellison and Munro's studies involved the recording, transcription and (non-statistical) analysis of the mock jury deliberations. They referred to the value of this as follows:

Though not without its own difficulties, amongst the benefits of mock jury research, it is submitted, is that it allows a richness to emerge within the data that cannot be captured via surveys or scales alone. Letting people talk freely in pursuit of their verdict generates vital insights into social, group, and individual reasoning. Not only does this yield methodological advantages in terms of verisimilitude to 'real' jury deliberation, it permits exploration of a fuller repertoire of beliefs than can be elicited by other mechanisms, which constrain participants' responses by limiting them in advance to responding to a predetermined set of myths.¹⁹⁵⁵

The Jury Reasoning Research captures these benefits of mock jury research. The Jury Reasoning Research was also able to capture greater benefits by conducting a much larger experiment involving many more mock jurors and applying complex statistical analyses to provide experimental results.

The Jury Reasoning Research was conducted with a total of 1,029 mock jurors allocated to 90 juries with 11 or 12 jurors per jury (and eight to 12 juries per experimental condition) to enable requisite statistical power to demonstrate a causal effect of a manipulated variable on an outcome, and to measure the effects of the jury group on reasoning in deliberation. The Jury Reasoning Research used mixed qualitative and quantitative methods. The statistical analyses took individual and group decision making into account by conducting multi-level analyses, and also considered the effects of pre-trial attitudes and biases on decision-making.

Professors Ellison and Munro assessed a total of 20 mock juries in one study and 27 mock juries in another study, each with eight jurors per jury. Due to the unit of analysis being juries and not individual jurors, and the overall low number of juries, the available power of the design precluded any causal inferences about the effects of the manipulated variables on the observed deliberations or verdicts. Thus, only descriptive analyses were feasible. The observed results may simply be random.

The studies by Professors Ellison and Munro may be of some relevance to the work of this Royal Commission to the extent that there is overlap between:

- rape myths in relation to adult sexual assault and myths and misconceptions about child sexual abuse
- methods that might improve jurors' understanding of adult sexual assault and child sexual abuse.

However, the studies by Professors Ellison and Munro are of no relevance to the issues of tendency and coincidence evidence or joint trials.

Definitions and measures of unfair prejudice

One submission raised concerns that the definitions of 'impermissible reasoning' and 'unfairness to the defendant' used in the Jury Reasoning Research were too narrow and that the concepts of impermissible reasoning and unfair prejudice are much wider.

The operational definitions applied in the Jury Reasoning Research and their derivation are explained in the Jury Reasoning Research.¹⁹⁵⁶ The researchers also responded that the purpose of the Jury Reasoning Research was not to document any and all forms of impermissible reasoning by juries or unfair prejudice.

In their response, the researchers cite a recent publication by Professors Saks and Spellman,¹⁹⁵⁷ which was published after the experiments reported in Jury Reasoning Research were concluded, to identify the types of unfair prejudice they examined – and did not examine – in the Jury Reasoning Research.¹⁹⁵⁸

The researchers state:

The balancing test regarding the probative value versus the unfairly prejudicial quotient of relevant evidence applies generally in all types of criminal and civil cases, although this topic has not been as widely researched as have many other psychological aspects of the rules of evidence. In considering all types of cases and all possible types of evidence, Saks and Spellman provided three examples of modes of improper jury decision making that might arise and comprise unfair prejudice, for example, when a jury decision is reached on unreliable or emotional grounds rather than a permitted logical basis related to the relevant evidence. Although their review was published after the JRR [Jury Reasoning Research] research concluded, the framework they applied matches the approach we used in the JRR, and their perspective is helpful in considering the submissions in response to the JRR.¹⁹⁵⁹

The researchers identify three types of impermissible reasoning described by Saks and Spellman as follows:

- reasoning evoked by a sense of outrage and sympathy for the victim in response to inflammatory evidence: ‘Something terrible happened, so someone must pay’
- reasoning inflamed by emotional responses to negative information about a particular defendant: ‘This guy is terrible; he should pay’
- mental contamination of the jury reasoning where evidence relevant for one purpose is (sensibly) but impermissibly applied for another purpose: ‘The (inadmissible) evidence suggests he did it’.¹⁹⁶⁰

The researchers explained that they focused on impermissible reasoning that might arise in joint trials rather than all three types of impermissible reasoning. Thus they focused on the second type of impermissible reasoning – ‘this guy is terrible; he should pay’.¹⁹⁶¹ They stated:

To examine the presence of this type of impermissible reasoning against the defendant in a joint trial, we differentiated three possible ways in which the additional negative information about the defendant’s previous abusive conduct might engender impermissible reasoning, namely (a) inter-case conflation of the facts; (b) accumulation prejudice; and (c) character prejudice.¹⁹⁶²

In section 25.1, we set out the reasons listed by McHugh J in *Pfennig* for restricting the admissibility of tendency and coincidence evidence and concerns about tendency and coincidence evidence expressed in different terms by other judges over time. It seems to us that these reasons and concerns are covered by the definitions of unfair prejudice used in the Jury Reasoning Research, at least to the extent that these reasons and concerns were relevant to the types of tendency and coincidence evidence being considered, as follows:

- The risk of creating undue suspicion against the accused which undermines the presumption of innocence, or that the jury will ignore the presumption of innocence and replace it with a presumption of guilt, is covered by character prejudice and possibly accumulation prejudice.
- The risk that juries assume too readily that behavioural patterns are constant and that past behaviour is an accurate guide to contemporary conduct, or that juries will convict because the previous misconduct shows the accused to be a bad person who should be punished, is covered by character prejudice and possibly accumulation prejudice.
- The risk of common assumptions about the improbability of sequences being wrong is covered by accumulation prejudice.
- The risk that the shocking facts of the other misconduct might cause a jury to be biased against the accused is covered by character prejudice.

- The risk that the jury will become confused and substitute an element from the other alleged misconduct for an unproven element in the present charge is covered by inter-case conflation prejudice.
- Concerns about lengthening trials to litigate the acts of other misconduct, or distracting the jury's attention from focusing on the real issues in the trial, do not arise in relation to joint trials where the acts of other misconduct are charged; this risk is considered by examining how juries used the tendency evidence in the tendency evidence trial.
- The risk that law enforcement officers might be tempted to rely on a suspect's antecedents rather than investigating the facts of the matter does not arise in child sexual abuse cases where the complainant names the accused; that is, the accused is charged because he is named by the complainant, not because he is a 'usual suspect'.
- The concern underlying the risk that rehabilitation schemes might be undermined if the accused's criminal record could be used in evidence against him or her is unclear:
 - To the extent that it reflects a concern that possession of a criminal record will be used to make the accusation, it effectively restates the 'usual suspect' concern which is addressed above.
 - To the extent it reflects a concern that possession of a criminal record will be used to wrongfully convict the accused on 'bad character' grounds, it is addressed by character prejudice and accumulation prejudice.
 - If it reflects a concern that an accused should not be convicted because it might undermine the accused's rehabilitation, this cannot be supported: if the accused is guilty, he or she should be convicted; the offender's prospects for and attempts at rehabilitation may be relevant to sentencing.

In further explaining the focus of the Jury Reasoning Research, the researchers refer to three key questions identified by Professors Saks and Spellman as relevant to a discussion of rules of evidence that allow courts to exclude relevant evidence when the danger of unfair prejudice outweighs its probative value:

- What is the actual probative value of the evidence?
- How probative will the jury think it is?
- Did the rule-makers, whether courts or legislatures, 'get it right' when creating the rule?¹⁹⁶³

In relation to the second and third questions, the researchers state:

Since the tendency evidence included in the simulated trials was admissible, the juries were entitled to use that evidence in reaching a verdict, and received guidance from the judge on how to use it. The focus of the JRR [Jury Reasoning Research] was the second

question specified by Saks and Spellman, i.e., how juries respond to tendency evidence, and in particular, whether juries used this evidence in a permissible versus and [sic – an] impermissible way.

The broader purpose of the JRR was to address the third question specified by Saks and Spellman, i.e., to generate information to determine whether judges' views of jury use of tendency evidence in a joint trial were accurate. In other words, the value of empirical research such as the JRR is to inform and refine legal policy.¹⁹⁶⁴ [Reference omitted.]

Accumulation prejudice

One submission raised concerns about how accumulation prejudice was measured because it arises from the effect of the jury being made aware of multiple allegations, not simply how many charges or counts there are or the number of witnesses called. Comparing trials with the same evidence but different numbers of charges (the tendency trials with two counts and the joint trials with six counts) and versions of the joint trial with different numbers of witnesses (four or six) does not test this.

The researchers responded:

In the JRR [Jury Reasoning Research] we defined accumulation prejudice as prejudice arising from multiple charges or counts and multiple witnesses. Although we did not define accumulation prejudice as arising from multiple allegations, this form of prejudice was nonetheless tested when we compared the case of the moderately strong complainant in the separate trial (two allegations) with the tendency evidence (six allegations; four uncharged) and joint trials (six allegations, all charged) ([Jury Reasoning Research] Report, pp. 94–154).¹⁹⁶⁵

One submission raised concerns that the finding that 'the factual culpability and conviction rates for the count based on the weakest evidence were not significantly elevated in the joint trial compared to the tendency evidence trial' should not be taken to controvert the accumulation hypothesis because there were no conviction rates in the tendency trial for the weakest claim, as it was not the subject of a charge. Further, there was not separate trial data for the weak case to provide a valid point of comparison.

The researchers agreed that there was no verdict measure to compare jury responses to the weak case in the tendency evidence trial and the joint trial. However, the factual culpability ratings, which were the researchers' proxy measure for verdict and were taken for individual jurors, were not significantly different between the two trial types and the accused was not rated more likely to have committed the charged act in the weak case in the joint trial compared with the tendency evidence trial.¹⁹⁶⁶

The researchers also responded that they tested the accumulation hypothesis by testing for differentiation between the weak and strong case in the joint trial, using verdict, factual culpability and other measures. They responded that the composite picture from these measures showed differentiation of the weak versus strong cases and that the cases were not treated alike.¹⁹⁶⁷ Further, the comparison of trial data for the weak case was made in the online juror study, which is in Appendix E of the Jury Reasoning Research.¹⁹⁶⁸

Character prejudice

One submission raised concerns that ‘character prejudice’ might arise because the accused is considered to be a person of bad character where, for example, the accused has admitted or does not dispute previous incidents.

The researchers agreed that there were no previous incidents of sexual abuse admitted by the accused. It may be that this concern is directed more at the fact that the Jury Reasoning Research does not test the influence of admitting prior convictions, or admitting the facts underlying prior convictions that the accused admits for the purposes of the trial, which was also raised in evidence in Case Study 46.

One submission raised concerns that the consistency of responses to the question about how convincing the defendant was across trial types – which the researchers suggest indicates that jurors were not engaging in impermissible reasoning on the basis of character prejudice – in spite of significant differences in conviction rates might mean that jurors perceived the question to be about presentation rather than the weight the juror gave to the defendant’s evidence.

The researchers responded that observed changes in the convincingness ratings for the moderately strong complainant across the different trial types controvert the suggested interpretation. Rather, the researchers responded that the difference in conviction rates appeared to be due to more evidence from credible sources and not character prejudice.¹⁹⁶⁹

Identifying reasons for verdict

One submission suggested that, where juries took an initial vote on charges, their reasoning would not be revealed in their deliberations, so studying the deliberations would not reveal the juries’ reasoning process.

The researchers disagreed with this concern. They responded that mock jurors who agreed with each other nonetheless articulated reasons for their views. Further, mock juries continued deliberating after taking votes and had much the same opportunity to discuss the evidence before and after taking their first vote. The researchers also responded that votes of guilty following only limited deliberation often related to the strong case and not to the moderately strong or weak cases.¹⁹⁷⁰

One submission raised concerns that the post-trial question asked of mock jurors as to the main reason for their verdict required a single quick response that would not be expected to reveal a prejudicial reasoning process.

The researchers responded by referring to the multiple methods they used to assess jurors' susceptibility to character prejudice, with the response to the post-trial question being only one method. Other methods included deliberation analysis, measures of individual juror bias and by comparing responses between trial types. Jurors were not rushed in making their responses. Further, response rates were compared across the trial types, and jurors had no information about the other trial types when they answered the question.¹⁹⁷¹

We discuss our conclusions about the Jury Reasoning Research and unfair prejudice in section 28.1.5.

26 Overseas approaches

26.1 Introduction

The Royal Commission commissioned then Associate Professor, now Professor, David Hamer of the University of Sydney to undertake a survey of the legal treatment of tendency, coincidence and relationship evidence in England and Wales, New Zealand, Canada and the United States. This research is published on the Royal Commission's website.

We also heard evidence about the position in England and Wales in Case Study 38.

In the Consultation Paper, we outlined the approaches in those jurisdictions as follows.

26.2 England and Wales

26.2.1 Introduction

The position in England and Wales in relation to the admissibility of 'evidence of bad character' has changed substantially with the enactment of the *Criminal Justice Act 2003* (UK) (CJA).

The position in England and Wales is of particular interest to the Royal Commission for a number of reasons, including the close historical association between the development of English and Australian common law. Following a Law Commission report, England and Wales abolished the common law rules governing the admissibility of propensity and similar fact evidence and replaced them with the statutory provisions enacted in Part 11, Chapter 1, of the CJA.

The English common law had a more liberal position on the admissibility of propensity and similar fact evidence than existed in Australia as a result of the High Court's decisions in *Hoch v The Queen*¹⁹⁷² and *Pfennig v The Queen*.¹⁹⁷³ However, the legislative provisions introduced in England and Wales were designed to make evidence of the defendant's bad character more readily admissible than the English common law had previously allowed.

Of the foreign jurisdictions that Professor Hamer reviewed, England and Wales have adopted provisions that are the most liberal in allowing the admission of tendency and coincidence evidence. They serve as a useful point of comparison to the various positions applying in Australian jurisdictions and as a useful model for possible reforms to Australian law. The English and Welsh provisions commenced on 15 December 2004, so there is now more than 12 years worth of practical experience available to assess the effectiveness – including the fairness – of the reforms.

26.2.2 Professor Hamer's research

The following is a summary of key aspects of the legal treatment of tendency, coincidence and relationship evidence in England and Wales identified by Professor Hamer.

Legal basis

The admissibility and use of tendency and coincidence evidence in England and Wales is governed by Chapter 1, Part 11, of the CJA.

Scope of the exclusionary rule

Section 101(1) of the CJA states that evidence of a defendant's bad character is admissible if, and only if, it satisfies one of seven conditions. These include that it is 'important explanatory evidence'¹⁹⁷⁴ or that it 'is relevant to an important matter in issue between the defendant and the prosecution'.¹⁹⁷⁵ The evidence is also subject to general tests of relevance and limited probative value.¹⁹⁷⁶

'Evidence of bad character' is defined as 'evidence of, or of a disposition towards' misconduct,¹⁹⁷⁷ with the exception of evidence either:

- that 'has to do with the alleged facts' of the charged offence
- 'of misconduct in connection with the investigation or prosecution of that offence'.¹⁹⁷⁸

'Misconduct' is defined in section 112(1) as 'the commission of an offence or other reprehensible behaviour'.

Propensity evidence and prior convictions

Professor Hamer states that section 101(1)(d) of the CJA provides a gateway for adducing evidence of a defendant's bad character to show a propensity for the commission of offences of the nature with which the offender is charged.¹⁹⁷⁹ Professor Hamer also states that this is a significant departure from the common law that propensity reasoning was forbidden.¹⁹⁸⁰ In order for it to be admissible, the bad character evidence must establish a propensity to commit offences of the kind charged and whether that propensity makes it more likely that the defendant committed the offence charged.¹⁹⁸¹

In discussing the number of previous offences needed to establish the propensity, Professor Hamer notes that instances of child sexual abuse are one of a subset of offences where a single previous conviction can be sufficient to establish that a propensity exists.¹⁹⁸² It may also be the case that the offences charged and those previously convicted can be quite different.¹⁹⁸³

Complainant or witness credibility and collusion

A recurring issue across jurisdictions is how the potential for collusion is addressed in cases where there are multiple complainants. The approach of the CJA is that the evidence is put to the jury for consideration as the triers of fact on the basis that section 109 states that, when considering the relevance or probative value of potential evidence, it is to be done on the assumption that the evidence is true.¹⁹⁸⁴ As an additional safeguard, section 107 of the CJA requires a judge to either direct a jury to acquit or order the discharge of the jury if the judge is satisfied at any time after the close of the prosecution case that bad character evidence has been admitted, the evidence is contaminated and the contamination would mean the conviction would be unsafe.¹⁹⁸⁵ Contamination may be either a result of deliberate collusion by witnesses or accidental or inadvertent.¹⁹⁸⁶

Relationship evidence

Professor Hamer describes ‘relationship evidence’ as ‘a useful descriptive term covering evidence of other (mis)conduct by the defendant towards the victim. Unlike evidence of “propensity”, for example, there is no specific provision for the admission of relationship evidence in the CJA’.¹⁹⁸⁷

Professor Hamer goes on to note that, for relationship evidence to be captured by section 101 of the CJA, it would need to fall within the definition of ‘reprehensible behaviour’. Also, if it is evidence of conduct in close proximity to the charged act, it may be considered to have ‘to do with the alleged facts’, which means that it is not within the definition of ‘bad character’ evidence.

If the relationship evidence is not excluded for these reasons and so it falls within s 101 of the CJA, it may be admissible under section 101(1)(c) as ‘important explanatory evidence’.¹⁹⁸⁸ Section 102 of the CJA states that information is ‘important explanatory evidence’ if ‘(a) without it, the court or jury would find it impossible or difficult properly to understand other evidence in the case, and (b) its value for understanding the case as a whole is substantial’.¹⁹⁸⁹

Evidence of prior acquittals

The CJA codifies the common law position of the time that the prosecution could adduce evidence of prior alleged offences as similar fact evidence even though the defendant had been acquitted. Professor Hamer points out that the assumption that the evidence is true (section 109) applies in cases where the defendant has been acquitted of an offence.¹⁹⁹⁰

Discretionary exclusion

Despite the provisions of section 101(1) regarding the admissibility of evidence, section 101(3) of the CJA requires the court not to admit evidence 'if, on an application by the defendant to exclude it, it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it'. Sections 103(2) and 103(3) have specific application to bad character evidence which has been led in relation to prior convictions if, because of the passage of time since the conviction or for any other reason, it would be unjust to admit the evidence.¹⁹⁹¹

Appeals and precedents

Professor Hamer notes that, because decisions of admissibility are often highly fact-specific, there will be little assistance in relying on previous cases.¹⁹⁹² He also notes that the Court of Appeal has indicated that it will not reverse decisions of trial judges unless they are 'plainly wrong' or discretion has been exercised unreasonably.¹⁹⁹³

Cross-admissibility and joinder of counts

In instances where charges relating to multiple victims are heard together, evidence will need to be assessed for admissibility in relation to each charge.¹⁹⁹⁴

26.2.3 Professor Spencer's evidence

In Case Study 38, we heard expert evidence from Professor John Spencer, Professor Emeritus of Law at the University of Cambridge, about the reforms adopted in England and Wales. The third edition of Professor Spencer's book, *Evidence of bad character*, was published later in 2016. Professor Spencer was involved in training judges in the English and Welsh provisions when they were first enacted, and his commentary on the provisions was published by the Judicial Studies Board of England and Wales.

Professor Spencer gave evidence that, generally, the issue with 'bad character' evidence (including tendency and coincidence evidence) is not that it is irrelevant to a consideration of the guilt or innocence of the defendant of the specific charges under consideration; rather, it is what weight should be given to that evidence. He said that evidence of prior offending can be relevant:

If you tie together the criminal statistics and, insofar as these suggest the increased likelihood of somebody with a record re-offending, and look at it against the likelihood of somebody without a criminal record offending, you find it is significantly more likely, and this is particularly so if we are talking about the repetition of the same kind of offence which the defendant was convicted of on the first occasion. As scientists of human behaviour say, nothing predicts behaviour like behaviour.¹⁹⁹⁵

He also explained that such evidence can be unfairly prejudicial in a weak case:

The danger comes if somebody is prosecuted where there is really little a fortiori no evidence linking the defendant with the offence, and evidence of bad character is put in to try to show he is guilty. At the very best, evidence of the defendant's bad character or of his misconduct on other similar occasions is only circumstantial evidence, usually relatively weak circumstantial evidence, and it, to my mind, is justifiable to admit it to supplement a case which already exists, but it is not satisfactory to admit it in order to substitute for a case that does not otherwise exist.¹⁹⁹⁶

Professor Spencer's evidence addressed the current statutory provisions in the CJA, which provide for the admission of bad character evidence under seven distinct gateways. The fourth gateway is most relevant for our consideration of the issues. Under section 101(d), the fourth gateway allows evidence to be admitted where 'it is relevant to an important matter in issue between the defendant and the prosecution'. Section 103(1) clarifies that matters in issue between the defendant and prosecution include the question of 'whether the defendant has a propensity to commit offences of the kind with which he is charged, except where his having such a propensity makes it no more likely that he is guilty of the offence'.

In terms of restricting the admission of such evidence, section 101(3) provides that the court must not admit evidence under section 101(1)(d) if, on an application by the defendant to exclude it, it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.¹⁹⁹⁷

Professor Spencer noted that this inevitably leaves significant discretion to judges to exclude evidence and retains a situation where the important issue of admitting tendency or coincidence evidence will inevitably come down to a subjective decision. In this regard, Professor Spencer said:

I think the change that we made in 2003 has certainly resulted in more evidence of bad character going before the court, but it certainly hasn't produced a new scenario in which you always know whether it will go in ...

I think some room has to be left to the sense of the judge who is in charge of the case. There are Court of Appeal cases which discourage judges from inventing their own versions of the new law in various ways, but essentially I think there has to be an assessment by the court of the overall fairness.¹⁹⁹⁸

Professor Spencer expressed the opinion that, despite the subjectivity retained in the provisions, part of the reason for a less restrictive approach being adopted as a result of the introduction of the provisions is that the Court of Appeal made clear that Parliament's intention in introducing the provisions was to 'wipe the slate clean'; hence, any restrictive common law that existed before the introduction of the provisions was no longer relevant.¹⁹⁹⁹

Professor Spencer also expressed his view that the changes had not led to an increase in unsafe convictions:

contrary to some predictions, there has been no suggestion that this change in the law has resulted in an increase of unsafe convictions. In fact, I can't think of any case which attracted much attention after the Act where the Court of Appeal has quashed a conviction in a case where you would think, 'My God, that evidence should never have been admitted.'²⁰⁰⁰

Professor Spencer's evidence also addressed the operation of section 107 of the CJA, which provides for circumstances where it is clear that evidence is contaminated. Professor Spencer pointed out that the court's power to direct an acquittal or order a retrial only arises where the court is certain that the evidence is contaminated, such that a conviction would be unsafe. Where there is a mere risk of contamination, the matter is left to the jury.²⁰⁰¹

26.3 Canada

The following is a summary of key aspects of the legal treatment of tendency, coincidence and relationship evidence in Canada identified by Professor Hamer.

26.3.1 Legal basis

In Canada, tendency and coincidence evidence is known as similar fact evidence and is governed by the common law. Canadian discussions of the law use the terms 'propensity' and 'coincidence', but Canadian law does not appear to draw a clear distinction between the two types of evidence.²⁰⁰²

26.3.2 Scope of the exclusion

Historically, there have been two different approaches adopted in interpreting the scope of the exclusion of similar fact evidence. Under the broad interpretation, any evidence revealing the defendant's misconduct is inadmissible. The narrower approach is that evidence will only be inadmissible if it has been adduced for the purpose of propensity reasoning. Professor Hamer notes that it is unclear which interpretation is in force.²⁰⁰³

26.3.3 The admissibility test: probative value versus prejudicial risk

These considerations of the purpose of propensity evidence have been overtaken by a new common law framework in which evidence is to be admitted if the prosecution can show that its probative value outweighs its prejudicial risk. This has represented a shift towards a more

principles-based approach to determining the admissibility of evidence.²⁰⁰⁴ Professor Hamer notes that, despite this change, Canadian cases have in some instances made determinations of admissibility on the basis that ‘mere propensity’ will always be inadmissible.²⁰⁰⁵

Professor Hamer suggests that statements such as these should be interpreted as meaning that, to gain sufficient probative value for admission, evidence must show a specific or distinctive propensity rather than a general one.²⁰⁰⁶

Quoting the Canadian case of *R v Handy*²⁰⁰⁷ (*Handy*), Professor Hamer identifies two main forms of prejudice that can arise from similar fact evidence:

The danger is that the jury might be confused by the multiplicity of incidents and put more weight than is logically justified on the ex-wife’s testimony (‘reasoning prejudice’) or by convicting based on bad personhood (‘moral prejudice’).²⁰⁰⁸

In measuring evidence’s probative value, the proposed evidence must be relevant to a genuine ‘live issue’, which must be framed with a certain level of specificity. For example, in *Handy*, the Supreme Court of Canada found that adducing similar fact evidence as evidence relevant to the complainant’s credibility was too broad.²⁰⁰⁹

There are contrasting positions as to what constitutes sufficient probative value. Some cases relied on the test in the English case of *Boardman*²⁰¹⁰ that the earlier offence needed to share a ‘striking similarity’ with the matter currently before the courts.²⁰¹¹ While subsequent authorities have held that this is not always the case, the similarity between the charged offence and the other misconduct will be a consideration. Professor Hamer notes that, in *Handy*, the Canadian Supreme Court put forward seven factors to consider in determining the connection between other misconduct and the charged offence, including the proximity in time and place of the similar acts, the number of occurrences and whether there were any distinctive features unifying the incidents.²⁰¹²

As is the case in England and Wales, Professor Hamer notes that the discretionary and contextual nature of applying the principles of admissibility means that higher courts are reluctant to override a trial judge’s decision on admissibility.²⁰¹³

26.3.4 Admissibility in child sexual assault cases

Unlike the position in England and Wales, where child sexual assault offences were considered to be sufficiently unusual that a single previous offence could give rise to an argument for propensity, the Canadian position is that there are no special rules in relation to child sexual abuse cases and the probative value must be sufficiently strong to outweigh the ‘reasoning prejudice’ and ‘moral prejudice’ discussed above.²⁰¹⁴

The Canadian position also appears to require a closer connection between the offence for which the defendant has been charged and the similar fact evidence. Hamer refers to the case of *Shearing v The Queen*,²⁰¹⁵ where the defendant was charged with 20 sexual assaults against 11 young women and adolescent girls in the setting of a spiritual organisation. For one group of matters the issue was consent; in the other group it was of commission. The prosecution sought that evidence in all cases be cross-admissible. The court held that, while the sexual acts themselves were not particularly distinctive, the modus operandi of the defendant was 'distinctively bizarre' and was sufficient for the admissibility test to be satisfied.²⁰¹⁶

26.3.5 Risk of collusion among multiple alleged victims or complainants

Unlike the position in England and Wales, the consideration of collusion is made at the point of admissibility rather than at the completion of the case of the prosecution. Canadian courts view the House of Lords decision in *Boardman* as authority that similar fact evidence was inadmissible if there was a possibility of collusion, although the defence bears the initial burden of raising the possibility of collusion.²⁰¹⁷ If an 'air of reality' to the claim of collusion is established, the prosecution will bear the burden of negating collusion on the balance of probabilities. If the evidence is admissible, the trial judge should instruct the jury on the risk of collusion.²⁰¹⁸

26.3.6 Relationship evidence

As outlined above, there is both a narrow and a broad approach to the exclusion of propensity evidence. If relationship evidence is led for the purpose of providing context and understanding for the jury rather than for the purpose of establishing the defendant as a person of bad character, under the narrow interpretation it could be admitted (subject to the general principle of probative value outweighing prejudicial risk). Under the broad interpretation, it will not be admissible unless it satisfies the admissibility test because it has a lower risk of prejudice.²⁰¹⁹

26.3.7 Prior convictions and acquittals, and admitted and disputed other misconduct

There are relatively straightforward processes for adducing previous convictions in Canada. However, for other matters, the degree to which the defence disputes prior misconduct may affect the assessment of probative value and prejudicial risk to determine whether it is admissible.²⁰²⁰ Unlike the position in England and Wales, there is also authority that the prosecution may be estopped from adducing evidence which relates to previously prosecuted acts which resulted in acquittal or which were stayed due to lack of prosecution evidence.²⁰²¹

26.3.8 Severance

Where the prosecution is proceeding on the basis of complaints from a series of alleged victims, charges relating to different complainants may be joined in a single indictment. Professor Hamer notes that a finding of inadmissibility of evidence in relation to one count is a strong basis for an argument for severance.²⁰²²

26.4 New Zealand

The following is a summary of key aspects of the legal treatment of tendency, coincidence and relationship evidence in New Zealand identified by Professor Hamer.

26.4.1 Legal basis

Admissibility of tendency and coincidence evidence is governed by Subpart 5 of Part 2 of the *Evidence Act 2006* (NZ).²⁰²³

26.4.2 Scope of exclusion

There is no distinction drawn between tendency and coincidence evidence. Propensity evidence is generally inadmissible but can be admitted if its probative value outweighs its prejudicial risk.²⁰²⁴ However, the Supreme Court of New Zealand has held that there is limited value in considering case law that existed before the Evidence Act commenced.²⁰²⁵

‘Propensity evidence’ is defined by section 40(1)(a) of the Evidence Act as ‘evidence that tends to show a person’s propensity to act in a particular way or to have a particular state of mind, being evidence of acts, omissions, events, or circumstances with which a person is alleged to have been involved’. The exclusion applies to any evidence that tends to show a propensity; it is not limited to evidence adduced for propensity reasoning.

Professor Hamer notes that this definition of propensity evidence in New Zealand is broader than in the other jurisdictions in the report – it includes evidence revealing a defendant’s other misconduct and potential propensity for misconduct, even if the evidence is not being used for a propensity purpose.²⁰²⁶

26.4.3 Probative value and prejudicial effect

The approach to assessing probative value is set out in sections 43(2) and 43(3) of the Evidence Act. Section 43(2) of the Evidence Act requires the judge to take into account the nature of the issue in dispute.

Professor Hamer discusses the case of *N v R*,²⁰²⁷ which illustrates the importance of identifying the nature of the issue in dispute. The defendant faced charges of digitally penetrating a 12-year-old while she was asleep and intoxicated. The defendant had previously pleaded guilty to a charge of sexual intercourse with a 13-year-old girl on the basis it was consensual. The court held that the prior conviction would be admissible to demonstrate a sexual attraction to pubescent girls if the issue was the identity of the offender. However, if the defendant admitted the indecent assault but denied penetration, the prior conviction would be inadmissible.²⁰²⁸

Section 43(3) provides a non-exhaustive list of factors to be considered in assessing probative value, including the frequency and the extent of the similarity between the other acts or omissions and the charged acts.²⁰²⁹

In the case of *Mahomed v The Queen*,²⁰³⁰ the majority of the Supreme Court indicated that each should be considered. In *R v Healy*,²⁰³¹ the Court of Appeal noted that the requirement is not to perform a tallying exercise but to provide an overall assessment against the criteria in section 43(3).²⁰³²

The New Zealand case law tends to recognise that child sexual abuse offending involves an unusual class of offender and that a single previous incident can have sufficient probative value. The courts tend not to attach great significance to differences in detail between the acts involved in child sexual abuse.²⁰³³ However, it does arise in some cases. In *D v The Queen*,²⁰³⁴ it was held that pornography on the defendant's computer showing adults having sexual contact with children was inadmissible on charges of sexual grooming and indecent assault of a 15-year-old.²⁰³⁵

Section 43(4) of the Evidence Act sets out mandatory considerations for the judge regarding prejudicial effect. The judge must consider whether:

- the evidence is likely to unfairly predispose the fact-finder against the defendant
- in reaching a verdict, the fact-finder will tend to give disproportionate weight to evidence of other acts or omissions.

There is also a general consideration of prejudice in section 8(2), which states that, when considering whether the probative value of evidence is outweighed by its risk of prejudicial effect, consideration must be given to the defendant's right to an effective defence.²⁰³⁶

The burden is on the prosecution to establish admissibility under section 43 and on the defence to exclude evidence under section 8.²⁰³⁷ If evidence is admitted under section 43, there is no scope for it to be excluded under section 8. The trial judge is seen to have considerable discretion in applying the balancing test under section 43.²⁰³⁸

26.4.4 Complainant credibility and collusion

Section 43(3)(e) specifically permits the judge to consider ‘whether the allegations ... may be the result of collusion or suggestibility’ in assessing the probative value of the evidence.²⁰³⁹

26.4.5 Relationship evidence

Professor Hamer notes there is no specific definition of ‘relationship evidence’ in the New Zealand legislation.²⁰⁴⁰ Given the broader nature of the exclusionary rule operating in New Zealand, relationship evidence faces a correspondingly increased barrier to admissibility. However, Professor Hamer references the suggestion of Mahoney et al that relationship evidence is a ‘common example where propensity evidence is admitted despite a lack of marked similarity with the offence being tried’.²⁰⁴¹

Professor Hamer notes the Court of Appeal’s decision in *Perkins v The Queen*,²⁰⁴² which suggests that relationship evidence is adduced for reasons other than propensity purposes and is likely to involve less risk of unfair prejudice. However, he suggests that propensity reasoning could still be applied to such evidence if it portrayed the offender as violent. He says that the Supreme Court in *Mahomed v The Queen* held that evidence adduced to explain family dynamics should have been ruled inadmissible.²⁰⁴³

26.4.6 Acquittals

Evidence of other misconduct may be admissible as propensity evidence even if the accused has been acquitted of charges in relation to that misconduct. However, Professor Hamer suggests that courts may be reluctant to effectively retry the earlier charges, although they may more readily admit the evidence if it is stronger than it was at the original trial.²⁰⁴⁴

26.4.7 Severance

In New Zealand, the cross-admissibility of propensity evidence is generally decisive in determining whether a joint trial will be allowed, although the decision is discretionary and justice may require that a joint trial be allowed where charges are so connected even though the evidence is not cross-admissible.²⁰⁴⁵

26.5 United States of America

Professor Hamer provides a less detailed overview of the relevant law in the United States for the following reasons:

- the approach in the United States is very different from that in Australia, England and Wales, Canada and New Zealand – it represents a more absolute exclusionary rule which could be considered to be at an earlier stage of development
- the law in the United States is extremely inconsistent
- the institutional structure of the United States law and courts is complex, and this makes it difficult to provide a succinct statement of the law and its interpretation.²⁰⁴⁶

26.5.1 Scope of the exclusion

Professor Hamer identifies that the current American common law and statutory principles closely reflect the position of earlier Australian common law, as reflected in *Makin v Attorney-General for New South Wales*.²⁰⁴⁷

Further, he notes Federal Rule of Evidence 404(b)(1), which states that '[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character'.²⁰⁴⁸

26.5.2 Categories of admissibility

While propensity evidence will be excluded if it is sought to be adduced for a propensity purpose, statute and case law both provide for the admissibility of propensity evidence for other purposes, including proving motive; opportunity; intent; preparation; plan; knowledge; identity; absence of mistake; or lack of accident.²⁰⁴⁹

Professor Hamer identifies the historical attachment to constitutional rights in the United States as one reason why the absolute prohibition on propensity evidence (for a propensity purpose) remains. He notes that there are linkages between the right to a fair trial and presumption of innocence; and the right not to be tried on the basis of character.²⁰⁵⁰ However, Professor Hamer notes that the absolute prohibition has proved unsustainable in practice, as propensity evidence is often adduced for other purposes without ensuring that the evidence does not entail propensity reasoning.²⁰⁵¹

26.5.3 General categories of admissibility in child sexual assault cases

Professor Hamer notes that the tendency to admit other-misconduct evidence appears to be stronger in sexual abuse cases. He notes that the exception relating to demonstrating a plan, where the other-misconduct evidence and the charged offence should be strongly connected to support an inference that the defendant formed a single continuing conception or plot, has been relaxed to the extent that Mueller and Kirkpatrick suggest the ostensible basis of admission ‘often smacks of a thin fiction that merely disguises what is in substance the forbidden general propensity inference’.²⁰⁵²

Professor Hamer identifies similar relaxation of the general exclusion in relation to matters of identity and to negate accident or mistake.²⁰⁵³ Prosecutors may also argue that evidence relies on coincidence reasoning rather than propensity reasoning in that evidence is adduced to support an argument that it is unlikely for the accused to accidentally touch his daughter’s genitalia on so many occasions.²⁰⁵⁴ Further cases arise in the categories of motive or to provide background on the alleged offence.²⁰⁵⁵

26.5.4 Specific provision for admissibility in child sexual assault cases

Professor Hamer notes that some jurisdictions have created specific provisions enabling the admissibility of propensity evidence in relation to child sexual offences.²⁰⁵⁶

Professor Hamer suggests the most significant of these are Federal Rules of Evidence 413 and 414, which enable admission of evidence of other sexual assaults or any child molestation in relation to charges of sexual assault or child molestation, respectively. This enables the evidence to be ‘considered on any matter to which it is relevant’. He notes commentary that these provisions have been subject to widespread criticism.²⁰⁵⁷ Justifications for these provisions include studies that demonstrate that the comparative propensity for sex offenders is particularly high²⁰⁵⁸ and that it is necessary to overcome under-enforcement of child sexual assault and the associated difficulty in finding corroborative evidence.²⁰⁵⁹

Professor Hamer notes a number of difficulties arising in the application of these rules. These include technical issues due to the exhaustive lists of offences for which this type of evidence can be adduced and equally specific requirements for the prior offences, which may be too narrow to include some evidence of grooming or sexual elements in other offences (such as murder).²⁰⁶⁰

26.5.5 Discretionary exclusion

Evidence which may be admissible through one of the exceptions to the exclusionary rule may be ruled inadmissible through the exercise of a general discretion such as that set out in Federal Rule of Evidence 403:

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.²⁰⁶¹

26.5.6 Standards of proof

Professor Hamer notes that some courts apply a particular standard of proof to other-misconduct evidence at the admissibility stage, including 'sufficient ... to support a finding by a jury', 'substantial' and 'clear and convincing'. If the evidence satisfies these standards, it may be admitted even though the accused has previously been acquitted on charges relating to the evidence.²⁰⁶²

27 Our consultations on tendency and coincidence evidence

27.1 Introduction

We have obtained evidence and opinions on the law in relation to tendency and coincidence evidence on a number of occasions at different stages in our work on criminal justice issues.

In particular, we obtained evidence and opinions on the law in relation to tendency and coincidence evidence:

- through obtaining the opinion of Mr Tim Game SC, Ms Julia Roy and Ms Georgia Huxley of the New South Wales Bar
- in Case Study 38 through hearing from a number of expert witnesses in the first week of the public hearing and in obtaining the opinion of Counsel Assisting following the public hearing
- through submissions in response to the Consultation Paper
- in Case Study 46 through hearing from a number of witnesses in relation to issues raised in the Consultation Paper and in the model Bill we published for consultation
- through submissions in response to the model Bill.

A number of individuals and organisations have contributed to our work on this issue on more than one occasion. In this chapter, we seek to consolidate the evidence and opinions we have received at various stages from individuals and organisations in a manner that does the evidence and opinions justice while avoiding unnecessary repetition. We outlined the views that Professor John Spencer, Professor Emeritus of Law at the University of Cambridge, expressed as an expert witness in the public hearing in Case Study 38 in section 26.2.3, and we do not repeat them here.

Inevitably, the best and fullest accounts of the evidence and opinions will be the transcripts of the public hearings and the opinions and submissions themselves. With the exception of some confidential submissions, these transcripts, opinions and submissions are all published on the Royal Commission's website.

In this chapter, we outline:

- the discussion in the Consultation Paper in relation to tendency and coincidence evidence, including a discussion of Counsel Assisting's opinion, in respect of which we sought submissions and which was discussed in evidence in Case Study 46
- the model Bill, in respect of which we sought submissions and which was discussed in evidence in Case Study 46
- what we were told in evidence and submissions by the following groups of stakeholders and witnesses:

- survivor advocacy and support groups
- statutory Victims of Crime Commissioners
- governments and government agencies
- Directors of Public Prosecutions (DPPs)
- members of the private Bar giving a defence counsel perspective
- legal bodies and representative groups
- the judiciary
- academics.

We outlined opinions and evidence given in submissions in response to the Consultation Paper and in the public hearing in Case Study 46 about the Jury Reasoning Research in section 25.3.5. We do not repeat that material in this chapter.

27.2 Consultation Paper and Counsel Assisting's opinion

27.2.1 Discussion in the Consultation Paper

In the Consultation Paper, we stated that a rational argument could be made that the courts' concerns about unfair prejudice are misplaced and, as a consequence, relevant evidence, in the form of tendency and coincidence evidence, has unnecessarily been kept from juries. As a consequence, there are likely to have been unjust outcomes in the form of unwarranted acquittals in institutional child sexual abuse prosecutions.

We expressed our agreement with Counsel Assisting's observation that:

A number of the case studies examined during the public hearing [in Case Study 38] suggest there have been unjust outcomes in criminal trials in Australian courts involving the sexual abuse of children in institutional settings. Of fundamental concern is the unwarranted severance of indictments where there is more than one complainant. In circumstances where an accused has occupied a position of authority in an institutional setting and where there are a number of separate allegations of sexual abuse, a decision that a separate jury should hear each complainant's account can often distort the true picture and be quite misleading. The case studies of Maguire and Noyes are good examples.²⁰⁶³

We also expressed our agreement with Counsel Assisting's observation that:

The criminal justice system in the Anglo-Australian tradition has long manifest strong concern for the rights of persons accused of serious crimes. Such concern is, of course, entirely appropriate. But it also must be recognized that the criminal justice system ill-serves society if its rules are weighted to favour accused persons without due cause, such as to promote acquittals of persons who are in fact guilty of serious crimes and who may continue to be a threat to vulnerable members of the community.²⁰⁶⁴

We stated that the aim of the criminal justice system is the conviction of the guilty and the acquittal of the innocent. The avoidance of wrongful convictions has played and will continue to play a fundamental role in the development of the criminal law in this area. It is for this reason that, in a criminal trial, the jury must return a not guilty verdict unless satisfied beyond reasonable doubt of an accused person's guilt of the offences charged.

However, as the Australian Law Reform Commission (ALRC), the New South Wales Law Reform Commission (NSW LRC) and the Victorian Law Reform Commission (VLRC) state in their 2005 *Uniform Evidence Law: Report*, 'there is a stark conflict between the policy objectives of receiving all probative evidence and minimising the risk of wrongful conviction'.²⁰⁶⁵

Based on what we had heard to the date of the Consultation Paper and the research and other materials we had considered at that time, we stated that we were then reasonably satisfied that the current law needed to change to facilitate more cross-admissibility of evidence and more joint trials in child sexual abuse matters.

Together with the low conviction rates and the recognition that juries regularly return different verdicts on different counts, we considered that the Jury Reasoning Research provided strong support for the view that the courts' long and strongly held concerns about tendency and coincidence evidence were misplaced.

We observed that, while the Uniform Evidence Act has moved substantially from the common law position, we had seen no evidence and heard no suggestion of injustices arising as a result of these changes. As Counsel Assisting stated:

The Uniform Evidence Act, for example, sets a lower threshold for admissibility [than the common law in Queensland], and has been in operation in at least NSW for over 20 years (since 1 September 1995). Yet there has been no serious argument made, so far as we are aware, that the lowering of the threshold in that Act has led to an increase in miscarriages of justice ...²⁰⁶⁶

Similarly, we observed that, while the Western Australian provisions – at least as they are applied in Western Australia – have moved further than the Uniform Evidence Act, again we had seen no evidence and heard no suggestion of injustices arising as a result of these changes.

Finally, we observed that the position in England and Wales had moved even more substantially than any of the positions applying in Australian jurisdictions, and again we had seen no evidence and heard no suggestion of injustices arising as a result of these changes, which had been in operation for more than 11 years.

Counsel Assisting expressed the view following Case Study 38 that:

The public hearings [in Case Study 38] provided a basis for concluding that the location where an offence or offences was allegedly committed may have a significant bearing on whether an alleged offender is convicted or acquitted.²⁰⁶⁷

In the Consultation Paper, we stated that we regarded this as both a significant concern and a significant impetus for reform.

We also expressed our agreement with Counsel Assisting's opinion that:

The legal principles relied upon to justify separate trials have at times appeared, in practice, as being pedantic, unreal or illogical. On occasions the outcomes of the resulting separate trials have appeared to be unjust because the tribunal of fact (usually a jury) has never been given the complete picture.²⁰⁶⁸

We stated that we knew enough about institutional child sexual abuse – including from the examples we considered in Case Study 38 and from the research report by Dr Karen Gelb, *A statistical analysis of sentencing for child sexual abuse in institutional contexts* (Sentencing Data Study) – to understand that some perpetrators of institutional child sexual abuse offend against multiple victims, including in some cases both girls and boys and children of quite different ages, and that they offend in a variety of ways.²⁰⁶⁹

We stated that the test for admitting tendency and coincidence evidence should not require degrees of similarity that are inconsistent with evidence of the variety of child sexual abuse offending committed by individual offenders. We stated that this is particularly the case where the identity of the alleged offender is not in issue.

We also expressed our agreement with Counsel Assisting's criticism of the Victorian Court of Appeal's decision in *PNJ v DPP*²⁰⁷⁰ (*PNJ*): while the court says that allegations of such acts of sexual abuse are 'sadly, unremarkable', this does not undermine the significance of a number of complainants making allegations against one particular accused. As Counsel Assisting stated, 'the force of the coincidence evidence lies in a number of complainants making an allegation against a particular person in authority'.²⁰⁷¹

We expressed our concern that exclusion of relevant evidence leaves some complainants – and other prosecution witnesses – in real difficulty in giving their evidence: they are told to tell the whole truth, yet they are prevented from doing so. Through no fault of their own, they are at risk of looking less credible and reliable to the jury when they give their evidence if they have to carefully monitor what they say to avoid saying anything they have been told cannot be said. We referred to the prosecutions of John Maguire and David Rapson as examples of this problem.

Having concluded that we were reasonably satisfied that the current law needs to change to facilitate more cross-admissibility of evidence and more joint trials, we stated that it was not yet clear to us how this could best be achieved. We sought the assistance of all interested parties on this issue.

In relation to the Uniform Evidence Act approach, we stated that it was not clear to us that the distinctions between tendency and coincidence evidence reflect how people – including jurors – reason. We suggested that rigid distinctions between tendency and coincidence evidence may be artificial.

We noted Counsel Assisting’s opinion that ‘there is inherent overlap between the two types of evidence’; that, in institutional child sexual abuse cases, tendency evidence will often reveal conduct with a variety of common features, while coincidence evidence will reveal a tendency of the accused to act in a particular way; and that ‘In a sense, thus, coincidence evidence can be seen substantially as a subset of tendency evidence’.²⁰⁷²

We stated that another significant concern with the Uniform Evidence Act approach was that it allows restrictions on admissibility that go too far in excluding tendency and coincidence evidence, with *PNJ* providing a key example in relation to coincidence evidence.

We stated that what we had learned through public hearings and private sessions made it very clear to us that the institutional context is often key to the perpetrator’s offending. That offending may then take a variety of forms depending on many factors, including which victims are available and how particular victims respond to the abuse.

We stated that it was not clear to us why charges in relation to such victims should not be tried together with cross-admissible evidence, trusting juries – with the assistance of any judicial directions – to assess the evidence appropriately. In particular, searching for distinctiveness – in the sense of unusual ways of committing sexual offences – or high degrees of similarity in the alleged offending against different complainants risks excluding highly probative evidence, particularly where the identity of the accused is not in issue.

We noted that the suggestion in *Bayley v The Queen*²⁰⁷³ that, following *IMM v The Queen*²⁰⁷⁴ (*IMM*), evidence that would have been ruled inadmissible for concerns about reliability may now be ruled inadmissible for lack of significant probative value, highlights the uncertainty and the different approaches that may be accommodated under the Uniform Evidence Act ‘significant probative value’ test.

We suggested that the Western Australian approach seems preferable, at least as it operates in Western Australia. However, a difficulty appears to be that the first limb of the test is the same ‘significant probative value’ test that applies under the Uniform Evidence Act. We suggested that, if this was adopted in other jurisdictions, it is possible that the Western Australian provisions would be given a more restrictive interpretation than the one that applies in Western Australia, and they may result in little change.

We also suggested that there appears to be significant merit in the approach adopted in England and Wales. Given the likely unjust outcomes that have resulted from the courts’ misplaced concerns about unfair prejudice, we suggested that an approach that allows more relevant evidence to be placed before juries was appealing. We suggested that, if a more

specific test cannot be designed to ensure that courts will not be able to continue to exclude tendency and coincidence evidence from juries because of misplaced or unproven concerns about unfair prejudice, the best available approach might be a test of mere relevance or the approach in England and Wales.

We expressed the view that it seemed reasonably clear that the risk of collusion, concoction or contamination should be a matter that is left to the jury, particularly following the High Court's decision on this point in *IMM*, albeit by a slim majority of 4:3. We stated that it also seemed reasonably clear that tendency or coincidence evidence should not be required to be proved beyond reasonable doubt.²⁰⁷⁵

We concluded by stating that we remained open to considering submissions that the current law does not need to change. We recognised that, given the complexity of these issues and the extent to which they have troubled the courts for many years, reform was likely to be challenging. We stated that we wanted to be confident that any reforms we proposed would achieve the desired outcomes and would not have unintended consequences.

27.2.2 Counsel Assisting's opinion

Counsel Assisting the Royal Commission in Case Study 38, Mr Jeremy Kirk SC and Mr David Barrow, provided an opinion on the issues examined in the first week of the public hearing. This opinion was published on the Royal Commission's website at the same time as the Consultation Paper was published.

In their opinion, Counsel Assisting outlined the relevant tendency and coincidence provisions in Australian jurisdictions and in England and Wales and the evidence heard in the first week of Case Study 38. They also set out some key issues for consideration in assessing the need for reform in this area of the law.

In considering possible options for reform, they noted that little enthusiasm was expressed in the public hearing for a return to a pure common law approach and that the South Australian provisions offered no obvious advantages over other approaches. Rather than focusing on the precise provisions in the Uniform Evidence Act, the Western Australian provisions or the *Criminal Justice Act 2003* (UK) in England and Wales, Counsel Assisting identified the following fundamental variables in testing the admissibility of tendency and coincidence evidence:

- In terms of assessing probative force, is it sufficient if the evidence is relevant (the test applied to all evidence) or should it have to pass some higher test, such as being of significant probative value?
- In assessing whether the probative value outweighs the unfair prejudicial effect of the evidence, should the balance be presumptively struck in the accused's favour, so that the evidence is only admitted if, for example, the probative value substantially outweighs any unfair prejudicial effect?

- Tied to that consideration, should the burden of persuasion be on the prosecution (seeking to persuade the judge that the evidence is admissible) or on the accused (seeking to persuade the judge that the evidence should be excluded)?²⁰⁷⁶

From this starting point, they considered the arguments in favour of possible different approaches as follows:

- **Uniform Evidence Act approach:** Counsel Assisting identified the main arguments in favour of adopting the Uniform Evidence Act approach as follows:
 - The approach is now well established.
 - There is no evidence it has caused undue harm or risk to defendants.
 - It has led to a more liberal approach to admission of tendency and coincidence evidence, especially as courts have come to give emphasis to the words used in the text of the legislation and moved away from previous common law understandings.
 - An argument can still be made to maintain appropriate protection against a form of evidence which has long been regarded by the law as likely to give rise to unfair prejudice, doing so by requiring that the evidence be of significant probative value and that that value substantially outweigh any unfair prejudicial effect; and requiring the prosecution to make out the case for admission of the evidence.
 - It has significant support from expert practitioners.²⁰⁷⁷

They noted that criticisms of the Uniform Evidence Act approach are that the interpretation of the provisions has become complex and that it has led to differing interpretations of various provisions in New South Wales and Victoria.²⁰⁷⁸

- **The approach in England and Wales:** Counsel Assisting summarised the main arguments in favour of adopting the approach in England and Wales as follows:
 - If the evidence is relevant to the offences charged then it should be capable of being considered by the triers of fact (typically, for more serious matters, the jury). Tendency and coincidence evidence can be significant in a case, as the evidence in Case Study 38 amply demonstrates.
 - Denying the triers of fact this relevant material increases the risk of the guilty going free, to the detriment of the community and the administration of justice.
 - 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 reason that we have juries rather than just relying on the assessment of individual judicial officers.

- Even if the threshold requirement is stated as being merely relevance, in practice it is likely that something more will be required. That is so because, given a requirement that the probative value outweigh any prejudicial effect, and given that some prejudicial effect will tend to be assumed by most judicial officers, tendency or coincidence evidence of peripheral relevance or minimal force is not likely to be admitted. That would be so even if the burden of persuasion was on the defendant.²⁰⁷⁹

The primary criticism of the approach in England and Wales, in Counsel Assisting’s opinion, was the traditional concern about letting much of this evidence go to the jury at all, given its risk of creating unfair prejudice against the defendant.²⁰⁸⁰ However, in this context, Counsel Assisting noted the findings of the Jury Reasoning Research conducted for the Royal Commission, discussed in Chapter 25.

- **An intermediate approach:** While not canvassing such an approach in detail, Counsel Assisting noted that, between a Uniform Evidence Act approach and the approach in England and Wales, there would be opportunities for reform – for example, where the evidence is required to have significant probative value and/or the burden of persuasion is on the prosecution, but in either case the probative value is only required to outweigh – not *substantially* outweigh – any prejudicial effect.²⁰⁸¹

In relation to the approach in Western Australia, Counsel Assisting observed:

- the evidence in Case Study 38 suggests that Western Australia has the lowest barrier to admission of tendency and coincidence evidence in Australia
- the approach is broadly consistent with sections 97 and 98 of the Uniform Evidence Act. However, the public interest test in Western Australia is a lower barrier to admission than section 101 of the Uniform Evidence Act; it is somewhat akin to the power to exclude evidence under section 137 of the Uniform Evidence Act
- the criticisms of Mr Game, Ms Roy and Ms Huxley concerning the uncertainty of the language of ‘the degree of risk of an unfair trial’ and the breadth of the definition of propensity evidence have some force.²⁰⁸²

Counsel Assisting also made some observations regarding specific issues that arose during the first week of the public hearing in Case Study 38. In their opinion:

- There is no inherent need for similarity with regard to tendency evidence, as defined by the Victorian Court of Appeal in *Velkoski v The Queen*²⁰⁸³ (*Velkoski*). The approach of the New South Wales Court of Criminal Appeal is to be preferred.²⁰⁸⁴
- The probative value of similarities should not be limited to those within an accused’s control. The New South Wales approach to this issue is to be preferred. The power of this evidence in cases of institutional abuse has been noted.²⁰⁸⁵

- The question of whether accounts by different complainants have been concocted or are contaminated should usually be a matter for the tribunal of fact.²⁰⁸⁶
- ‘Relationship’ or contextual evidence should be admissible if it is relevant to a fact in issue, subject to exclusion where the probative value of the evidence is outweighed by the risk of unfair prejudice to the defendant. In other words, no specific exclusion should apply; the general protection of the law is sufficient.²⁰⁸⁷
- The argument that evidence of a particular tendency on the part of an accused should be proved beyond a reasonable doubt adds an unnecessary complexity to jury directions. In all criminal trials, there must be a direction given that each element of an offence be proved beyond a reasonable doubt, and that is sufficient.²⁰⁸⁸
- The decision of a jury not to accept a feature of a prosecution (such as that a complainant did not consent or a particular event did not occur) is to be regarded as ‘incontrovertibly correct’. While it has been recognised that a verdict of acquittal does not equate with a positive finding of fact that an accused is innocent, a verdict of acquittal cannot be challenged and an accused must be given the full benefit of the acquittal.²⁰⁸⁹
- The arguments about whether evidence of a prior conviction should be able to be adduced as evidence in a subsequent trial are finely balanced.²⁰⁹⁰

27.3 Model Bill for public consultation

27.3.1 Purpose of the model Bill

In November 2016, shortly before the public hearing in Case Study 46 began, the Royal Commission released for public consultation a draft model Bill – the Evidence (Tendency and Coincidence) Model Provisions – which contained possible amendments to the Uniform Evidence Act in relation to the admissibility of tendency and coincidence evidence.

The model Bill was drafted by the New South Wales Parliamentary Counsel’s Office on the instructions of Royal Commission staff. It did not represent the views of Commissioners. Rather, it was drafted for the purposes of consultation, particularly through the public hearing in Case Study 46. It was designed to facilitate discussion of how the test for admissibility of tendency and coincidence evidence might be reformed to make such evidence more readily admissible and to facilitate more joint trials by providing a specific example of possible reforms for consideration.

The model Bill was provided to some witnesses who were to give evidence in Case Study 46, and it was published on the Royal Commission’s website for broader public consultation. It was not published until after submissions in response to the Consultation Paper had been received, so it was not available to be addressed by interested parties in their submissions.

A number of witnesses in Case Study 46, including DPPs and those witnesses who provided a defence perspective, were asked their opinions of the model Bill. Some of those who gave evidence in Case Study 46 subsequently made written submissions about the model Bill.

The model Bill contained two alternative sets of provisions. The first alternative proposed amendments that maintained the distinction between tendency evidence and coincidence evidence. The second alternative removed this distinction and instead referred to 'propensity evidence'. The test for admissibility was intended to be the same in both alternatives.

27.3.2 Key aspects of the model Bill

Test for admissibility

The first limb of the test for admissibility of tendency or coincidence evidence proposed in the model Bill, in addition to maintaining the current requirement to give notice, required that the court thinks the evidence will be relevant to an important evidentiary issue in the proceeding (Schedule 1, proposed section 97(2)(b) for tendency evidence and proposed section 98(2)(b) for coincidence evidence).

The second limb of the test – allowing for the exclusion in criminal proceedings of tendency or coincidence evidence that has satisfied the first limb of the test – allowed the court to refuse to admit tendency or coincidence evidence if the court thought that both:

- admission of the evidence is likely to result in the proceedings being unfair to the defendant
- if there is a jury, the giving of appropriate directions to the jury about the relevance and use of the evidence is unlikely to remove the risk (Schedule 1, proposed section 98A(1)).

If directions were likely to remove the risk of unfairness to the defendant, under proposed section 98A(3) of the model Bill the court was required to give those directions rather than refuse to admit the evidence.

The first limb of the test adopted a test of relevance instead of the current test of significant probative value. Under section 55 of the Uniform Evidence Act, evidence is relevant if it is 'evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding'.

The definition of 'relevant evidence' is very wide and was intended to be so.²⁰⁹¹ The requirement that the evidence be relevant to 'an important evidentiary issue in the proceeding' was intended to provide a limit to the evidence that might be admissible as tendency or coincidence evidence.

What evidence would be relevant to an important evidentiary issue in the proceeding was defined in proposed section 95A of Schedule 1 of the model Bill as follows:

each of the following kinds of evidence is **relevant to an important evidentiary issue** in a proceeding:

- (a) evidence that shows a propensity of a party to be untruthful if the party's truthfulness is in issue in the proceeding,
- (b) evidence that shows a propensity of a party 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,
- (c) evidence that could be relevant to any matter in issue in the proceeding if the matter is important in the context of the proceeding as a whole.

The test proposed in the model Bill drew on the test applying in England and Wales under Chapter 1 of Part 11 of the *Criminal Justice Act 2003* (CJA).

Under section 101 of the CJA, evidence of the defendant's bad character is admissible in criminal proceedings in specified circumstances, including where 'it is relevant to an important matter in issue between the defendant and the prosecution': CJA, section 101(1)(d).

A 'matter in issue between the defendant and prosecution' is defined to include:

- (a) the question whether the defendant has a propensity to commit offences of the kind with which he is charged, except where his having such a propensity makes it no more likely that he is guilty of the offence;
- (b) the question whether the defendant has a propensity to be untruthful, except where it is not suggested that the defendant's case is untruthful in any respect: CJA, section 103(1).

The second limb of the test under the CJA requires the court to exclude the evidence if it 'appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it': CJA, section 101(3).

The common law and unfair prejudice

The model Bill explicitly abolished the common law in relation to propensity and similar fact evidence. Proposed section 94(4) provided:

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 abolished and, as a result, is not relevant when applying this Part to tendency evidence or coincidence evidence.

This also drew on the CJA, which provides in section 99(1):

The common law rules governing the admissibility of evidence of bad character in criminal proceedings are abolished.

The model Bill included another provision directed at common law assumptions that tendency and coincidence evidence is unfair – in the sense of unfairly prejudicial – to the accused. In relation to assessing likely unfairness to the accused under the second limb of the test, proposed section 98A(2) of the model Bill provided:

The admission of evidence is not unfair to a defendant in a criminal proceeding merely because it is tendency evidence or coincidence evidence.

This provision drew on the findings of the Jury Reasoning Research. It was intended to require that tendency or coincidence evidence not be assumed to be unfairly prejudicial in the sense that it is likely to be misused by the jury. It was intended to require that there would need to be something particular about the circumstances of the proceedings, or something particular about the tendency or coincidence evidence in question, that would cause admission of the evidence to be likely to result in the proceeding being unfair to the defendant, and it would be unfair in a way that would be unlikely to be addressed by appropriate directions to the jury.

Other elements of the model Bill

Scope of the model Bill

The model Bill was drafted to apply to tendency and coincidence evidence in all civil and criminal proceedings. It was not limited to child sexual offences or child sexual offences in an institutional context. It followed the current approach of the Uniform Evidence Act to the admissibility of tendency and coincidence evidence, which is to have one common set of provisions applying to all civil and criminal proceedings, with some additional requirements for criminal proceedings.

Credibility and reliability – collusion, concoction and contamination

Proposed section 95A(2) was intended to have the effect of requiring issues of credibility and reliability – including issues of collusion, concoction or contamination – to be left to the jury by requiring the court to determine the admissibility of tendency or coincidence evidence on the assumption that the evidence is credible and reliable. Proposed section 95A(2) provided:

In determining whether evidence is relevant to an important evidentiary issue in a proceeding, the court is to consider whether the evidence, assuming it was accepted as credible and reliable, would be evidence of a kind referred to in subsection (1) [which defines evidence that is relevant to an important evidentiary issue in a proceeding]: section 95A(2).

Prior convictions and acquittals

The model Bill provided for prior convictions to be admitted and used as tendency or coincidence evidence (provided that they satisfy the test for admissibility).

Section 91 of the Uniform Evidence Act currently prevents evidence of a judgment or conviction, or a finding of fact, in a proceeding being admitted to prove a fact that was in issue in that proceeding.

For example, section 91 would prevent a prior conviction for a child sexual abuse offence being admitted in a subsequent trial of the same accused for child sexual abuse offences as tendency or coincidence evidence to prove that the accused committed the offence the subject of the prior conviction. Evidence of the conduct constituting the prior offence might be admissible as tendency or coincidence evidence if the complainant in the prior trial were available to give evidence of the conduct. However, the fact that the accused was convicted in the prior trial is not admissible to prove that the accused engaged in the conduct, committed the offence or was convicted in respect of it.

Section 92 of the Uniform Evidence Act currently provides for limited exceptions to the exclusionary rule in section 91. These limited exclusions are not of assistance in relation to tendency or coincidence evidence in criminal proceedings. Section 92(2) creates an exception which allows evidence of a conviction to be admissible against the person convicted in *civil* proceedings, provided that the conviction has not been quashed or set aside or is not the subject of appeal.

The model Bill provided an additional exception to section 91 by proposing the insertion of the following as section 92(2A):

In a civil or criminal proceeding (and without limiting subsection (2)), section 91 (1) does not prevent the admission or use of a party's conviction for an offence as tendency evidence or coincidence evidence.

The model Bill also provided that evidence was not inadmissible as tendency or coincidence evidence only because it was about a conviction or acquittal. Proposed section 94(5) provided:

Without limiting subsection (4), evidence is not inadmissible as tendency evidence or coincidence evidence 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 (including 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.

Removal of general exclusions

The Uniform Evidence Act currently provides general provisions under which evidence may be excluded, including because of the danger of unfair prejudice.

Section 135 applies to civil and criminal proceedings and it provides:

The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:

- (a) be unfairly prejudicial to a party, or
- (b) be misleading or confusing, or
- (c) cause or result in undue waste of time.

Section 137 applies to criminal proceedings only and it provides:

In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant.

The model Bill excluded these discretions under proposed section 101, which provided:

Tendency evidence or coincidence evidence about a party that is admissible under this Part cannot be excluded under section 135 or 137 on the ground that it is unfairly prejudicial to the party.

This would have had the effect of ensuring that tendency or coincidence evidence that satisfied the proposed test for admissibility could not be excluded under the general discretions. The risk of unfair prejudice to the accused was dealt with in the second limb of the proposed test for admissibility. The exclusion in section 135 also allows the exclusion of evidence that might cause or result in undue waste of time. This risk was addressed in the first limb of the proposed test for admissibility through the requirement that the evidence be relevant to an important evidentiary issue in the proceeding, as defined.

Combining tendency and coincidence evidence

Finally, Schedule 2 of the model Bill adopted the same elements discussed above in relation to Schedule 1 of the model Bill, but it removed the distinction between tendency evidence and coincidence evidence and instead referred to 'propensity evidence'.

'Propensity evidence' was defined in proposed section 98(1) in Schedule 2 as follows:

This section applies to the admissibility of evidence (propensity evidence) of:

- (a) any one or more of the following to prove that a person has or had a propensity to act in a particular way or have a particular state of mind:
 - (i) the character or reputation of the person,
 - (ii) a tendency that the person has or had,
 - (iii) conduct of the person (including conduct of the same or a similar kind to conduct that is a fact in issue in the proceeding), or
- (b) the occurrence of 2 or more events to prove that a person did a particular act, or had a particular state of mind, because of similarities in the events or the circumstances in which they occurred (or both).

The definition of propensity evidence was intended to cover tendency evidence (paragraph (a)) and coincidence evidence (paragraph (b)). It was not intended to apply more broadly – for example, to relationship or context evidence.

It may be that combining tendency evidence and coincidence evidence into the one category of propensity evidence might have made little difference. However, it was thought that it might have removed some of the more rigid distinctions between tendency and coincidence evidence. It might also have more readily permitted both tendency and coincidence reasoning to be used in cases where the evidence supports both forms of reasoning and where some judges currently might admit the evidence on one basis only.

27.4 What we were told in our consultations and public hearing

27.4.1 Survivor advocacy and support groups

In submissions in response to the Consultation Paper and in evidence in Case Study 46, a number of survivor advocacy and support groups commented on the issues of the admissibility of tendency and coincidence evidence and the availability of joint trials. Those that commented on the issues supported greater admissibility and more joint trials.

Micah Projects conducted a forum with survivors in relation to issues raised in the Consultation Paper and reported participants' views in its submission. In relation to tendency and coincidence evidence and joint trials, Micah Projects stated:

This was viewed by participants as a difficult area to give feedback on because it involved areas of law, criminal trials and evidence that some people felt was very technical. Overall however, people felt that joint trials would be fairer to those who had been sexually abused and as a group complainants would be in a stronger position in relation to the perpetrator[.]

Participants also responded that people should be able to go to trial together and their evidence heard as a collective against the perpetrator. *'I would feel more supported if there was a joint trial, I would feel like I was being believed'*. Participants in the forum felt that there needed to be provision for class actions against institutions as well as individual offenders *'and the evidence of complainants should be heard at once as this give the victim more support and a stronger case against perpetrators'*.²⁰⁹² [Emphasis original.]

In response to a question about criminal justice outcomes being determined by the state in which the complainant lives, Ms Karyn Walsh, representing Micah Projects, gave evidence that:

Well, there's lots of inconsistencies around the process, the evidence, the sentencing, the trials – the joint trials. Like that is really traumatic for people in not even understanding why sometimes it's agreed to, when it's not, when a group of people come together and two or three might be asked to say, 'Well, we can have a joint trial but only of these cases, yours can't be involved' – you know, those experiences are very traumatising for people. You know, they do their best to come to terms with it because they think, well, at least if a few people can go forward and get a conviction, that's better than nothing, but it's not a sense of justice for them and it doesn't feel right for them and isn't right, really. I think the system needs to do much better than that and should certainly explain to people – people don't understand why these decisions are made ...²⁰⁹³

Survivors & Mates Support Network (SAMSN) and Sydney Law School made a joint submission to the Consultation Paper. The submission draws on a workshop conducted with eight SAMSN members, SAMSN's co-founders and the chair of SAMSN's Clinical Advisory Board. In relation to tendency and coincidence evidence and joint trials, they stated:

Separate trials increase the stress and make it very difficult to impossible for the story to be conveyed to the factfinder with any integrity and context since events are 'chopped up' and the connections between them are hidden.

One of the main reasons child witnesses in the evaluation of the specialist jurisdiction in New South Wales in 2006 said they did not believe that they had been able to tell their story was that they were not able to mention certain aspects of the offences because of admissibility issues, especially in relation to separate trials.²⁰⁹⁴

Mr Craig Hughes-Cashmore and Professor Judy Cashmore gave evidence in relation to the joint submission by SAMSN and Sydney Law School. Professor Cashmore gave evidence of an example of a 15-year-old girl who was interviewed for a research project and was affected by an order for separate trials. She had already been involved in an aborted trial. Professor Cashmore gave evidence that:

The offences that she was talking about had occurred in concert with a couple of offenders and a couple of other complainants. She was told that she could only refer [to] what had happened to her and with the one particular offender. Now, that made no sense to her and it also meant that she couldn't really tell her story in any way that had any integrity.

So she said, ‘Look, I was sitting there and they asked me a question and I could see that the jury were looking at me and thinking why am I hesitating? “Does that mean that she’s lying, that she can’t get this together?”’ – because she was trying to work out a way in which she could answer the question without aborting the trial. Now, that is not in any service of justice, I would argue.²⁰⁹⁵

In its submission in response to the Consultation Paper, Broken Rites stated:

The conduct of joint trials is a major problem for survivors and we consider it [the separation of trials] to be a manipulation of legal process. It [separating trials] destroys trust and causes extreme stress. I understand that there has been at least one witness suicide in a multi trial case.²⁰⁹⁶

Dr Wayne Chamley, representing Broken Rites, was asked to explain the statements in Broken Rites’ submission that the conduct of joint trials is a major problem for survivors and it is seen as a manipulation of the legal process. Dr Chamley gave evidence that:

Well, what we see happening is that the police are engaging with all the potential witnesses to build up a case. I don’t understand what happens, but the detectives really get in there and they’re no doubt looking at files about the person in care and where they were and all that sort of thing, and looking at the statements given by the persons, and there’s an expectation by these potential witnesses that there’s going to be a mega-trial and they’re all going to be together and this predator is going to take his chances before the courts.

And all of a sudden they’re told, ‘Well, no, that’s not happening. We’re now going to have nine trials’, and they’re sitting out there for 12 and 14 months wondering what the hell is going on here. With any engagement with another authority figure, their stress levels are ballistic anyway, and then they’re sitting out there for months after months. There’s a suppression order, the police can’t tell them anything, and they just go into meltdown.²⁰⁹⁷

In its submission in response to the Consultation Paper, Care Leavers Australasia Network (CLAN) stated:

In regard to the issues of joint trials and tendency and coincidence evidence, CLAN believe that in some cases joint trials have resulted in better outcomes for many Care Leavers who otherwise would not have had a trial based upon their individual abuse. As stated earlier there can be quite a few difficulties with evidence of child abuse and sometimes it is only the word of one against the other. However, when a number of individuals come together who share similar experiences and evidence it is harder to dismiss the claims as a one off or a child who may be making something up.²⁰⁹⁸

In its submission in response to the Consultation Paper, Jannawi Family Centre stated:

We also support joint trials which we believe provide transparency and efficiency in the justice process, in addition to reducing the pressure and responsibility of victims and witnesses to participate in multiple trials [sic] depending on how they are viewed in each matter. It also means that the accused also does not have to participate in multiple trials spanning years.²⁰⁹⁹

In its submission in response to the Consultation Paper, People with Disability Australia (PWDA) submitted that ‘the availability of tendency and coincidence evidence and joint trials may help to address the extensive barriers to justice faced by particular cohorts of people with disability’ and recommended law reform in relation to tendency and coincidence evidence and joint trials.²¹⁰⁰

Dr Jess Cadwallader, representing PWDA, gave the following evidence in relation to joint trials and how they might assist people with disability to obtain justice:

some of what we have seen, particularly in cases concerning older-style institutions, where people with disability or children with disability were housed alongside other children, there have been some cases where children without disability or adults without disability have succeeded in accessing justice, but the children with disability or the adults with disability that they have grown into have not. I have no doubt that it may take some time – I hope it won’t – to get in place witness intermediaries and the other supports required for people with disability, but I think that the coincidence and tendency and the joint trial potential for people with disability is that they can then share in the same kinds of access to justice that are available for other people seeking to access justice.²¹⁰¹

The Victorian Aboriginal Child Care Agency (VACCA) consulted community members in relation to issues raised in the Consultation Paper and reported their views in its submission. In relation to tendency and coincidence evidence and joint trials, VACCA submitted:

Community members agreed that it should be easier to have joint trials. Joint trials strengthen the case and not having joint trials takes away corroboration. In many examples police would not charge perpetrators without the corroborating evidence they have from multiple victims and it is therefore unrealistic to expect a prosecution to be successful without a joint trial. Victims’ best interests are not being met if joint trials are not held.²¹⁰²

In his submission in response to the Consultation Paper, Mr Peter Gogarty made a number of recommendations for law reform. His recommendations for amendments to the Uniform Evidence Acts are relevant to tendency and coincidence evidence and joint trials. He recommended:

Amendments to the Uniform Evidence Acts to provide for the peculiarities of child sex abuse trials – in particular recognition of the well documented reality that child abusers almost never have a single victim; that child abuse survivors often take decades to disclose their abuse, and; that childhood sexual abuse seldom occurs in circumstances where there are witnesses other than the victim.²¹⁰³ [Emphasis original.]

In its submission in response to the Consultation Paper, Women’s Legal Service NSW submitted that it ‘supports the proposition that it should be easier to have joint trials so that all allegations against a particular accused can be heard and determined in one trial’.²¹⁰⁴ It stated:

The existing law is unjustifiably weighted in favour of the interests of accused persons, without adequately responding to the interests of survivors. The practice of separating trials for separate counts to prevent the possibility of concoction and prejudice to the accused, and the exclusion of much tendency and coincidence evidence, means that juries do not get a full picture of the context and circumstances of the alleged offence.²¹⁰⁵

Women’s Legal Service NSW submitted that a simple test of relevance would be the best test for admissibility.²¹⁰⁶

Women’s Legal Service NSW referred to the experiences of some of its clients who have not reported sexual assaults but who have indicated they would do so if other victims were to come forward and they could support each other through the trial. It referred to the risk of attrition at the time when complainants are told the trial is to be severed.²¹⁰⁷

Ms Janet Loughman, who, with Ms Dixie Link-Gordon, represented Women’s Legal Service NSW in the public hearing in Case Study 46, gave evidence that more of Women’s Legal Service NSW’s clients would report if they could go through the criminal justice system in conjunction with other survivors.²¹⁰⁸ Ms Link-Gordon gave evidence that Aboriginal women would appreciate having group support as follows:

Yes, for sure. There are so many stories out there, I can’t even begin to start on it, in regards to women who have been abused in the same institutions, the same foster homes, maybe the same homes, and there’s only one that has ever got up and told her story, and the other women are aware of it, but, you know, seeing the process that person may have gone through in sharing the experience of sexual assault has been difficult, so it really does shut down the other person from moving.²¹⁰⁹

Ms Loughman and Ms Link-Gordon gave evidence that there can be a high rate of attrition when trials are separated and of the traumatising experience when trials are separated and the same perpetrator is convicted in one trial and acquitted in another where the complainants have been through the same or similar experiences.²¹¹⁰

In relation to the issue of unfair prejudice, Women’s Legal Service NSW stated:

WLS NSW [Women’s Legal Service NSW] notes that decisions on the separation of trials, or exclusion of evidence are made on the basis of unfair prejudice to the accused or the ‘interests of justice’. WLS NSW believes that the interests of justice must be more broadly construed to also include the ‘injustice’ to complainants in severed trials. A fair trial, in our view is one that does justice to all parties including the complainant.²¹¹¹

Women’s Legal Service NSW expressed its support for leaving issues of concoction, contamination or collusion to the jury, stating that it is common for an accused to offend against more than one child, and they may target sites that provide access to children – whether in a family, school, sporting team or religious community – where the victims will clearly know each other.²¹¹²

In relation to whether specific provision needs to be made in favour of joint trials, Women’s Legal Service NSW stated that:

[Women’s Legal Service NSW] supports the establishment of a presumption that when multiple charges for sexual offences are joined in the same indictment, the charges are to be heard together. This presumption should not be rebutted merely because evidence on one charge is inadmissible on another charge. This was recommended by the Australian Law Reform Commission and NSW Law Reform Commission’s comprehensive report *Family Violence – A National Legal Response*, and is already in place in Victoria under section 194 of the *Criminal Procedure Act 2009*.²¹¹³

Ms Loughman also referred to the recommendations of the ALRC and the Human Rights and Equal Opportunity Commission in favour of joint trials in their *Seen and Heard* report in 1997, in addition to the recommendations of the ALRC and NSW LRC in favour of joint trials in the 2012 report *Family violence: A national legal response*.²¹¹⁴

Sisters Inside²¹¹⁵ and the National Association of Services Against Sexual Violence²¹¹⁶ also expressed their support for reforms to facilitate more joint trials.

27.4.2 Statutory Victims of Crime Commissioners

We received submissions in response to the Consultation Paper from a number of commissioners with statutory responsibility for victims of crime.

In his submission, the Victims of Crime Commissioner for Victoria, Mr Greg Davies APM, recommended that:

The Royal Commission consider reform in the area of tendency, coincidence and joint trials. In considering a preferred model particular regard should be had to the approach currently in place in England and Wales.²¹¹⁷

After referring to the findings of *Jury reasoning in joint and separate trials of institutional child sexual abuse: An empirical study* (Jury Reasoning Research), Mr Davies stated:

I reiterate the point made by the Royal Commission, that the current system in England and Wales is considerably more liberal in admitting tendency and coincidence evidence and after 11 years of operation there is no evidence of injustice.

The principle of a fair trial is fundamental to the criminal justice system, however fairness must also be apportioned to victims and the broader community. The system must ensure all relevant evidence is considered in the course of a trial. Restrictive rules in relation to the admission of tendency and coincidence evidence in trials relating to charges of institutional child sexual abuse, fail to provide juries with a complete picture and unfairly weigh the trial process in favour of the accused.

It is concerning that in a number of case studies considered by the Royal Commission it is likely that injustices have occurred as a consequence of the inadmissibility of tendency or coincidence evidence and the resulting severance of indictments. This is completely at odds with the notion of a fair trial and makes the call for reform in this area imperative.²¹¹⁸ [References omitted.]

In his submission, the Victims of Crime Commissioner for the Australian Capital Territory, Mr John Hinchey, expressed support for changing the law to facilitate more cross-admissibility of evidence and more joint trials in child sexual abuse matters.²¹¹⁹ He expressed support for adopting the approach in England and Wales.²¹²⁰

In relation to the questions in the Consultation Paper asking how the law should be reformed, Mr Hinchey submitted:

- there should be no requirement beyond relevance for admissibility
- similarity should not be essential
- admissibility should be favoured, with the potential for a jury warning in relation to the weight to be given to the evidence or the possibility of prejudice
- the prosecution should bear the burden of establishing relevance and the defence should bear the burden of excluding evidence
- a provision similar to the Queensland provision in section 132A of the *Evidence Act 1977* (Qld) would be beneficial, with issues of concoction, contamination and collusion left to the jury
- tendency and coincidence evidence should not be required to be proved beyond reasonable doubt
- in relation to evidence of prior convictions, 'In line with Associate Professor David Hamer's research, prior convictions should be able to be raised unless, because of the passage of time since the conviction, or for any other reason it would be unjust to admit the evidence'

- a provision similar to that in Victoria and followed by South Australia, where there is a presumption in favour of joint trials in sexual offence cases, would be beneficial.²¹²¹

Mr Hinchey submitted that reforms in relation to tendency and coincidence evidence and joint trials should apply to all categories of offences, not just to child sexual abuse or institutional child sexual abuse offences.²¹²²

The Commissioner for Victims' Rights for South Australia, Mr Michael O'Connell APM, expressed support for changing the law to facilitate more cross-admissibility of evidence and more joint trials in child sexual abuse matters.²¹²³

Mr O'Connell also referred to the difficulties complainants face in giving evidence when some of the evidence is inadmissible:

Regarding child victim-complainants, I add that I have encountered difficulty explaining to a child and/or his or her parent / guardian the obligation to truthfully tell the court what they saw, heard etc. but thereafter should the child be both a corroborating witness in one trial and a victim-complainant in another, trying to distinguish telling the whole truth and telling the admissible legal truth. One child, for instance, was forbidden from mentioning he or she was sexually assaulted while present when another child was sexually assault [sic] because [the trials of] the two alleged sexually [sic] assaults on different victims but the same accused-defendant were held separately – and, so much fuss is made about children's capacity to tell the truth, yet the rules of evidence not only discourage truth telling they can 'require' the truth be hidden. It is little wonder that some claim, truth discovery in an adversarial criminal justice system is too often by accident.²¹²⁴

27.4.3 Governments and government agencies

We received a number of submissions responding to the Consultation Paper from governments and government agencies. Submissions from DPPs are discussed in section 27.4.4.

In its submission, the New South Wales Government acknowledged the range of issues associated with the current law on tendency and coincidence evidence and joint trials raised in Chapter 10 of the Consultation Paper, particularly in relation to child sexual assault proceedings.²¹²⁵

The New South Wales Government stated:

As canvassed by the Royal Commission, NSW is a Uniform Evidence Act jurisdiction and the law on tendency and coincidence in NSW is governed by the Evidence Act 1995 (NSW). NSW notes that, while there is no explicit legislative presumption in favour of joint trials in child sexual assault matters in NSW, it is ultimately open for the prosecution to present an indictment seeking to try an accused in relation to two or more victims in the same trial.

It is then a matter for the accused to seek to sever any counts on the indictment under section 21 of the *Criminal Procedure Act 1986* (NSW).

NSW will give close consideration to the recommendations of the Royal Commission on the issues of tendency and coincidence evidence and joint trials. Given the use of uniform evidence laws around Australia, it is best that any change to the legislation is agreed and adopted by all participating jurisdictions.²¹²⁶

In its submission, the Victorian Government provided some information about the position that applied in Victoria before it adopted the Uniform Evidence Act with effect from 1 January 2010 as follows:

In 1997, prior to introducing the Evidence Act, Victoria introduced sections 372 and 398A into the Crimes Act to address the problem of sexual offence trials involving multiple complainants being regularly severed due to the inadmissibility of propensity evidence.

Section 372 provided a presumption of joinder in cases involving two or more charges for a sexual offence. Section 398A provided that propensity evidence that was relevant to a fact in issue was admissible where, in all the circumstances, it was just to admit the evidence despite any prejudicial effect it may have on the person charged with the offence. The provision also modified the common law by providing that the possibility of a reasonable explanation consistent with the innocence of the accused was not relevant to the question of admissibility.

On 1 January 2010, the Criminal Procedure Act and the Evidence Act commenced in Victoria. This resulted in:

- the re-enactment of section 327 in sections 193 and 194 of the Criminal Procedure Act
- section 398A being replaced by the uniform evidence laws on tendency and coincidence in sections 97 and 98 of the Evidence Act.

At that stage, the cases on the admissibility of tendency and coincidence evidence in NSW (in applying the uniform evidence law) indicated that the way that the courts interpreted and applied the law produced similar results to the laws in Victoria. Because of this, a re-enactment of section 398A was not considered necessary.²¹²⁷

In relation to drawing on approaches from overseas jurisdictions, the Victorian Government stated:

The approach of international jurisdictions (Canada, UK, NZ) while relevant and providing interesting comparisons, are not consistent with the approach of the Uniform Evidence Law. As such, adopting any particular reform, such as that of the UK, is likely to result in a similar raft of issues concerning its interpretation.²¹²⁸

In relation to the issue of whether tendency and coincidence evidence should be required to be proved beyond reasonable doubt, the Victorian Government stated that the *Jury Directions Act 2015* (Vic) provides that only the elements of an offence must be proven beyond reasonable doubt so that any circumstantial evidence – including tendency and coincidence evidence – no longer needs to be proved beyond reasonable doubt.²¹²⁹ The Victorian Government submitted:

Requiring the jury to be satisfied beyond reasonable doubt of indispensable intermediate facts or uncharged acts unnecessarily complicates jury directions and the jury's task and risks misleading the jury into focusing on factors other than whether the offence has been proved.²¹³⁰

In relation to whether issues of concoction, collusion or contamination should be left to the jury, the Victorian Government submission provides information on the position that applied in Victoria before the introduction of the Uniform Evidence Act, where the leading authority *R v Best* established that these were issues for the jury under s 398A of the *Crimes Act 1958* (Vic).²¹³¹ The Victorian Government submitted that the *Evidence Act 2008* (Vic) was not intended to change the operation of the law; however, in practice it had that effect.²¹³²

The Victorian Government quoted the following passage from the reasons of the plurality (French CJ, Kiefel, Bell and Keane JJ) in the High Court's decision in *IMM*:

Before turning to the application of ss 97(1) and 137 to the facts in this case, there should be reference to the appellant's submission concerning the risk of joint concoction to the determination of admissibility of coincidence evidence. The premise for the appellant's submission – that it is 'well-established' that under the identical test in s 98(1)(b) the possibility of joint concoction may deprive evidence of probative value consistently with the approach to similar fact evidence stated in *Hoch v The Queen* – should not be accepted. Section 101(2) places a further restriction on the admission of tendency and coincidence evidence. That restriction does not import the 'rational view ... inconsistent with the guilt of the accused' test found in *Hoch v The Queen*. The significance of the risk of joint concoction to the application of the s 101(2) test should be left to an occasion when it is raised in a concrete factual setting.²¹³³ [References omitted.]

The Victorian Government submitted that 'it may be desirable to clarify the position of pre-trial consideration of issues of concoction, collusion or contamination'.²¹³⁴

In relation to the issue of whether evidence of prior convictions should be admissible, the Victorian Government submitted that this would depart from the general approach used in the Uniform Evidence Act.²¹³⁵ The Victorian Government stated:

The Consultation Paper does not consider in depth the category of 'bad character evidence', which is generally how evidence of convictions is characterised. Greater consideration should be given to this law and related principles before proposing any reform to the existing law on the admission of this evidence. It is not clear whether what

is proposed is the admission of the bare fact of a conviction, or the admission of a statement of facts in relation to an offence and the information that a person has been convicted. This also raises the question of the type of evidential reasoning that is relevant to this form of evidence – whether it be tendency evidence, coincidence evidence or context evidence.

Consideration should also be given to the risk of unfair prejudice when a jury is presented with evidence that equates with the finding beyond reasonable doubt of another jury in a separate trial. Given the nature of allegations in sexual offence cases involving a number of victims, there is also the possibility that the one trial might have evidence of tendency based on conduct for which the accused has not been convicted as well as conduct for which the accused has been convicted. In addition to issues concerning the risk of unfair prejudice, there may be considerable challenges for trial judges being able to give clear directions and the jury being able to comprehend any nuances involved.²¹³⁶

In relation to the issue of joinder, the Victorian Government outlined the provisions that govern the proper joining of charges in Victoria, including the presumption of joinder for sexual offence cases which is not rebutted merely because evidence on one charge is inadmissible on another charge.²¹³⁷ However, the Victorian Government stated that ‘in practice charges are often severed, or the issue of severance is conceded by the prosecution where evidence is not cross-admissible between complainants’. The Victorian Government referred to the perceived risk of unfair prejudice but submitted that ‘the Royal Commission’s jury research provides evidence concerning the level of such risk, suggesting that consideration should be given to changing this area of law’.²¹³⁸

In relation to whether any reforms should be limited to sexual offence cases, the Victorian Government submitted:

Given the complexity of this area of law, it would be undesirable for such laws to apply differently depending upon the type of offence charged. It is arguable that there are significant differences in practice in the application of tendency and coincidence laws – this appears to stem from concerns about the risk of unfair prejudice to the accused arising from the admission of this kind of evidence. The Royal Commission’s research [the Jury Reasoning Research], discussed at Chapter 10.5 of the Consultation Paper, is therefore particularly important to these issues.

Whatever changes is proposed, the Victorian Government will need to consider how such laws will work in non-sexual offence cases. Consideration could also be given to a joint reference to the Australian Law Reform Commission on the Uniform Evidence Law, as occurred in 2004.²¹³⁹

In its submission, the Tasmanian Government stated that it is currently considering reforms relevant to tendency and coincidence evidence and joint trials as follows:

The Tasmanian Government is currently considering the introduction of a presumption of joint trials in child sexual offence cases that is not dependent on the cross admissibility of the evidence. In addition, the Government is also considering amendments to the Tasmanian Evidence Act 2001 to provide that concoction is not relevant to the admissibility of tendency or coincidence evidence. A significant driver for this reform is considered to be the likely resulting reduction in number of times a victim is required to give evidence prior to trial on a voir dire.²¹⁴⁰

In relation to whether any reforms should be limited to child sexual abuse or sexual abuse cases, the Tasmanian Government stated:

The Tasmanian Government considers that any reform to evidence law should be carefully considered in relation to all crimes to determine whether complexities such as jury directions can be reduced. It should also be recognised that often non-sexual crimes are included on an indictment that generally relates to historical child sexual abuse. This has the potential to provide complexity for juries if discreet [sic – discrete] directions in relation to the use of evidence relate to evidence of sexual crimes only.²¹⁴¹

In its submission responding to the Consultation Paper, ACT Policing expressed support for reform in relation to tendency and coincidence evidence and joint trials. It stated:

A simplified process to submit tendency and coincidence evidence would improve chances of a successful court outcome for victims. It would allow for all relevant information to be presented to the court and allow patterns of behaviours to be shown.²¹⁴²

27.4.4 Directors of Public Prosecutions

Introduction

In Case Study 38, we heard expert evidence from five state DPPs. The DPPs gave their evidence concurrently in two panels:

- The first panel involved Mr Lloyd Babb SC, the DPP for New South Wales; and Mr John Champion SC, the DPP for Victoria.
- The second panel involved Mr Michael Byrne QC, the DPP for Queensland; Mr Joseph McGrath SC, then the DPP for Western Australia; and Mr Adam Kimber SC, the DPP for South Australia.

The following four DPPs or Offices of the Director of Public Prosecutions (ODPPs) made detailed submissions in response to the Consultation Paper in relation to tendency and coincidence evidence and joint trials:

- the ODPP for New South Wales
- Mr Champion, the DPP for Victoria
- Mr Daryl Coates SC, the DPP for Tasmania
- Mr Jonathan White SC, the DPP for the Australian Capital Territory.

In Case Study 46, seven DPPs gave evidence in the following panels:

- on 30 November 2016, the following DPPs from Uniform Evidence Act jurisdictions gave evidence concurrently:
 - Mr Babb, the DPP for New South Wales
 - Mr Champion, the DPP for Victoria
 - Mr Coates, the DPP for Tasmania
 - Mr White, the DPP for the Australian Capital Territory
- on 1 December 2016, the following DPPs from non-Uniform Evidence Act jurisdictions gave evidence concurrently:
 - Mr Byrne, the DPP for Queensland
 - Ms Amanda Forrester SC, the Acting DPP for Western Australia
 - Mr Kimber, the DPP for South Australia.

We outline the views they expressed in case studies 38 and 46 and in their submissions in response to the Consultation Paper, organised generally by the topics on which we sought submissions in the Consultation Paper and in relation to the model Bill.

Should the law be reformed?

The DPPs from Uniform Evidence Act jurisdictions expressed support for reforming the law in relation to the admissibility of tendency and coincidence evidence, as did Mr Kimber from South Australia. Ms Forrester from Western Australia did not consider that reform was needed in Western Australia, and Mr Byrne from Queensland expressed a preference, if the law were to be reformed in Queensland, for the Western Australian approach.

In its submission in response to the Consultation Paper, the New South Wales ODPP agreed with the view of Commissioners stated in the Consultation Paper that the current law needs to change to facilitate more cross-admissibility of evidence and more joint trials in child sexual abuse matters.²¹⁴³ As to whether reform is needed in New South Wales, the New South Wales ODPP stated:

In our view, while we have somewhat succeeded in NSW in achieving the right balance, there is room for improvement.²¹⁴⁴

The New South Wales ODPF explained its view of the importance of tendency and coincidence evidence in child sexual abuse matters as follows:

The preponderance of appellate law in relation to the admissibility and use of tendency and coincidence evidence relates to child abuse cases. The criminogenic profile of offenders who sexually abuse children is that they will abuse more than once. Consequently, not only is the use of tendency and coincidence evidence desirable from the prosecution point of view to augment the case, but it is often available. Accordingly, it is vital in our view that the criminal law to adopt a fair, easily understood and readily applied test for the admissibility of this evidence. Not to do so will see a disproportionate number of acquittals or appellate proceedings, as NSW experienced between 2001 and 2007. As noted by Ms Williams, Crown Prosecutor, in her evidence before the Commission, severance of trials can have a catastrophic effect where one complainant of many is left giving evidence alone, their evidence often standing alone against the word of an authority figure such as a priest [page 402].²¹⁴⁵ [Reference omitted.]

In his submission in response to the Consultation Paper, the Victorian DPP expressed strong support for substantial reform of the law in relation to tendency and coincidence evidence and joint trials. He stated:

I am firmly of the view that the law of tendency, co-incidence, joinder and severance, as it operates in Victoria at present, is in need of substantial reform. I have expressed this view in evidence to the Commission and I have written to the Victorian Attorney-General to the same effect.

I regard reform of this area of law as one of the highest priority issues affecting the effective prosecution of child sex offences.²¹⁴⁶

The Victorian DPP referred to the High Court appeal in *Hughes v The Queen* (discussed in section 23.2.3), in which he was granted leave to intervene to submit that the approach of the New South Wales Court of Criminal Appeal to the interpretation of the tendency and coincidence provisions in the Uniform Evidence Act should be preferred to the Victorian approach in *Velkoski v The Queen*.²¹⁴⁷

The Tasmanian DPP expressed support for some reform but opposition to complete redrafting of law. He stated:

In my view, there is scope to relax the current provisions to allow juries to consider a broader range of evidence. This would reflect the modern experience, being that juries are able to dispassionately assess the weight to be given to fundamentally abhorrent evidence. This should, however, be done within the established uniform evidence framework. The uniform evidence legislation came into force in New South Wales more than twenty

years ago but it is only this year that the law relating to the assessment of probative value has been settled by the High Court. It is not in the best interests of complainants to again completely re-draft the law in this area and subject them to the inevitable period of uncertainty as new provisions are applied and interpreted.²¹⁴⁸

In his submission in response to the Consultation Paper, the DPP for the Australian Capital Territory stated that, while the provisions were working well, they should be reviewed and amended to better reflect the realities of child sexual offending:

We are very active in this jurisdiction in making applications to lead tendency evidence in child sex offence matters. Indeed, in the majority of child sexual offence matters, these applications are made by prosecutors in pre trial applications. ... While recently many of our applications have been successful, there have been a number that have been refused with little reasoning to indicate the basis of the refusal. I have generally not appealed these decisions because an appeal can add months to the finalisation of a matter and I must take into account the best interests of the witnesses. ... While I am generally of the view that the tendency provisions in the *Evidence Act 2011* (a uniform Evidence Act) are working well, I believe the time has come to review them and consider what changes might be made to better reflect the realities of child sexual offending including typical offender behaviours.²¹⁴⁹

In relation to the importance of tendency and coincidence evidence in sexual assault cases, including child sexual abuse cases, Mr White gave the following evidence:

The problem with sexual assault is that, of its nature, it is committed in private, and so it is fundamentally a different crime type, and tendency is, therefore, a very useful additional piece of evidence. ...

So it is a very different crime type. We probably wouldn't run word-on-word cases in a lot of other crime type areas, but we run them in sexual assault cases because of the public interest in doing that. So that really does indicate an imperative to see if any assistance can be gained through the tendency provisions.²¹⁵⁰

In Case Study 38, in relation to the common law *Pfennig* test for admissibility that applies in Queensland, Mr Byrne referred to the variance in the application of the test and the difficulty this causes. He said that difficulties arise because of the how judges account for the 'prejudicial capacity of a high order'. He said:

There is also some difficulty in application because of different people's perceptions of the weight, value and utility of the evidence which needs, of course, to be assessed against the issues as a whole that exist in the prosecution case.²¹⁵¹

In Case Study 38, Mr Byrne suggested that such variance might be minimised through uniform training and education for the legal profession and the judiciary.²¹⁵²

In Case Study 46, in discussing the test for admissibility in the model Bill, Mr Byrne said:

I would be concerned that there would continue to be the litigation over the meaning of the terminology, as has happened under the current provisions. If Queensland – and I stress the word ‘if’ – were to move away from the common law tests to be applied to a legislative one, as I have previously testified I’d prefer the Western Australian provision, if for no other reason than there is an established body of jurisprudence which also comes from a code state, which I see as significant.²¹⁵³

Ms Forrester told the public hearing in Case Study 46 that she did not support further reform in Western Australia. She said:

We certainly wouldn’t be advocating a change [in Western Australia]. I don’t actually see a problem with the Uniform Evidence Act provisions as they are; it’s just the interpretation of them that is causing the conflict.

If the terms in the Uniform Evidence Act were applied in the way that they are in Western Australia, this wouldn’t be so great an issue, and I think, unfortunately, that the draft model provisions that we have been provided with [in the model Bill] have the same almost necessary flaw, in the sense that there’s always going to be terminology that’s open to interpretation, and at that point, as Mr Kimber said, you’re back at the start.²¹⁵⁴

In response to a question as to why the courts in Western Australia have not gone back to the common law concerns about tendency and coincidence evidence and unfair prejudice, Ms Forrester said that it was the clear intention of the legislature, in introducing the provisions, that they would increase the opportunities for matters to be cross-admissible and therefore joined, and the Court of Appeal gave effect to that intention. Although the test still required the evidence to have ‘significant probative value’, the courts in Western Australia have interpreted the evidence to have greater probative value than other jurisdictions have done.²¹⁵⁵

Referring to the test for admissibility in the model Bill – which Counsel Assisting summarised as essentially requiring the evidence to be relevant to a matter which is reasonably significant in the case and the defendant does not persuade the court that admission would be likely to result in the proceeding being unfair in a way that cannot be cured by directions²¹⁵⁶ – Mr Kimber said:

I wouldn’t have any opposition to this model. It has the attraction of starting, really, with mere relevance, then retaining, though, the discretion to exclude.

The one observation I make, though, is that without any definition around unfairness, then there’s a risk that dragged back in is all of the common law rules; that judges will say, ‘It needs to be substantially probative to overcome the risk of misuse’, and I would have some concern that we would just circle back to where we began.²¹⁵⁷

Reflecting concerns about further uncertainty in this area of the law, some of the Uniform Evidence Act DPPs expressed reservations about wholesale change, whether adopting the Western Australian approach or the approach applying in England and Wales.

While the New South Wales and Victorian DPPs suggested in Case Study 38 that the approach in England and Wales was worthy of consideration,²¹⁵⁸ the New South Wales ODPP expressed some caution in relation to adopting that approach because it would represent significant change and it might not have the same outcome in Australian jurisdictions given local rules and conditions.²¹⁵⁹ Mr Champion noted that, if an approach such as that in England and Wales was implemented in Australia, there was the possibility of a plethora of interpretations across the states and territories.²¹⁶⁰

The Tasmanian DPP also expressed support for some reform but opposition to complete redrafting of law because of the uncertainty that would arise. He stated that he would not support the adoption of law that mirrors the current legislation in Western Australia or in England and Wales.²¹⁶¹

However, the New South Wales ODPP also identified the need for greater certainty about how a trial will proceed as a reason in favour of reform. The New South Wales ODPP expressed interest in the approach to admissibility as it applies in Western Australia and support for a lower threshold for admissibility because of the greater certainty it may give prosecutors – and complainants and other witnesses – about how a trial will proceed as follows:

In our view, the lower threshold for admissibility in the Western Australian provision appears to give the prosecution the advantage of greater certainty in determining how the trial will proceed. One of the practical issues that we face in NSW is that there is rarely certainty about how trials will proceed, that is jointly or singly, until objections to tendency and coincidence evidence and consequent separate trial applications are determined by the court. More often than not this is not determined in advance of the trial date. This in turn causes uncertainty as to the commencement of the evidence and consequent anxiety for witnesses and last minute organisation for the prosecution team. Witnesses cannot be thoroughly prepared to give evidence or interviews edited, until it is known what evidence is going to be permissibly led. Whilst this problem could be addressed in NSW by early case management hearings there would still be benefit, much earlier in the proceedings, from both the prosecution and defence perspective to have a reliable informed view as to whether or not there will be a joint or separate trial. The uncertainty about such a central issue delays the entry of pleas of guilty and otherwise hampers the timely preparation of a case for trial. A decision to appeal the ruling by the trial judge on the eve of the trial further delays proceedings from time to time. Such a situation would be avoided if determinations were made well in advance of the trial date.²¹⁶²

The validity of concerns in relation to unfair prejudice

In Case Study 38, Mr Babb gave his opinion that juries can cope with evidence of abhorrent acts and nevertheless deliver sound and considered verdicts on the evidence before them:

I agree, to an extent, that sexual offending against children does raise emotions in people. In most right-minded and right-thinking people in the community, they reject it as abhorrent and terrible behaviour. But that is a different thing, where there is a dispute as to whether the touching has actually occurred, to whether a jury won't follow directions and only use admissible evidence in the way that they are directed to use it.

I think they are two different things and I would need some reliable proof to say that despite being offended by such behaviour and regarding it as abhorrent, that jurors were not willing to follow directions and give an accused a fair trial.²¹⁶³

Mr Champion agreed. In response to judicial remarks that judges must remember that cases of child sexual abuse are peculiarly likely to arouse feelings of emotion and prejudice, he stated:

I think we need to re-examine that statement in the light of society's development over the last 10 or 20 years. I think that as we have said today, juries are to be trusted, and we heard a little bit about that last night from the Professor [Professor Spencer].

Throughout our day-to-day lives we are all hearing, in the community, about shocking events. We are processing it, we are accepting it, we live with it. I think that causes me to say that if we were to adopt that statement, I would prefer to do it with some research or some rational argument.²¹⁶⁴

In its submission in response to the Consultation Paper, the New South Wales ODPP referred to the Jury Reasoning Research and stated:

The research conducted by the Royal Commission clearly points in the direction that assumptions about jurors being unduly swayed by particular types of evidence have been over corrected in the criminal justice process.

In our submission, an equally viable view concerning unfair prejudice is that innumerable juries have judged cases based on a sanitised and entirely artificial version of the facts, where victims and witnesses have perhaps looked unreliable or dishonest while struggling to give a truthful account, because they have been told to omit aspects of the accused's offending or other behaviour.²¹⁶⁵

The New South Wales ODPP further submitted:

In our view the research findings [in the Jury Reasoning Research] provide powerful support for the proposition that much accepted wisdom that juries will misuse evidence tendency and coincidence evidence is misplaced and overstated. The caution that the

courts have routinely applied to these categories of evidence has had the effect that triers of fact have been deprived of truthful and full accounts, such that those guilty of child sexual abuse have been acquitted.²¹⁶⁶

In relation to the Jury Reasoning Research, the Victorian DPP submitted:

I agree with the Jury Reasoning Research findings and the view that the courts' long and strongly held concerns about juries' assessment of tendency and coincidence evidence are largely misplaced.

I also agree that the legal principles relied upon to justify separate trials have at times appeared, in practice, as being pedantic, unreal or illogical.²¹⁶⁷

In his submission in response to the Consultation Paper, the Tasmanian DPP submitted in relation to tendency and coincidence evidence and unfair prejudice generally:

The experience in this State is that juries are able to rationally consider evidence which could give rise to a risk of unfair prejudice. There is no evidence in my experience to suggest that if juries are properly directed as to how such evidence is to be used that they will be enflamed and irrationally convict accused people without properly considering the allegations in relation to a particular charge.

This has been demonstrated by verdicts where the jury finds an accused guilty of some counts but not guilty of others. Similarly, it has been demonstrated where the jury finds an accused not guilty of maintaining a sexual relationship with a young person, a crime which is proved if the jury are satisfied that on three separate occasions an unlawful sexual act has been committed against the complainant, but guilty of one or two unlawful sexual acts. These verdicts can only be explained by the jury having logically determined their verdicts.²¹⁶⁸

In Case Study 38, in the context of responding to concerns about the admissibility threshold in Western Australia, contemplating that the admission of the evidence might risk an unfair trial, Mr McGrath defended the ability of juries, properly directed, to appropriately consider the evidence:

It's sometimes the way we approach propensity evidence. We have a great distrust in juries as the trier of fact, and if we reach that point, then why have a jury trial. Yet in all the other aspects of criminal law evidence, we do trust jurors and the entire jury system is predicated [on] understanding juries do understand and will follow the directions of the trial judge. So it is[:] why is it that we approach this area that somehow they will be over awed, won't follow, and they will go down the prejudicial line.²¹⁶⁹

Similarly, Mr Kimber told the public hearing in Case Study 38:

I think we can all point to many cases in which juries involving one complainant have acquitted of counts and convicted of others, and we can also identify cases where there are multiple complainants, and they have convicted of some complainants and acquitted of other complainants. That reflects a close attention to the directions they are given and a very close attention to the particular charge that they are considering.²¹⁷⁰

Mr Champion suggested that there might be benefit in including in any reform an express abrogation of the common law in the Uniform Evidence Act, as was proposed in the model Bill.²¹⁷¹

Particular elements of reform

The first limb of the test for admissibility

In its submission in response to the Consultation Paper, the New South Wales ODPP expressed interest in considering requiring nothing more than relevance for admissibility as follows:

We are also interested to further consider the more radical ‘fundamental variable’ posited by Counsel Assisting that, in terms of assessing probative force, it is simply sufficient if the evidence is relevant. We agree that denying the triers of fact such relevant material increases the risk of the guilty going free to the detriment of the community and the administration of justice.²¹⁷²

In relation to whether there should be any requirement beyond relevance for admissibility, the New South Wales ODPP submitted:

We are interested in further considering relevance as the sole requirement for the admissibility of tendency and coincidence evidence. It is accepted that this is a radical departure from the current state of the law in NSW. We believe, however, that the robustness of the Jury Reasoning Research is such that an approach that focuses on relevance has much to commend it. We would welcome the opportunity to further consider this reform.²¹⁷³

The Victorian DDP expressed support for including the public interest in the test for admissibility of tendency and coincidence evidence, submitting:

It would assist in the proper assessment of the admissibility of tendency evidence if the statutory tests and factors for admissibility included reference to ‘the public interest’. It is in the public interest that the jury has a full and complete picture of the alleged offending, including the fact of multiple complainants making similar allegations.

The ‘public interest’ test should also advert to the risk of prejudice to the accused, which in most cases can be adequately addressed by jury directions. However, the starting point must be that it is in the public interest for tendency evidence to be admitted, where it assists the jury to gain a full and accurate picture of the alleged offending where it involves multiple complainants.²¹⁷⁴

The Victorian DPP also expressed support for the inclusion of guiding principles, submitting:

It would assist greatly if the relevant provisions – in particular sections 97 and 98 of the *Evidence Act* and section 194 of the *Criminal Procedure Act* – were enhanced by the adding of some statements of general or guiding principles.

Those guiding principles could refer to the strategies which are often used by sex offenders in an institutional setting, including grooming and related behaviour, especially where the children are vulnerable to abuse for a variety of reasons.

Statutory recognition of those factors could assist in a more appropriate and increased admission of tendency and coincidence evidence.²¹⁷⁵

The possibility of including guidance or principles to assist courts in applying the test for admissibility was discussed further in Case Study 46. Mr Champion agreed with the suggestion that they might make appeals less likely or necessary. He said:

One would suspect, without going back to the days when Parliament was considering the Uniform Evidence Act provisions, that they doubtless thought that the Uniform Evidence Act was going to make it easier and that it would reduce the scope for interpretation, or wide interpretations and differing interpretations. It has not turned out to be the case.²¹⁷⁶

Mr Babb suggested that guidelines might not be sufficiently comprehensive, or might reduce flexibility, but he suggested that they have some attraction.²¹⁷⁷ Mr White suggested that there may be utility in guidelines, but the issue of tendency is always an issue of fact and will involve an evaluative judgment.²¹⁷⁸ Mr Coates expressed some support for guidelines, noting they might resolve the differences between Victoria and the other Uniform Evidence Act jurisdictions in relation to the degree of similarity needed for tendency evidence.²¹⁷⁹

In relation to introducing guidelines, Ms Forrester said:

it might have had utility at some point in the past, but now I don't believe it would in our state. I also find that the more guides you have, the more restrictively people apply them and give the opportunity for greater judicial interpretation, and in the case of these particular provisions, some limitation of their operation. It certainly is not something that we would be advocating for in Western Australia.²¹⁸⁰

Ms Forrester said that, while she could see why the Victorian DPP might want guidelines, there are not many successful appeals in relation to admissibility or directions in Western Australia, and the provisions are working well; to change them now would create more uncertainty.²¹⁸¹

Mr Byrne noted that, while Queensland does not have a statutory basis for its admissibility rules, given his opinion that one of the difficulties with the application of the common law was the inconsistency of approach, a list of factors would assist. However, he also noted

Ms Forrester's observation that a list may become a restrictive list of proscription.²¹⁸²
Mr Kimber said that he tended to agree with Mr Byrne. He said that the bigger issue is what the test for admissibility should be.²¹⁸³

Requirements for similarity

In response to the question in the Consultation Paper, 'If there is to be any requirement for similarity in the evidence, how should it be expressed and what should it allow and exclude', the New South Wales ODPP submitted:

We agree with the New Zealand position which recognises that child sexual abuse offending involves an unusual class of offender and that a single previous incident can have sufficient probative value. Differences in detail are not greatly significant [page 431]. Moreover, given our prosecutorial experience over many such cases, we particularly agree with the experience and understanding of the Commissioners that 'some perpetrators of child sexual abuse offend against multiple victims, including on some cases both girls and boys and children of quite different ages, and that they offend in a variety of ways' [page 448]. The logical extension of this approach must be that any requirement for similarity is inconsistent with the nature of institutional sexual offending (and we note offending over multiple victims at large).

It is axiomatic that the relevance of the evidence depends largely on this issues [sic] in the particular case in question. There should be no requirement of similarity for tendency evidence to be admissible. As noted at page 394 of the Consultation Paper, in NSW, similarity can assist in establishing significant probative value but is not required. We share the view that similarity can be relevant to the question of admissibility but is not determinative. We regard similarities in circumstances of institutional offending as being capable of bearing on the question of relevance.

The requirement for similarity can bring about perverse outcomes. Generally, sexual acts do not vary widely and minds might differ as to the level of similarity involved. Moreover, ostensible similarity may not be similarity in substance, but evidence of motive and opportunity. For instance the fact the accused is a scout master and numerous complainants are scouts is really more relevant to, and admissible as opportunity rather than similarity.²¹⁸⁴

The Victorian DPP addressed two issues that have arisen particularly in the courts' assessment of significant probative value. In relation to whether factors are beyond the accused's control, the Victorian DPP submitted:

One of the major errors made by the courts in assessing the probative value of tendency evidence – especially in an institutional setting – has been treating factors allegedly 'beyond the accused's control' as being of little if any probative value. I disagree with that approach. For example, the fact that the alleged incidents all occurred within a particular institution – where the accused was in a position of authority and the complainants were subject to that authority – should be relevant when assessing 'probative value'.

Accordingly, I would support amendments to the effect that when assessing the probative value of proposed tendency evidence, the court should not be permitted to disregard evidence of factors allegedly ‘beyond the accused’s control’.²¹⁸⁵

In relation to whether the behaviour of the accused is remarkable or distinctive, the Victorian DPP submitted:

Two other aspects of the way in which courts have approached the admissibility of tendency and coincidence evidence have been misconceived and could be corrected by legislative amendments.

It should not be necessary, for showing significant probative value, that the actual behaviour of the accused should include ‘remarkable’ or ‘distinctive’ features, or that the behaviour should all necessarily translate into the same actual criminal charge.

There will often be cases in which the alleged behaviour – including pre-offence grooming – is frequent and similar, but not identical or ‘remarkable’, and in which the actual physical acts may differ sufficiently to require the averring of different criminal charges. In many such cases, the overall evidentiary situation is such that the evidence from different complainants should be regarded as of sufficient probative value as to be admissible as tendency and/or coincidence evidence.

A related point is that it is not appropriate to discount the probative value of certain alleged behaviour on the basis that it is allegedly ‘typical’ or ‘normal’ criminal behaviour which might be expected to occur in the circumstances in issue. Whether or not such an assessment is even valid, it should not reduce the probative value of such evidence.²¹⁸⁶

In relation to the consideration of factors outside the control of the accused, the Tasmanian DPP submitted:

Fortunately in this State, the courts have tended to follow the New South Wales authorities, such as *PWD* (2010) 205 A Crim R 75, in relation to the assessment of the probative value of tendency and coincidence evidence. The type of reasoning seen in decisions such as *PNJ* (2010) 27 VR 146, where similarities ‘outside the accused’s control’ were not considered relevant to the assessment of probative value, have not been followed.²¹⁸⁷

In relation to requirements for similarity, the DPP for the Australian Capital Territory submitted:

There should be no requirement for similarity in the manner of sexual offending against children. Having a sexual interest in children is unusual. Once a tendency to have a sexual interest in children is established, how that sexual interest is manifested may vary widely. That should not reduce the probative value of such evidence.

For example showing pornography to child A may indicate a sexual interest in that child. It is not otherwise normal behaviour. This would on the face of it be probative in relation to whether the accused had a tendency to be sexually attracted to children and act on that tendency. This would be relevant evidence to take into account when considering whether the accused committed contact offences upon child B. The manner of the offending and conduct may vary, but the common thread is sexualised conduct with children. We know it is common for offenders to target more than one child. This does not mean they will do the same thing to each child.²¹⁸⁸

In Case Study 38, Mr Byrne also referred to the problem of focusing on individual components of circumstantial evidence rather than the overall effect of the evidence. He said:

People naturally, and almost necessarily, concentrate on individual components to get their picture across. But in my view, doing that highlights the minutiae which may, but often does not, matter in the overall result ...

... in my view, there needs to be more emphasis on a wider view of the evidence which is sought to be admitted, taking into account the purpose for admission to use the Uniform Evidence Act nomenclatures as to whether it is for purposes of tendency or coincidence, and looked at it in the concept of the whole case.²¹⁸⁹

In Case Study 38, in relation to degrees of similarity, Mr Babb disagreed with the proposition in *PNJ v DPP*,²¹⁹⁰ discussed in section 24.4, that, in relation to the question of whether coincidence evidence is admissible, factors beyond the control of the accused should be excluded.²¹⁹¹ Mr Babb suggested that, ultimately, it is a matter of fact and degree, and 'In relation to coincidence, the less similarity there is, the less improbability there is in the random happening of those events'.²¹⁹² Mr Champion's views on the decision in *PNJ v DPP* are discussed in section 24.4.

In their opinion given after Case Study 38, Counsel Assisting summarised Mr McGrath's evidence on the effect of the Western Australian approach in sexual abuse cases, including as it might apply in some of the prosecutions discussed in Chapter 24, as follows:

The decision of Steytler J in *Dair v Western Australia* (2008) 36 WAR 413 – to the effect that prejudice arising from impermissible reasoning (ie the desire to punish an accused for past misdeeds and the impact of saturation or distraction) could all be met by judicial direction – meant that this type of evidence was 'invariably admitted' (T17766). Mr McGrath noted that '[i]n sex cases, it is extremely difficult to think of cases where we have endeavoured to lead propensity evidence and failed to do so' (T17775).

In Mr McGrath's opinion the evidence of other sexual misconduct in the Poulter, Rapson, Doyle and Noyes case studies would have all been admissible in Western Australia (T17775). He was dismissive of the table referred to by the Victorian Court of Appeal in *PNJ*: 'we would never descend into such minutiae' (T17777). He was also of the opinion that the increased

ability to rely on such evidence had not lengthened trials. This was because the propensity and coincidence evidence came usually from earlier criminal proceedings where the accused had been convicted. Evidence was usually adduced by way of agreed facts, with the facts taken from the remarks on sentence at first instance (T17778).²¹⁹³

In Case Study 46, in discussing the decision the Victorian Court of Appeal's decision in *Director of Public Prosecutions v Bobby Alexander (a pseudonym)*,²¹⁹⁴ (*Alexander*), discussed in section 24.9, Mr Champion said:

I think that points to the problem that we have and that what has developed here is that we have developed an over-concentration in terms of minutiae, but also as to the particular acts that are said to have occurred.

What resonated to me with some comments made by the previous witness [Professor Hamer] were the words that he said that 'offenders don't specialise to that degree'. I thought that really captured what this debate is really all about, in that we have this predilection to concentrate on specific acts and the distinct similarities, whereas what we should be doing is concentrating on the behaviour. That's what this is all about. It's a type of behaviour that we are really aiming to bring in as tendency; less so, perhaps, coincidence. It I think falls into a slightly different category. But it is the predilection to the behaviour that I think is really important here. We've I think gone off track in respect to this issue and we're concentrating on the minute detail to the point now that we're looking for what dissimilarities exist rather than looking at the overall circumstances of the behaviour that is involved.²¹⁹⁵

In relation to how the circumstances in *Alexander* might have been dealt with in New South Wales, Mr Babb said:

I think there would be a good prospect that there would have been a joint trial in this case. I think that the argument in relation to tendency is that the key factors are the sexual attraction to juvenile boys and the willingness to act upon that sexual attraction.

The focus wouldn't be so great on the difference in behaviour or the difference in location where that behaviour took place.²¹⁹⁶

The second limb of the test for admissibility

In its submission in response to the Consultation Paper, the New South Wales ODPP expressed interest in considering the 'intermediate' approach suggested by Counsel Assisting in Case Study 38, where the difference to the current approach is that the significant probative value is only required to outweigh (and not to substantially outweigh) any prejudicial effect. The New South Wales ODPP submitted:

In our view there is considerable merit in considering this approach. Any new approach in this area of the law must be assessed both in terms of fairness and workability, but also in terms of its ability to deliver better results for victims of child sexual assault than has

occurred in the past. There is reason to believe that some of the least acceptable outcomes in terms of exclusion of tendency and coincidence evidence which have emerged in the course of the Royal Commission hearings would not have eventuated if the proposed new approach had been in place. We are interested in making further submissions about this in due course.²¹⁹⁷

In response to a question about whether, if there were to be a weighing of probative value against prejudicial effect, the test should favour admissibility or exclusion of the evidence, the New South Wales ODPP expressed interest in the Western Australian test of weighing probative value against the degree of risk of an unfair trial.²¹⁹⁸

The Tasmanian DPP submitted that one way of increasing admissibility while maintaining the Uniform Evidence Act approach would be to remove the test in section 101 of the Uniform Evidence Act so that tendency or coincidence evidence would be required to have significant probative value which outweighed the danger of unfair prejudice (under section 137), but it would not be required to *substantially* outweigh the danger of unfair prejudice.²¹⁹⁹

In response to the question whether the burden for persuading the court should be on the prosecution or defence, the New South Wales ODPP submitted that the prosecution should retain the burden of persuading the court to admit the evidence.²²⁰⁰

Concoction, contamination and collusion

In Case Study 38, in relation to issues of collusion and contamination and whether they should be left to the jury, Mr Byrne, Mr McGrath and Mr Kimber all expressed approval for the operation of provisions in their jurisdictions which exclude consideration of the possible contamination of evidence in determining the admissibility of the evidence, leaving such matters to the jury.²²⁰¹

In response to the question whether issues of concoction, contamination or collusion should be left to the jury, both the New South Wales ODPP and the Victorian DPP submitted that they should be left to the jury.²²⁰²

The Victorian DPP expressed concern about the extent to which the court, rather than the jury, makes assessments of factual issues such as the complainant's credibility and reliability, which he submitted are essentially jury issues, stating:

The court should rule on the issue of admissibility, assuming the evidence in issue to be credible and reliable. If the evidence is admitted, it is then a jury issue as to whether it is accepted as true. The normal jury directions can be given to the jury about how they do that, but what matters is that credibility is an issue for the jury, not the trial judge.²²⁰³

The Victorian DPP submitted that, while the issue has been substantially addressed by the High Court in *IMM*, he believes that the effect of that judgment should be closely monitored, and legislative reform considered if appropriate.²²⁰⁴

The Tasmanian DPP submitted that Tasmanian courts have followed the New South Wales authorities as to assessing the probative value of evidence at its highest, and that the High Court's decision in *IMM* has confirmed that this approach is correct. However, he also stated that, although it is contrary to assessing the evidence at its highest, trial judges in Tasmania have continued to consider the possibility of concoction or contamination when assessing probative value.²²⁰⁵ The Tasmanian DPP stated that this has rarely resulted in the exclusion of evidence; however, it has allowed the accused to cross-examine complainants prior to trial on a voir dire. He submitted that, 'In my view, the law should be amended to remove the possibility of concoction or contamination having any impact on the assessment of probative value', stating that such an amendment 'would make certain that complainants do not need to give evidence on more occasions than is necessary'.²²⁰⁶

In relation to whether possible collusion is leading to evidence being ruled inadmissible, the DPP for the Australian Capital Territory stated:

The ACT has tended to follow the NSW approach rather than the more restrictive approach in Victoria in relation to tendency evidence ... However there have been a number of cases with multiple complainants where trials have been severed. This tends to be in sibling matters and seems to flow from the judgment of Mason CJ, Wilson and Gaudron JJ in *Hoch v The Queen*.²²⁰⁷

The DPP for the Australian Capital Territory summarised a number of cases, including one involving allegations of child sexual abuse in an institutional context – a cricket club – and submitted:

What the above cases illustrate is that even in the absence of evidence of collusion or concoction, there is almost an assumption that if they are sisters or known to each other, then the probative value of the evidence can be reduced to the extent that it is excluded. While the High Court's decision in *IMM v The Queen* indicates that potential collusion is not relevant to the s97 test, but may be relevant to the s101 test, at [59], nevertheless in this area alone *potential collusion between witnesses* is relied upon frequently. It is difficult to think of any other situation where the relevant evidence of a witness is *excluded* due to witnesses potentially discussing the matter. For example, would two eyewitnesses to a robbery who are a married couple be precluded from giving evidence because they may have discussed the robbery? Of course, the answer is no. No doubt they would be cross examined about what they discussed before they gave evidence, but it would rarely if ever be precluded on the basis it had no probative value. Why then *exclude* evidence where there is a *possibility* of collusion?

The challenge in child sex cases is the lack of corroborative evidence. The likelihood of one person fabricating allegations is reduced where there are others making similar allegations. This is a matter of common sense. The obsession with possible concoction as a basis to rule out potentially probative evidence ignores the reality of child sexual abuse.

Concerns about possible concoction between victims (where there is opportunity) can be tested at trial before a jury. This is where possible concoction should be tested. The mere fact complainants know each other should not be a basis for exclusion. Nor should the fact they have discussed the abuse. Often this leads to disclosure. It is not uncommon for children to not disclose until it is disclosed by another victim. This does not mean the disclosure is necessarily concocted. I am of the view that issues that potentially affect the credibility or reliability of witnesses should be left to the jury, as is done in any other case.²²⁰⁸ [Emphasis original.]

Standard of proof

In Case Study 38, in relation to the question whether tendency and coincidence evidence should need to be proved beyond reasonable doubt, Mr Babb said that, in New South Wales, coincidence evidence is not required to be proved beyond reasonable doubt. However, for tendency evidence, both the fact of the act that supports the tendency and that the tendency exists are required to be proved beyond reasonable doubt.²²⁰⁹ Mr Babb expressed the view that, consistent with the treatment of other circumstantial evidence, these should not require proof beyond reasonable doubt.²²¹⁰ This was also the position expressed in the New South Wales ODPP's submission in response to the Consultation Paper.²²¹¹

Mr Champion noted that, under the *Jury Directions Act 2015* (Vic), a judge simply gives a direction that the elements of the offence need to be proven beyond reasonable doubt, thus removing any requirement that tendency evidence, or other similar matters, need to be proved beyond reasonable doubt.²²¹²

In relation to whether evidence relied on as tendency evidence should be proved beyond reasonable doubt, the DPP for the Australian Capital Territory submitted that, consistently with circumstantial evidence generally, it should not need to be proved beyond reasonable doubt.²²¹³

Prior convictions and acquittals

In Case Study 38, in relation to the use of prior convictions, Mr McGrath gave evidence that, in Western Australia, evidence of prior convictions can be led in trials and that generally the prosecution will agree on the underlying facts supporting that conviction to be tendered in the trial.²²¹⁴ Mr Byrne stated that this is also the practice in Queensland.²²¹⁵

In its submission in response to the Consultation Paper, the New South Wales ODPP expressed some support for allowing the admission of prior convictions as follows:

Yes; in a limited way, namely if the evidence is relevant to the issues in dispute in the trial. We note with interest that 60% of mock jurors [in the Jury Reasoning Research] expected that they would be informed at a trial of any prior child sexual abuse incident or conviction involving the accused [page 423].²²¹⁶

The DPP for the Australian Capital Territory expressed support for reforms to facilitate the admission of evidence in relation to prior convictions without needing to call witnesses. He submitted:

Currently if it is sought to lead evidence of acts upon other children, even where the accused has been convicted of those offences, in the absence of consent on the part of the accused, it is necessary to call that evidence from the witnesses. Many witnesses would not want to go through giving evidence again. Where an accused has convictions for offences which are admissible as tendency evidence, it would be desirable if legislation could provide that the evidence can be lead [sic] by tendering the remarks on sentence and/or statements of facts, or evidence in the trial (in transcript form).²²¹⁷

In response to the question whether evidence of alleged conduct for which the accused has been acquitted should be admissible, the New South Wales ODPP stated:

We do not have a settled view on this question. The arguments in favour are that in an institutional context in particular, as complainants come forward at different times, it is often the case that when the first complainant comes forward there is no tendency or coincidence evidence available from other complainants because they have not yet come forward. The argument against is that it would be inappropriate to deprive the accused of the full benefit of an acquittal.²²¹⁸

Specific provision for joint trials

In their submission in response to the Consultation Paper, the New South Wales ODPP and the DPPs of Victoria, Tasmania and the Australian Capital Territory expressed support for a legislative presumption in favour of joint trials.

In response to the question whether specific provision needs to be made in favour of joint trials, in addition to law reform in relation to admissibility of tendency and coincidence evidence, the New South Wales ODPP submitted:

We support a statutory presumption in favour of joint trials for all charges where there are allegations of a sexual nature made by one or more complainants and the evidence is cross admissible. Our support for this is based on the need to have greater certainty at the outset of the criminal process as to how the evidence at trial will be presented. We also believe that such a presumption is in line with community expectations that other similar allegations will not be hidden from the jury. In addition, the Royal Commission hearings have highlighted the support that victims receive from [sic] the knowledge that other victims have come forward and that the complete picture of the alleged offending will be placed before the jury. We agree with the victim that gave evidence before the Commission that limiting the number of complainants who give evidence is not reflective of the truth [at page 405].

We agree that the jury research provides cogent evidence that juries will not reason impermissibly in relation to tendency and coincidence evidence.

One important factor in favour of joint trials is that victims are better able to give full and frank evidence. As noted above, at present they are often obliged to refrain from telling the whole truth. This is problematic in an environment where they have sworn or affirmed to tell the whole truth. As noted in the Consultation Paper, our experience is that victims are prevented from telling the whole truth in separate trials and can appear less reliable and credible as a result of needing to comply with complex rulings on the evidence that mean they cannot refer certain events or aspects of their evidence [page 448].²²¹⁹

In relation to whether there should be specific provision for joint trials, the Victorian DPP submitted:

The operation of the provisions which regulate joinder and severance – primarily section 194 of the *Criminal Procedure Act* – could be improved by – for example – making it clear that when assessing whether to sever a joint indictment in a child sex case on the basis of alleged prejudice to the accused, the trial judge should not take into account factors already mentioned as factors for the jury, such as possible lack of credibility due to collusion or related matters.

The existing provision declares, in effect, that the mere fact of a lack of cross-admissibility does not, of itself, justify severance. I support that approach, which should be more rigorously pursued by the courts than it is at present. Too often, a finding on non-cross-admissibility seems to automatically lead to severance; in my view that is an incorrect approach.

On the question of joinder, the relevant provisions could be enhanced by the addition of a ‘public interest’ test, namely a statutory recognition of the public interest in allegations made by multiple complainants against one accused being heard in one trial, where possible.

The specific ‘public interest’ factors include the public interest in juries hearing a complete and coherent narrative without the need for artificial ‘editing’ of the evidence (as occurs in severed trials) and the public interest in the finite resources of the criminal justice system being used efficiently, consistent with the legitimate rights of the accused.²²²⁰

In relation to the cross-admissibility of evidence and joint trials, the Tasmanian DPP submitted:

The uniform evidence law provisions have been applied in Tasmania such that in the vast majority of trials involving sexual allegations the evidence of each complainant has been ruled to be cross-admissible. It is settled law in Tasmania that if evidence is cross-admissible then the indictment is properly joined. While a trial judge retains discretion to sever a

properly joined indictment, this discretion is seldom exercised. Where the evidence is cross-admissible it would be pointless to sever the indictment as the same evidence would be presented at two trials.²²²¹

The Tasmanian DPP stated that he would not have a difficulty with the introduction of a presumption in favour of joint trials, although he suggested that it would have limited application as it would apply only where the evidence is not cross-admissible.²²²²

The DPP for the Australian Capital Territory also expressed support for a legislative presumption in favour of joint trials for trials with multiple complainants²²²³ and particularly where children are victims. However, he stated:

It must be said that previous attempts at such reform, for example s 194 of the *Criminal Procedure Act 2009* of Victoria, have not been successful in the face of a judicial culture which favours separation of trials. One path of reform would be to make it clear that issues of credibility and reliability of witnesses' evidence are matters for the jury and should not be taken into account by a judge on any application to sever an indictment.²²²⁴

Scope of reform

In Case Study 38, in relation to possible reforms to tendency and coincidence law, Mr Babb and Mr Champion advocated for any reform to apply in all criminal matters rather than having different requirements for institutional child sexual abuse cases.²²²⁵

In its submission in response to the Consultation Paper, the New South Wales ODPP stated that it does not support reform to address a limited cohort of offences.²²²⁶ The New South Wales ODPP submitted generally in relation to possible reforms raised in the Consultation Paper:

However, at the outset of this submission we want to emphasise that despite the significant proportion of child sexual abuse offences (and other sexual offences) before the courts in NSW, we are of the firm view that changes to criminal legislation and procedure and to the ODPP's Prosecution Guidelines generally need to be generally applicable to all offences, not just child sexual abuse offences.²²²⁷

The Tasmanian DPP submitted:

Amendments should not be made which create special provisions for sexual crimes. Such provisions would inevitably increase the complexity in an already legally complex area. If necessary, changes can be made within the current framework of the uniform evidence legislation without the need for provisions which apply to some crimes but not others. Directions would be particularly onerous when an indictment contained charges of both physical violence and sexual crimes. While it would be rare to file such an indictment

in the context of sexual abuse in an institutional context, allegations of physical and sexual abuse may arise within familial relationships. It is not in the interests of justice to burden juries in such cases with competing directions relating to different crimes. The necessity for such direction would also be taken into account when the court was considering the discretion to sever.²²²⁸

Distinction between tendency and coincidence evidence

Whether or not the distinction between tendency evidence and coincidence evidence should be maintained was the subject of some discussion, particularly in Case Study 46.

In its submission in response to the Consultation Paper, the New South Wales ODPP commented on the distinction between tendency and coincidence evidence as follows:

We agree that rigid distinctions between tendency evidence and coincidence evidence are artificial. There is no bright line between tendency evidence and coincidence evidence. For example, to invite the jury to reason that it is implausible for numerous complainants to make similar allegations absent any concoction is to invite coincidence reasoning. There will be tendency aspects to the evidence as between the evidence of the complainants.²²²⁹

In Case Study 46, in commenting on whether the distinction between tendency and coincidence evidence causes problems, Mr Babb said:

I think there's such a strong overlap that focusing on the labels creates problems. But one thing that I think is important is that all the parties focus on what is the probative value and why is it important evidence, and there is slightly different reasoning that is going on. So at some stage you are talking about how the jury can properly use this material, and at some stage I think you always are looking at: are we talking here about the improbability of multiple people making like allegations; or are we talking about a course of behaviour that indicates that someone is behaving that way.²²³⁰

Mr Babb suggested that the most important thing is to bring real clarity of thought to how the jury will be directed in relation to the evidence, and to have that clarity from the beginning, including so that the accused person knows how the evidence will be used and the case they have to answer.²²³¹ Mr Babb said that, currently, not all lawyers understand the distinction between tendency and coincidence evidence and the thinking may remain muddled, while the sorts of checklists or key questions outlined by Mr Game in his advice (with Ms Roy and Ms Huxley) might assist.²²³²

Mr White said that there is utility in maintaining the distinction between tendency and coincidence evidence, while recognising that particular factual situations might involve both, and he agreed with Mr Babb as to the importance of having rigour in identifying the reasoning.²²³³

Mr White suggested that *Alexander* should have been viewed as a tendency evidence case rather than a coincidence evidence case, although he suggested that the practical issue is whether a joint trial will be allowed.²²³⁴ Mr Champion said that *Alexander* allowed tendency and coincidence reasoning equally.²²³⁵ Mr Coates expressed agreement with Mr Babb that:

the real issue there [in *Alexander*] was it was a boys home, young boys and he was prepared to carry out those acts on numerous boys.

The fact that the acts were different in some cases – some being intercourse and others being indecent assaults – in my view is not that relevant.²²³⁶

In relation to whether there is utility in distinguishing between tendency and coincidence evidence in the way it has been done in the Uniform Evidence Act, Mr Kimber said:

I think there are advantages, and I think the real advantage that I see is that it focuses everyone's attention upon what the particular use is in the evidence in a particular context, and that then informs, or should inform, the way the trial starts, the way the trial is run and, probably most importantly, what a jury is told at the end of that trial as to how the evidence can be used by them.

So I think you can assign different labels, as you've just identified, Mr Kirk, but they are different uses and I think there is utility in distinguishing between them, even though, in many matters, both uses might be available.²²³⁷

Mr Byrne agreed with the utility of understanding and identifying the evidence and the end use to be made of it, but he doubted the utility of assigning different labels to the evidence.²²³⁸ Ms Forrester agreed with Mr Byrne.²²³⁹ The Western Australian provisions refer to 'propensity evidence', but Ms Forrester said:

We don't tend to use 'propensity evidence' when directing juries, as such. It tends to be that the evidence is led to demonstrate to the members of the jury that the accused has a tendency or a sexual habit, sexual interest in children of a certain age, or however we have defined that particular conduct and its probative value in the trial. That is then what the jury are directed on. Then they're told that they must not use it as mere propensity, in the sense that simply because they have done that in the past, they must have, as opposed to are more likely to have, committed those particular acts.²²⁴⁰

Mr Kimber said that, in South Australia, the evidence would be explained to juries in terms of a particular disposition to behave in a particular way, and that the term 'propensity' may be useful for lawyers but is not helpful for juries.²²⁴¹

Mr Byrne said that, in Queensland, it will depend on the issues in the individual trial, but judges will often refer to propensity evidence to the jury in terms such as 'evidence other than that of the specific charges, which is discreditable if you accept it'.²²⁴²

27.4.5 Members of the private Bar

Introduction

We have heard from a number of members of the private Bar during our consultations and public hearings in relation to tendency and coincidence evidence and joint trials. Generally, these barristers have provided a defence perspective on the issues.

In particular:

- In 2015, barristers Mr Game, Ms Roy and Ms Huxley provided advice to the Royal Commission, titled 'Tendency, Coincidence & Joint Trials'. The advice set out the common law on tendency and coincidence evidence, the relevant legislative provisions governing such evidence in Australian jurisdictions, the logical underpinnings of the use of such evidence, and their opinion of the appropriateness of the existing provisions. The advice is published on the Royal Commission's website.
- In Case Study 38, to provide a defence counsel perspective, we heard expert evidence from three senior members of the private bar. Mr Dennis Lynch QC of the Queensland Bar, Mr Stephen Odgers SC of the New South Wales Bar and Mr Peter Morrissey SC of the Victorian Bar gave concurrent evidence in the public hearing.
- In Case Study 46, four members of the private Bar gave evidence about tendency and coincidence evidence and joint trials as follows:
 - Mr Game and Mr Morrissey gave evidence concurrently on 29 November 2016
 - Mr Arthur Moses SC and Mr Odgers gave evidence concurrently on 1 December 2016.

In addition to co-authoring the advice on these topics referred to above, Mr Game 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 Lynch was nominated by the Criminal Law Committee of the Queensland Bar Association to represent the Queensland Bar Association in Case Study 38.

Mr Morrissey was until the week before the public hearing in Case Study 46 chair of the Criminal Bar Association of the Victorian Bar.

Mr Odgers 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 Odgers is also the author of a leading text on the Uniform Evidence Act.²²⁴³

Mr Moses is an executive member of the Law Council of Australia and was nominated by the Law Council of Australia, which made a submission in response to the Consultation Paper, for the purposes of the public hearing in Case Study 46. We discuss Mr Moses' evidence in this section; and the submission of the Law Council of Australia in section 27.4.6.

We outline the evidence and opinions of members of the private Bar under the two panels in which they gave evidence in Case Study 46, with a separate outline of the evidence given by Mr Lynch in Case Study 38. We also include in this outline additional matters raised in evidence by Mr Morrissey and Mr Odgers in Case Study 38 and in the advice given to the Royal Commission by Mr Game, Ms Roy and Ms Huxley.

Mr Game and Mr Morrissey

Mr Game gave evidence in Case Study 46 that he continues to support the Uniform Evidence Act test for admissibility and that a test of relevance would enable too much extraneous material to be admitted.²²⁴⁴

In their advice to the Royal Commission, Mr Game, Ms Roy and Ms Huxley argued that the Uniform Evidence Act provisions strike the most appropriate balance and that it would be desirable for jurisdictions that have not adopted the Uniform Evidence Act to adopt those provisions. They stated:

In short, we think that the current rules are for the most part appropriate, particularly in the Uniform Evidence Act jurisdictions. One cannot help but be struck by the myriad of judicial opinions, apparently contradictory case outcomes and the (sometimes overwhelming) complexity that mars this area of law. However, attention to the reasoning processes that underlie the application of the rules of admissibility helps to explain and resolve contradictory outcomes and navigate unavoidable complexity. Having said that, some rules in South Australia, Western Australia and Queensland restricting the factors that the trial judge can take into account in determining admissibility are undesirable. It would be preferable if the Uniform Acts' approach to tendency and coincidence were adopted in each jurisdiction.²²⁴⁵

They concluded that:

the tests regarding the admission of tendency and/or coincidence in Australia evidence [sic] are for the most part appropriate and strike the right balance between ensuring relevant and probative evidence is placed before the jury and protecting an accused's right to a fair trial.²²⁴⁶

Mr Game told the public hearing in Case Study 46 that, however formulated, there must be a test of cogency to articulate and justify how the evidence relates to the issue,²²⁴⁷ or how the two things are connected 'when one of them is not the thing that you are actually trying to establish; it is something else'.²²⁴⁸ Mr Game said that the Uniform Evidence Act test of significant

probative value does that.²²⁴⁹ Mr Game said that the courts have had problems with ‘significant’, but said that the problems were largely resolved and the outstanding issues may be addressed by the High Court in the *Hughes* appeal.²²⁵⁰

In their advice, Mr Game, Ms Roy and Ms Huxley suggested a set of basic questions that should be asked when framing an application to use tendency or coincidence evidence. For example, in the case of tendency evidence, the basic questions should help to identify what the alleged tendency is, whether the evidence supports it and whether the alleged tendency can logically support an inference that the accused committed the actual crime in question.²²⁵¹

They stated that this was important because:

The problem with the use of tendency and coincidence evidence in child sexual assault trials is not the threshold for admissibility but rather difficulties in identifying the logical limits of the evidence. The above discussion is intended to raise issues that should be addressed by prosecutors, defence counsel and trial judges when dealing with this kind of evidence. Early identification of the evidence sought to be admitted, the inferences to be drawn from the evidence and the process of reasoning is vital to reduce delays associated with trying these types of offences.²²⁵²

They set out a prompt for practitioners to guide them through the process of considering the role that particular evidence can play in a tendency and coincidence context, including considering its probative value and its possible unfairly prejudicial effects.²²⁵³

In relation to a test of relevance, Mr Morrissey said that the mock jurors in the Jury Reasoning Research who said that they expected to hear about prior convictions, if they existed, were wrong and that they should not be interested in them. He said:

the mere fact of the conviction itself is irrelevant. It’s what it says about a fact in issue in the case, whether it goes to the mental state or the proclivity to drive a particular car or to do something that is probative in the case.

The fact that the jurors thought they needed to know that tells you that they are prepared to reason in an illicit way ab initio, and that is the sort of problem that arises. We all know that we’re curious to know what sort of a bloke this fella is. I am, and we all are. The fact that the jury proceeded in that way tells you that there is a need for a curative, protective limit upon relevance – the same sort of limit that was raised from completely the opposite direction when female complainants in rape cases were subject to the sorts of outrageous cliché-ridden directions that were required in the past. Juries are now told that they may never reason like that, not in any case.

What is relevant is limited by the law. There is nothing per se wrong with placing limits upon mere relevance, because a particular juror might find it relevant that a person was a gender, a particular preference, a race or some other characteristic.

I make that point simply because mere relevance, unprotected by the sort of focus of cogency which Mr Game refers to, is potentially dangerous and may well lead to injustices that are difficult to detect. That's one of the reasons why the general position – and it will be the position of the Victorian Criminal Bar Association as well – is to maintain the three-step process [of relevance, significant probative value and prejudice]. Western Australia is one version of it. The Evidence Act is another.²²⁵⁴

Mr Morrissey also suggested that a test of mere relevance would expand the prosecutor's duties of disclosure such that they would become extraordinarily wide.²²⁵⁵

In Case Study 38, in relation to tendency and coincidence generally, Mr Morrissey agreed with concerns identified by Mr Odgers and said:

The real danger is one of hijacking of the real issues by peripheral issues, and the reason why there needs to be some sort of a guard is because of that danger, that the hijacking of genuine issues of probative value of the actual allegations themselves will come to be coloured, or over coloured, by the peripheral evidence. The less peripheral, the more admissible it will become.²²⁵⁶

In response to a question whether he was aware of any miscarriages of justice in relation to tendency or coincidence evidence since the commencement of the more liberal provisions in the *Evidence Act 2008* (Vic), Mr Morrissey said:

I'm not aware of that being the case, no, and in fact I think that it has added rationality to the way in which cases are pursued by both sides. Similar fact under the common law was so ill understood and so controversial that it lent incoherence and anxiety to the trial process.²²⁵⁷

Mr Game gave evidence that, in *Pfennig v The Queen*²²⁵⁸ (*Pfennig*) the propensity evidence was particularly powerful because it demonstrated the same thing as the offence charged – a propensity to abduct children. However, in *HML v The Queen*,²²⁵⁹ the High Court allowed propensity to be something substantially less than the same thing – such as a sexual interest – which Mr Game said had a much lower quality of probity.²²⁶⁰ Mr Game said that concern arises both for fairness and efficiency reasons if the trial is not confined as closely as possible to the facts in issue in the case.²²⁶¹

Mr Morrissey gave evidence that the Uniform Evidence Act excludes many matters that could be seen to be relevant, and he agreed that the reasons for excluding some relevant evidence related to efficiency and prejudice.²²⁶² In relation to prejudice, Mr Morrissey said:

In my experience as a trial barrister, one who has dealt with many accused and also advised victims and complainants over time, there's no-one who is not prejudiced, in reality, by their first hearing of the fact that 'he's done it before'. I think I said it last time [in Case Study 38²²⁶³]: it's a visceral response. To say that the mock juries [in the Jury Reasoning Study] were not ultimately swayed by it is a different thing from saying that it's not prejudicial.

This Commission, I'll say it as strongly as I can, I would be submitting, will just be falling into a factual and self-deceiving error if it says that it's not prejudicial as such. ...

It's unfairly prejudicial because of the emotion that it generates and the disgust that it generates and the revulsion that it generates. That's the unfairness. It is turning a rational jury into an emotional one. The jury directions, which everyone embraces and which form an elaborate and well thought-out range of curatives, are put there for that very reason. Perhaps they're effective, but it can't be denied that they're there for a reason, and that's to cure the emotion.²²⁶⁴

In Case Study 38, in response to a question whether evidence of uncharged acts has an impact on the jury because it is powerful evidence, Mr Morrissey said:

It could be, but it is really because of the shock. When I say 'visceral', I mean its initial appearance on the scene in a trial is a big moment in all cases. Sometimes it can be tamed by rational argument, submissions, evidence, but it is a big moment and everyone regards it so. Perhaps wrongly, perhaps guided by clichés, but, anyway, I'm putting it forward as the fact: it is a fact of life for defence counsel.²²⁶⁵

Mr Morrissey also expressed the view in Case Study 38 that no inference can be drawn that juries are giving fair consideration to each count merely because they convict on some counts and acquit on others.²²⁶⁶ He expressed support for the trial judge retaining the ability to determine that evidence will be overwhelming for the jury in a particular case, and he referred to the prosecution in *Rapson v The Queen*,²²⁶⁷ discussed in section 24.5, as an example of the judge not allowing all the evidence to be cross-admissible.²²⁶⁸

In Case Study 46, Mr Morrissey said that the prejudice may be curable by a direction so that a joint trial can proceed with cross-admissible evidence, but this depends on the facts in each case and fashioning an appropriate direction.²²⁶⁹ Mr Morrissey also suggested that joint trials should not depend solely on cross-admissibility and that, in Victoria, the Crown should more often press for a joint trial when it loses an argument for cross-admissibility.²²⁷⁰

In response to a question why, given the common law has been changed and the reforms in Western Australia and England and Wales have operated for almost 12 years with no significant suggestion that they have led to significant miscarriages of justice, there is not a decent case for reform and why the onus is not on those who wish to justify the current provision, Mr Morrissey gave the following evidence:

First of all, the fact of the sky not falling in, to use your [Counsel Assisting's] earlier phrase, doesn't assist because you'll never know. There is nothing more unpopular than a person convicted of a child sex offence, and there will never be an outcry, there will never be a press campaign, there will never be public interest in liberating such a person. If there is one, that person will be seen as a one-off injustice. So if there is a flaw in the English process, it will be self-concealing.

In terms of whether the system is currently working, the fact that the Uniform Evidence Act replaced the common law and allowed for a more liberal regime of admissibility may have been a welcome development, but it's not a test of whether it's a welcome development or not that the sky – and I don't mean disrespect in that, but you wouldn't know by a groundswell, because groundswells in criminal law are generated by things that are outside of the criminal law, such as the press who wish to see a particular agenda advanced one way or the other, depending on what decade we are in.

In terms of the coherence of the current regime, such differences as exist between Victoria and New South Wales are matters which the law will work out and is doing so.

In Victoria, there was a range of positions, and I take it that the proposal that was helpfully advanced and provided to us for comment had really three steps to it. It was the question of who bears the onus, if you like, to establish admissibility; secondly, did there need to be a cogency step, and currently it's phrased as 'no significant probative value'; and, thirdly, perhaps more generally, a public interest phase of the type in section 101.

There is no sign that that is working poorly.²²⁷¹

In Case Study 38, in relation to the Western Australian approach, Mr Morrissey said:

In Victoria, I think there would be a grave objection to any provision that contemplated a risk, at whatever level, that a court would accommodate an unfair trial. Whilst it's put in terms of the fair-minded observer, and to use your Honour's formulation earlier, that would be hard to explain to an accused person and their family, that they may be convicted in an unfair trial, but it was worth the risk. The use of the term 'risk of an unfair trial' is, under any view, to be avoided. It would diminish the confidence, I think of those in Victoria, in the process they are undergoing.²²⁷²

In their advice, Mr Game, Ms Roy and Ms Huxley were critical of the Western Australian approach. They stated:

The balancing act required between the probative value and the degree of risk of an unfair trial, is to be conducted 'such that fair-minded people would think that the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial', is of little utility. It suggests, for example, that there can be a public interest in an unfair trial in some circumstances; or that the judge would, but for the section, have some view other than that shared by 'fair-minded people'.²²⁷³

In Case Study 46, referring to the approach in England and Wales, Mr Game said:

When you ask questions about the British system, I don't accept the first premise, which is that the [Uniform Evidence Act] sections are not working. I think they are actually working quite well, but what you're witnessing – and I really do appreciate the distress of the many

victims that have spoken, but when it comes down to what the provision is doing and how it works, I think the provision is fine. I just think courts are slow; they do take time to take up a new evidentiary provision. It sometimes takes years for these things to work their way through, and that's what we're witnessing.²²⁷⁴

In relation to potential reform and the differences between New South Wales and Victoria in applying the tendency and coincidence provisions of the Uniform Evidence Act, Mr Morrissey gave evidence that:

Victoria is a bit more perhaps self-aware about it than New South Wales, simply because we're less good at and less practised in the Evidence Act. Practitioners are coming to terms with that Act and so, in a sense, are more hypersensitive to change and aware of it.

We're not seeing a difficulty with the fact that there's a difference between New South Wales and Victoria. We're seeing that the High Court will resolve those issues. It is desirable that there be uniformity and it's more desirable that either one or the other position prevail, which is likely to happen. The decision in *IMM* was welcomed even though, on parochial grounds, it perhaps went against Victorian reasoning. It has made for a more healthy way of running trials and a more clear understanding between prosecutors and defence. Out of court, it has worked well.

The common understanding between practitioners needs to be developed. That is a benefit to complainants and to accused people because the trials are efficient ...²²⁷⁵

In relation to the standard of proof, Mr Morrissey noted that where, as in Victoria, tendency evidence does not need to be proven beyond reasonable doubt, this can create confusion for a jury – they need not be satisfied beyond reasonable doubt that the accused committed an uncharged act of child sexual assault, but, in using the fact of that uncharged act in assessing the guilt or innocence of the accused with respect to the current charge, they do need to apply that standard.²²⁷⁶ Mr Morrissey referred to the New South Wales approach favourably as providing a safeguard.²²⁷⁷

In relation to the admissibility of prior convictions, Mr Game gave evidence that the tender of a prior conviction does not establish the underlying facts and, if the facts were not proved, there would be nothing put before the jury.²²⁷⁸ If the Uniform Evidence Act was amended to permit the jury to accept that the conviction was properly founded, Mr Game said that the jury would still need the information underlying the conviction.²²⁷⁹

In relation to the admissibility of evidence of offences for which the accused was acquitted, Mr Game said:

the introduction of evidence about acquittals undermines what really is a fundamental precept of criminal law, which is incontrovertibility, which brings together ideas of issue estoppel and *autrefois acquit*. The same applies in civil proceedings in issue estoppels

and so forth. And there are reasons for that not just connected with fairness but reasons of finality with respect to proceedings, so they are a separate body of reasons why that's problematic.²²⁸⁰

Mr Game suggested that child sexual abuse cases should be better investigated rather than placing sole emphasis on the complainant's account and not investigating the surrounding circumstances.²²⁸¹ Mr Morrissey raised similar concerns in relation to Victoria, suggesting that it was difficult for complainants when facts emerged at committal which could have been established in the police investigation and defendants were being over-charged.²²⁸²

In relation to the model Bill, Mr Game raised the following concerns:

- section 94(5) raises concerns about prior convictions, acquittals and collateral challenges noted above²²⁸³
- the provisions would allow evidence about the credibility of an accused, particularly through section 95A(1)(a)²²⁸⁴
- it is not clear that evidence in section 95A(1)(a) would meet the description in section 97(1), and section 95A(1)(b) is unnecessary because a particular type of offence is not needed for tendency or coincidence evidence²²⁸⁵
- the provisions allow a test that is lower than relevance because section 95A(1)(c) applies to evidence that '*could* be relevant', and the definition of 'relevant evidence' refers to evidence that '*could* rationally affect' – the two '*coulds*' produce a test that is less than a test of relevance²²⁸⁶
- under the test in section 98A of 'likely to result in the proceeding being unfair':
 - it would only be possible to succeed on the prejudice point if there is something very unusually prejudicial and weak about the evidence
 - 'likely' should be replaced with 'there is risk' or a 'real' or 'appreciable' risk because 'likely' has connotation of probability about it and would be construed on the basis that it means more than 50 per cent probable
 - the focus should be on the evidence and not on the overall proceeding²²⁸⁷
- contrary to the combination of tendency and coincidence evidence in Schedule 2, there is value in keeping tendency and coincidence evidence separate and understanding which reasoning you are using, even if it is both.²²⁸⁸

Mr Morrissey stated his agreement with the points that Mr Game made in relation to the model Bill.²²⁸⁹

Mr Moses and Mr Odgers

In relation to the approach to the admissibility of tendency and coincidence evidence, Mr Odgers said:

it seems to me that the approach of the common law and our legal system for 100 years has been that there are assumed to be certain dangers with this kind of evidence and that the prosecution should be required to demonstrate that the evidence is sufficiently worthwhile, sufficiently cogent, to justify admission rather than imposing an onus on the defence to persuade the court that relevant evidence should be excluded. ...

... as a practising lawyer, as somebody who has considered this field for a long time academically and professionally, I personally have no doubt whatsoever that this kind of evidence can carry with it significant levels of unfair prejudice and that – and I can defend that proposition if you wish me to.

That view of mine therefore leads me to the conclusion that given that generalisation, it's appropriate that the courts insist that the prosecution demonstrate that notwithstanding those real dangers, the evidence is sufficiently probative to justify its admission.²²⁹⁰

In Case Study 38, Mr Odgers said the following about the development of the law's approach to this issue:

Nobody is disputing the relevance of this evidence. The concern is that history and experience and research suggests that there is a real danger that the evidence will be given more weight than it deserves, or lead to an undercutting of the standard of proof in criminal trials. It is that concern which justifies an approach which says: let's be careful before we let this in; let's require it to be shown under the uniform evidence law that the evidence has some significance before we let it in; and let it be demonstrated that the value outweighs the dangers with it. Those are reasonable requirements, and the view of the criminal Bar in New South Wales is that those requirements should be maintained.²²⁹¹

In Case Study 46, Mr Odgers expressed the opinion that the law as it is currently applied in New South Wales is about right and that there are now high levels of admissibility for tendency and coincidence evidence.²²⁹² Mr Odgers also said that the rules should not be changed just because it is hard to get convictions and we want more convictions; rather, the rules should reflect policy and principle.²²⁹³

In relation to the approach to the admissibility of tendency and coincidence evidence under the Uniform Evidence Act, Mr Moses said:

We well accept and recognise that the current provisions of the Evidence Act may be causing some concern, because there have been instances – and we've read them – where there haven't been joint trials allowed and persons have been acquitted, only to

come back before the court in respect of matters that occurred at about the time of the first incident, and people surmising that had that been known at the time, it may have led to a conviction. So we are aware of the difficulties.

What we would urge for consideration by the Royal Commission – and we acknowledge the very important work it has done – is whether it refers its recommendations to the Australian Law Reform Commission, because we do think there needs to be a belt-and-braces approach to the Evidence Act as a whole and not being amended in parts, otherwise we will have the difficulties we have had with the Victorian versus New South Wales interpretations. There might need to be a holistic review of this and we might then, hopefully, get some of the states, such as Western Australia, coming in under the umbrella of the uniform evidence law and have a joint approach across the Commonwealth ...

I think one of the issues that this Commission has exposed is that you can't have, in effect, an apartheid of rights depending on what state you are in. We need to have consistency. Victims deserve to have consistency.²²⁹⁴

Mr Odgers said that the main reason for advocating a referral to the ALRC is that changing the Uniform Evidence Act provisions would go far beyond the area of child sexual abuse, applying to other kinds of criminal offences and to civil litigation, while the Royal Commission's research and analysis has focused on child sexual abuse.²²⁹⁵

In relation to the issue asymmetry in the balancing of probative value and unfair prejudice, such that the probative value must 'substantially outweigh' the risk of unfair prejudice, Mr Odgers said that he does not consider that the word 'substantially' makes much difference and that many cases are decided on the basis of the tests in sections 97 and 98, not on the exclusion in section 101.²²⁹⁶

In Case Study 38, Mr Odgers did not accept that evidence of juries convicting on some charges but not others in a joint trial was evidence that juries do not use unfair prejudice in reaching their verdicts, noting that there may be other reasons why a jury might give an accused the benefit of the doubt in relation to some charges.²²⁹⁷ He also noted that the law, which has been quite restrictive on the admissibility of tendency and coincidence evidence, was based on judicial experience of real dangers in the evidence.²²⁹⁸

In Case Study 46, in response to a question whether the experiences in Western Australia and England and Wales provide some evidence that a more liberal regime may not lead to great injustice, Mr Odgers said that the test in Western Australia is very close to that in the Uniform Evidence Act, although he could not comment on how it is being applied in practice.²²⁹⁹

In Case Study 38, Mr Odgers expressed concerns with the approach in England and Wales, arguing that, because tendency and coincidence evidence may be given more weight than it deserves, the onus should remain on the prosecution to show that the evidence is sufficiently probative to justify its admission.²³⁰⁰ Mr Odgers said:

I've read Professor Spencer's evidence. I think that even he concedes that he is probably in a minority of academics in the United Kingdom in supporting the approach taken in the Criminal Justice Act. I think he concedes that a majority of academics take the view that it's – it's not sufficiently protective of fair trial rights and designed to reduce miscarriages of justice, but I began my evidence by saying that at the end of the day the critical choice is between the approach which says presumptively the onus should be on the prosecution to persuade the court that the evidence should be admitted notwithstanding dangers, which is the current approach, and the United Kingdom approach, which essentially says presumptively it comes in unless the defence is able to demonstrate that the dangers outweigh the benefits.

Importantly, not just simply is that problematic because it tends to undercut what we say are the real dangers, it assumes there really aren't any and requires the defence to demonstrate that there are, it has the general effect that most of this evidence now comes in in the United Kingdom, but it also has the effect, by replacing the rules with discretions, that appellate review is significantly reduced, guidance is much less available now from appellate courts in the United Kingdom because it is essentially a discretionary question.²³⁰¹

Mr Odgers also strongly opposed the view that the admissibility of evidence should in any way turn on the strength of the other evidence in the case:

It seems to me as a matter of principle you apply the same rules and you make the same judgments about probative value and dangers of prejudice regardless of whether or not there's other evidence of guilt.²³⁰²

In Case Study 46, Mr Odgers also agreed with Mr Morrissey's evidence that it is unlikely to be demonstrated that the more liberal approach has led to miscarriages of justice.²³⁰³ He said:

If a person has been convicted in a word-against-word case, for example, it is going to be a very, very rare event indeed that it can be demonstrated that there has in fact been a substantive miscarriage of justice and would really require, I would have thought, the complainant to retract and convincingly retract, and that, as we all know, is a very rare event.²³⁰⁴

Mr Moses told the public hearing that he had spoken to the president of the Western Australian Bar Association, Mr Hylton Quail, who practises in criminal law, about the operation of the Western Australian provision in section 31A of the *Evidence Act 1908* (WA). Mr Moses reported that Mr Quail told him that once the test of significant probative value had been met, essentially the evidence would be admitted. Mr Moses also reported that Mr Quail said he was not aware of any injustices in relation to the application of the test in Western Australia.²³⁰⁵

In response to a question about the approach of the Victorian Court of Appeal in *Alexander*, Mr Odgers said he was not in a position to either support or criticise the court's decision and that in other cases courts might agree that, regardless of specific dissimilarities, all the matters

could be heard together.²³⁰⁶ Mr Odgers said that Victorian courts have perhaps been more protective of accused persons than New South Wales courts and that Victorian courts have, to an extent, been influenced by the approach of the common law.²³⁰⁷ He said:

These are issues which clearly have gone to the High Court and are going to the High Court to try to clarify the proper approach. All I can say is that in my experience, in New South Wales, my sense is that – and I think the prosecutors who have given evidence before this Commission confirmed this – there is a sense that the New South Wales courts seem to be getting a fairly sensible outcome in terms of questions of admissibility for both tendency and coincidence evidence under the Act.²³⁰⁸

Mr Moses gave the following evidence in relation to the differences between New South Wales and Victoria in the interpretation of the tendency and coincidence provisions:

It is unsatisfactory, your Honour, that in two states with identical wording in the legislation there is a different approach, because you are going to have a shifting sands approach to the reception of evidence, depending upon where a crime is committed and tried. That is unsatisfactory.

Leeming J mentioned in a paper that he delivered in 2015 that with sections 97 and 98 and this contest that had been going on between the Victorian Court of Appeal and the New South Wales Court of Appeal, some of it could be explained by the fact that the legislative histories concerning those provisions were different and that the New South Wales provisions were amended substantially and some of them came into effect in 2009 following a review by the Law Reform Commissions, whereas the Victorian provisions came in differently, and that may be an explanation for this contest.

I have read your Honour's comments when Mr Game was giving his evidence as to whether the Hughes judgment in the High Court will resolve this issue. I probably tend to agree with your Honour that it may not resolve this issue. It may need to be the subject of some form of reform because as we go around the states, as I said, it depends on where the crime was committed as to how the evidence will be treated, and that surely can't be satisfactory for the Commonwealth in 2016.²³⁰⁹

Mr Moses also agreed that the interpretation of the provisions evolves, and even experienced judges had been applying the common law rather than the statute, which may be why there are different approaches in New South Wales and Victoria.²³¹⁰

In relation to the distinction between tendency and coincidence evidence, Mr Odgers said that whether there is an overlap in reasoning does not matter because essentially the same test for admissibility applies and it is desirable that parties adducing the evidence be required to make clear how they seek to rely on it.²³¹¹ Even if the distinction was removed, it is inescapable that the Act defines what sort of evidence it is to which the rules will apply.²³¹² Mr Odgers said that

an advantage of the Uniform Evidence Act is that it makes clear that the requirements in Part 3.7 only apply where tendency or coincidence reasoning is being relied on, whereas under the common law this is unclear.²³¹³

In Case Study 38, in relation to the standard of proof, Mr Odgers expressed the view that, if an item of evidence is indispensable to proving guilt beyond reasonable doubt, that item of evidence should be proved beyond reasonable doubt.²³¹⁴ He also noted that an argument can be made that tendency evidence is potentially so dangerous that it should only be relied on if it is proved beyond reasonable doubt.²³¹⁵

In Case Study 46, in relation to the issue of the admissibility of prior convictions, Mr Odgers said that, for tendency evidence, informing the jury that the accused has done the kind of act in question before is likely to be prejudicial and result in coincidence reasoning rather than tendency reasoning.²³¹⁶ While a plea of guilty would be an admission that could be used in a subsequent trial, it is the underlying facts and circumstances that are relevant rather than the fact of a conviction.²³¹⁷

In relation to the possibility of providing guidance in the legislation by listing factors to be taken into account in determining admissibility, Mr Odgers said that he could see no harm in that approach, although the factors may operate in different ways in different contexts, but it would be unlikely to make much difference, as counsel often refer to those factors already and they are listed in textbooks such as Mr Odgers'.²³¹⁸

Mr Lynch

Mr Lynch gave evidence in Case Study 38 but not in Case Study 46.

Mr Lynch said that, in his experience in Queensland, convictions in child sexual abuse cases, even single-complainant cases, are increasing and that the position has changed since the example of Noyes,²³¹⁹ which we discussed in section 24.6. Mr Lynch said:

I think the general experience at present is that defending these sorts of cases is very difficult, and if you add in the prejudice that will undoubtedly be there in some way, to some extent, when you add two, three, four, or however many further complainants – it's just overwhelming.²³²⁰

Mr Lynch said:

My experience, and I think the experience of others at the criminal Bar in Queensland, is that there are lots of cases where you would expect that there will be an acquittal, where there is now a conviction. So the added complainant or joinder of charges for convenience, or for whatever reason, is likely to diminish further any prospect of there being a trial on the real issue in the case, and that is: has this particular allegation been proved?²³²¹

Mr Lynch expressed support for the *Pfennig* test and the rules as they apply in Queensland and said that they work fairly well.²³²²

In relation to issues of collusion and contamination, and whether they should be left to the jury, Mr Lynch gave examples of some difficulties that arise in Queensland where the evidence is admitted but the judge's directions effectively tell the jury to ignore it because the evidence is potentially affected by collusion or contamination.²³²³

27.4.6 Legal bodies and representative groups

Introduction

A number of legal bodies and representative groups made submissions in response to the Consultation Paper.

We discussed the submission of Women's Legal Service NSW and the evidence given by Ms Loughman and Ms Link-Gordon representing Women's Legal Service NSW in section 27.4.1.

In relation to Case Study 46, the evidence of Mr Moses, who represented the Law Council of Australia, is discussed in section 27.4.5.

The issues of tendency and coincidence evidence and joint trials were also discussed with the following witnesses who gave concurrent evidence in Case Study 46:

- Mr Liam Cavell, representing the New South Wales Law Society Young Lawyers Criminal Law Committee
- Ms Penny Musgrave and Mr Aaron Tang, representing the New South Wales Law Society.

Following Case Study 46, a number of legal bodies and representative groups provided comments on the model Bill. Further, the media reported comments made by Mr Greg Barns, the criminal justice spokesman for the Australian Lawyers Alliance, which are also outlined in this section.

Law Council of Australia

In its submission in response to the Consultation Paper, the Law Council of Australia stated that the Royal Commission should not propose significant changes to the law that will apply generally to all tendency and coincidence evidence in any proceedings, noting that the Royal Commission's work and research has focused on child sexual abuse cases only.²³²⁴ The Law Council of Australia stated that:

the primary submission made by the Law Council is that the Royal Commission should call on the Australian Government to refer to the ALRC [the Australian Law Reform Commission] a review of the law relating to tendency and coincidence evidence, where the ALRC would be assisted by the work already done by the Royal Commission. The review could look at the more general issues, carry out any necessary further research, invite the participation of law reform bodies in other Australian jurisdictions and develop a suitable general reform package.²³²⁵

The Law Council of Australia accepted that the approach of the common law as expressed in *Pfennig*²³²⁶ and *Hoch v The Queen*²³²⁷ is too restrictive but noted that the common law only applies in Queensland, where the Law Council of Australia stated it has been significantly modified.²³²⁸

In relation to the approach under the Uniform Evidence Act, the Law Council of Australia stated:

The Law Council has reservations with regard to the implicit criticism [in the Consultation Paper] of the Uniform Evidence Act approach to tendency and coincidence evidence. The following points should be noted:

- (a) A number of Crown Prosecutors from NSW gave evidence before the Royal Commission and discussed cases they had been involved in where the view might be taken that an overly restrictive approach had been taken to the admissibility of tendency and coincidence evidence in trials dealing with allegations of child sexual abuse. However, all of these Crown Prosecutors expressed the view that the current approach in NSW to such evidence is satisfactory. Counsel Assisting the Royal Commission have noted that the evidence of the NSW Crown Prosecutors 'was to the effect that the problems that previously beset the prosecution of offenders charged with multiple offences against more than one complainant in NSW have largely been resolved'.
- (b) Counsel Assisting the Royal Commission also noted that 'the evidence received in the public hearings suggests that the provisions are working relatively well in NSW, and in a way which has significantly increased the ability to have cross-admissibility and joint trials with respect to allegations by multiple complainants'.
- (c) In the advice prepared for the Royal Commission by Tim Game SC, Julia Roy and Georgia Huxley, the opinion was expressed at [1.2] that the current rules in the Uniform Evidence Act jurisdictions 'are for the most part appropriate'.
- (d) While there are differences between the approaches taken in Victoria and NSW to the same Uniform Evidence Law provisions (and some basis for criticism of the Victorian approach in respect of a number of issues), the Royal Commission notes that one of those issues has been already resolved by the High Court in favour of the NSW approach. As Counsel Assisting the Royal Commission have noted, it is likely that the other issues will also be resolved by the High Court in due course. In those circumstances, it is premature to propose changes to the Uniform Evidence Law because of concerns with the way that the Victorian courts have dealt with those issues.

- (e) The Consultation Paper observes that ‘it is not clear to us that the distinctions between tendency and coincidence evidence reflect how people – including jurors – reason. Rigid distinctions between tendency and coincidence evidence may be artificial’. However, there is a clear distinction between the two kinds of reasoning, although the same item of evidence may on occasion permit both modes of reasoning. Further, any artificiality is of limited practical importance given that identical tests of admissibility apply to both categories of evidence.²³²⁹
[References omitted.]

The Law Council of Australia referred to Counsel Assisting’s observation that any rational system of evidence law will require a court to engage in a balancing exercise of probative value and danger of unfair prejudice in relation to tendency and coincidence evidence and submitted that the approach under the Uniform Evidence Act ‘maintains appropriate protection against a form of evidence which has long been regarded by the law as potentially carrying with it a real risk of unfair prejudice to the accused’.²³³⁰

The Law Council of Australia expressed a number of reservations in relation to the preliminary view in the Consultation Paper that the Western Australian approach seems preferable to that of the Uniform Evidence Act, including:

- the definition of ‘propensity evidence’ is too broad and extends to relationship evidence and any conduct of the accused from which a tendency or propensity to act in a particular way might be inferred
- the requirement for ‘significant probative value’ is the same in Western Australia as it is under the Uniform Evidence Act
- the other part of the test is problematic in suggesting that the requirement of a fair trial might be qualified
- the only evidence that the Western Australian approach as it operates in practice is working well has come from two prosecutors, with no contradictor or academic scrutiny
- in relation to the statement in the Consultation Paper that ‘we have seen no evidence or heard any suggestion of injustices arising as a result of these changes’, absence of evidence of injustice should not be conflated with evidence that there has not been injustice: ‘It is difficult to imagine what evidence could ever be obtained to demonstrate that a conviction was unjustly obtained as a result of the admission of such evidence, absent the highly unlikely scenario of a complainant making an admission that the complaint was a fabrication.’²³³¹

The Law Council of Australia stated that it does not support adoption of the Western Australian approach.²³³²

In response to the preliminary view expressed in the Consultation Paper that there appears to be significant merit in the approach adopted in England and Wales, the Law Council of Australia gave a number of reasons that the approach taken in England and Wales should not be adopted, including:

- there are reservations about the findings of the Jury Reasoning Research (which are discussed in section 25.3.5)
- the English approach has not been followed in other comparable jurisdictions, such as Canada and New Zealand
- for more than a century, one of the fundamental theses of the common law has been that on a criminal charge guilt is not to be ‘inferred from the character and tendencies of the accused’, referring to McHugh J’s statement in *Pfennig*
- the Victorian DPP, in his evidence in Case Study 38, did not accept that a system where all relevant evidence was admissible, with the question of the probative value of the evidence being left for the jury, would be workable
- Mr Game, Ms Roy and Ms Huxley expressed the opinion that any change in the current approach under the Uniform Evidence Act will lead to lengthier trials that explore collateral issues and the possibility of a higher incidence of successful appeals
- Professor Spencer’s opinion supporting the English approach is not widely supported among the academic community in England, and even Professor Spencer observed that there would be a danger of injustice if such ‘usually relatively weak circumstantial evidence’ is admitted in a case where there is little or no other evidence linking the accused with the offence
- in relation to the statement in the Consultation Paper that ‘we have seen no evidence or heard any suggestion of injustices arising as a result of these changes, which have now been in operation for more than 11 years’, as with the Western Australian approach, absence of evidence of injustice should not be conflated with evidence that there has not been injustice.²³³³

The Law Council of Australia stated that it does not support adoption of the approach in England and Wales.²³³⁴

In relation to the questions in the Consultation Paper asking how the law should be reformed, the Law Council of Australia submitted:

- in relation to whether collusion, concoction and contamination should be left to the jury:
 - the High Court’s decision in *IMM* has resolved one of the main differences between Victoria and other Uniform Evidence Act jurisdictions
 - the position in relation to coincidence evidence is not clearly resolved and there is merit in the view that, with coincidence evidence, a trial judge should not be barred from considering alternative explanations

- the Western Australia provision that prevents a court from having regard to the possibility that evidence may be the result of collusion, concoction or suggestion goes too far²³³⁵
- in relation to whether tendency or coincidence evidence should need to be proved beyond reasonable doubt:
 - most Australian jurisdictions require that the jury be directed not to use tendency evidence unless satisfied that the tendency has been proved beyond reasonable doubt, but Victoria has removed that requirement under the *Jury Directions Act 2015*
 - an intermediate position may be preferable, such that, if the existence of the tendency is indispensable to proof of guilt, it should be proved beyond reasonable doubt
 - this is an issue of general importance beyond the scope of the Royal Commission and should be referred to the ALRC²³³⁶
- in relation to whether evidence of prior convictions should be admissible:

The current position in most Australian jurisdictions is that, while any admission made by a person in one proceeding may well be admissible in a later proceeding, the opinion of a tribunal of fact in one proceeding is generally not admissible in another proceeding. The reasons for the general rule are based on policy and raise issues far beyond the scope of the Royal Commission. The Royal Commission has formed the view that the position in Western Australia is different, apparently relying on a single case (CDV) where there was a retrial and the convictions that had not been quashed on appeal were led unopposed as propensity evidence. It is not apparent that any court has ruled on the question. There are practical problems with any change. For example, a conviction in one trial may subsequently be held to have been a miscarriage of justice, with the consequence that evidence of the conviction in subsequent trials would most likely lead to convictions in those trials also being quashed on appeal. Counsel Assisting the Royal Commission have expressed the view that the arguments are ‘finely balanced’. In any event, the Law Council considers that the issue is of such general importance that the Royal Commission should call on the Australian Government to refer the issue to the Australian Law Reform Commission to review the issue more generally.²³³⁷

- in relation to whether evidence of alleged conduct for which the accused has been acquitted should be admissible, the current legal position is supported²³³⁸
- in relation to whether any specific provision needs to be made in favour of joint trials, the current legal position is supported: if evidence is cross-admissible, a joint trial is appropriate; if evidence is not cross-admissible, the trials should be separated.²³³⁹

The Law Council of Australia also provided comments on the model Bill as follows:

- the model provisions have implications beyond the Royal Commission's remit of child sexual abuse
- for reasons outlined during its evidence in Case Study 46 (being the evidence of Mr Moses on 2 December 2016), such significant legislation requires detailed consideration and should be referred to the ALRC for appropriate review
- its submission in response to the Consultation Paper, and that of the New South Wales Law Society, urged caution with respect to reliance on the Jury Reasoning Research to justify reform
- the ALRC is the appropriate body to review the law relating to tendency and coincidence evidence, assisted by the work already done by the Royal Commission. It could consider the issues more generally, carry out any further research, invite the participation of law reform bodies in other Australian jurisdictions and develop a suitable general reform package
- the Tasmania Law Reform Institute released a final report on this issue in 2012,²³⁴⁰ and the Law Society of Tasmania suggests its proposals might be more appropriate than those in the model Bill
- the Law Society of New South Wales is concerned that implementation of the model Bill may complicate and delay child sexual assault trials in New South Wales, undermining other reforms such as the pilot involving the prerecording of complainants' evidence and use of witness intermediaries and potentially affecting their evaluation, and the Law Council of Australia shares these concerns.²³⁴¹

Bar Association of Queensland

In its submission in response to the Consultation Paper, the Bar Association of Queensland stated:

The Bar Association of Queensland does not accept the proposition that the rules of admissibility and joinder should be amended to make it easier for such evidence to be admitted, or allow for more joint trials, whether in cases of child sex offences or otherwise.²³⁴²

The Bar Association of Queensland stated:

Our system of criminal justice is offence based. That is to say, it depends upon identifying specific behaviour of the offender. Prosecuting authorities formulate a charge or charges based upon the specific act or acts of the offender. Proof of the charge or charges then relies upon evidence being sufficient to satisfy a tribunal of fact (usually a jury), beyond reasonable doubt, that the conduct in question occurred. There is no basis to convict a defendant of any offence unless the conduct in question is so proved.

In particular, defendants cannot be convicted of an offence simply because it is proved they are of bad character or have a tendency to commit particular types of offences.

Child sex offences are no different. The usual contest where such charges are defended concerns whether or not the acts alleged occurred at all. For that reason, reliability of the victim's account is central to the question of proof. Reliability usually involves consideration of consistency of account and clarity of detail. Accordingly, acquittal in a case where the jury, although satisfied beyond reasonable doubt a child was a truthful historian, were not satisfied beyond reasonable doubt that a particular act or acts occurred, presents no inconsistency of logic or reasoning, no legal inconsistency and no miscarriage of justice. On the contrary, to return a verdict of guilty in such a case, because the jury were satisfied the defendant was a paedophile, would be a clear miscarriage of justice.

Proof that a defendant has, at some other time, committed a similar offence or offences to that charged will not usually assist in determining whether a specific allegation is true, unless the other conduct somehow logically confirms, or tends to confirm, the offence charged. An example will be where the conduct is 'strikingly similar' or has 'hallmark' characteristics, etc. This is of course the very basis of the long history of the development of the law relating to the admission of similar fact or propensity evidence. Likewise, allowing joint trials of child sex offences where the evidence is not cross-admissible has long been recognised to produce prejudice, dangerous to the concept of a fair trial.²³⁴³

The Bar Association of Queensland expressed a number of concerns and criticisms about the Jury Reasoning Research, which are discussed in section 25.3.5.

The Bar Association of Queensland submitted:

It is the experience of our members that convictions in cases of alleged child sexual abuse have increased significantly. Much has been done, administratively, to improve the fairness of trials for complainants in child sex cases. A primary focus of the administration of justice has been to ensure a fair trial for a defendant. Where a defendant is charged with child sex offences, attainment of that goal is increasingly more difficult. It is our view that liberalisation of rules relating to admission of evidence in such cases, and allowing joint trials where evidence is not cross-admissible, prejudices the rights of defendants to a fair trial. Our view is that this will likely result in more defendants being convicted, not because of what they have properly been proved to have done, but because they are of bad character or believed to have a criminal tendency.

The discussion paper suggests that liberalisation of these rules has so far not shown any evidence of an increased risk of miscarriage of justice. We respectfully suggest no such conclusion should be drawn. Where a defendant had information or evidence to show he was the subject of untrue allegations, presumably, he would utilise that evidence at his trial to secure an acquittal. Where he has no evidence of that apart from his own

knowledge, there is little scope for anything beyond his appeal against conviction, which is determined upon the evidence adduced at trial. Indeed, we wonder what evidence of an untrue allegation a defendant is, in reality, ever likely to be able to assemble.²³⁴⁴

Law Society of New South Wales

In the covering letter to its submission in response to the Consultation Paper, the Law Society of New South Wales stated:

The Law Society's primary concern is that the law in relation to tendency and coincidence evidence and joint trials should not be reformed. The Law Society considers that any proposals to amend the Uniform Evidence Law (and joint trials) should be referred to the Australian Law Reform Commission for appropriate review, consultation and research. The Law Society urges caution with respect to reliance on the Jury Reasoning Study report to justify reform, for reasons we detail in the submission. The Law Society strongly recommends that the Royal Commission engage in significant peer review of what can be drawn from the Study to support any proposed changes.²³⁴⁵

In its submission, the Law Society of New South Wales stated:

The Law Society is strongly of the view that the law in relation to tendency and coincidence evidence and joint trials should not be reformed. The Law Society has had the benefit of reviewing the Law Council of Australia's submission on tendency and coincidence evidence and joint trials and fully endorses the Law Council's position. We support the position that any proposals to amend the Uniform Evidence Law (and joint trials) should be referred to the ALRC for appropriate review, consultation and research.²³⁴⁶

Ms Musgrave gave evidence in Case Study 46 that the Criminal Law Committee of the New South Wales Law Society is of the view that the Uniform Evidence Act provisions, as they are applied in New South Wales, do not require change.²³⁴⁷ Ms Musgrave agreed that, given the law is applied differently in New South Wales and Victoria, this might suggest that the law as it is applied in Victoria might benefit from some reform.²³⁴⁸

Ms Musgrave agreed that the Criminal Law Committee of the New South Wales Law Society considered that there is a burden of persuasion on those who seek to change the law in relation to the admissibility of tendency or coincidence evidence to make out the case for change and that the burden is a very high one.²³⁴⁹

In response to a question as to why, given the Jury Reasoning Research and the experience in England and Wales and Western Australia, the burden should not be on those who resist reform to justify the current situation, Ms Musgrave said:

This all runs into the troublesome area of addressing one issue in isolation. I mean, this is a proposal to change what is a fairly fundamental rule, and the Bill as it currently stands changes it not just for child sexual assault but across the board, and is a very significant amendment to the Uniform Evidence Act.

So what is being counselled is, really, two things: first, the need for abundant caution in doing that and the need to go out more generally, given that it's going to apply outside child sexual assault; and, secondly, to make sure that it is contextualised. So rather than have this fundamental change front-ended with a whole lot of other activity in this area; rather, the better course would be to evaluate the other reforms that are going ahead, and I'm thinking very much in a New South Wales context at this point, and I acknowledge that, because the reforms I'm talking about are things like prerecording, children's champion, specialist judges, all those sorts of things, and also reflect on the change in awareness and understanding levels, take that opportunity to have the ALRC review it more generally, and then come back to that question of whether or not tendency and coincidence needs to be changed.²³⁵⁰

The Law Society of New South Wales raised a number of concerns and criticisms about the Jury Reasoning Research, which are discussed in section 25.3.5.

In relation to the approaches in England and Wales and Western Australia, the Law Society of New South Wales stated:

With reference to the discussion regarding the approaches in the UK and in Western Australia, these differ from the applications under the uniform evidence legislation (especially in NSW), but that does not mean that they are valid; rather, they are different. Further, if these jurisdictions' changes are not soundly based, there is more need for caution. Translating them into a national standard needs to be evidence-based, not intuitive. The Law Society notes that the Consultation Paper refers to the absence of miscarriages of justice in jurisdictions that have reduced defendants' protections from unfair prejudice. However, the absence of known miscarriages of justice is an imperfect measure of whether the rules of evidence are working or failing. The Law Society would suggest that the examples of failed justice uncovered by the Royal Commission is not in itself an indicator that the rules of evidence are failing.²³⁵¹

The Law Society of New South Wales submitted that it does not support changes suggested in the Consultation Paper that refer to:

- reducing or removing admissibility requirements beyond relevance in the context of tendency evidence, coincidence evidence, or prior convictions more generally;
- changing the weighing of probative value against prejudicial effect of evidence to lighten admissibility standards;
- changing the prosecution burden for persuading the court to admit tendency evidence, coincidence evidence, or prior convictions to lighten those standards.²³⁵²

The Law Society of New South Wales submitted that this 'is a major reform that requires ALRC and strong peer reviewed evidence to support it'.²³⁵³

Law Society of New South Wales Young Lawyers Criminal Law Committee

In its submission in response to the Consultation Paper, the Law Society of New South Wales Young Lawyers Criminal Law Committee (the Committee) stated:

Principal amongst the Committee's concerns is the continued complexity of the law regarding the use of tendency and coincidence evidence. Despite the introduction of the Uniform Evidence Acts, the varying practice between states leaves lawyers, complainants and defendants uncertain as to the applications of these important evidentiary concepts.

This is of particular concern in the conduct of institutional child sexual abuse matters. As the Royal Commission has discovered, it was the practice of many institutions to move offenders between branches, and often interstate, following complaints of offending. The differences between tendency and coincidence laws in different states can therefore result in situations in which offenders face completely different trials depending on the state in which the offending took place. As such, the Committee supports the conclusions contained within *Case Study 38: Opinion of Counsel Assisting the Commission Regarding Week 1 of the Hearing – Admissibility of Tendency and Coincidence Evidence* that the approach to tendency and coincidence evidence taken by the Uniform Evidence Act should be adopted in each Australian jurisdiction.²³⁵⁴ [Reference omitted.]

Mr Cavell gave evidence in Case Study 46 that the Committee was more accepting of the possibility of reform than the New South Wales Law Society.²³⁵⁵

The Committee's comments and concerns in relation to the Jury Reasoning Research are discussed in section 25.3.5.

The Committee referred to the following particular findings of the Jury Reasoning Research:

- the insignificance of the 'joinder effect'
- mock jurors' adoption of a more onerous definition of 'beyond reasonable doubt' in joint trials compared to separate trials
- jurors being more likely to engage in impermissible reasoning in separate trials without tendency evidence than they were in separate or joint trials with tendency evidence.²³⁵⁶

The Committee submitted:

In light of this, the Committee agrees with Counsel Assisting that there may be opportunities for reform in this area. The Committee notes that this is a complex area of law and recommends that any proposals to amend the Evidence Act be referred to the Australian Law Reform Commission.

Any proposed amendments should continue to allow for judicial discretion over admissibility questions, but also recognise the abilities of a jury to reason as directed. This approach may better balance the interests of the defendant with the interests of the community.²³⁵⁷ [Reference omitted.]

In relation to evidence relevant to the institutional setting and how it affects the assessment of significant probative value, the Committee submitted:

The Committee does not support the rigid approach taken by the Victorian Court of Appeal in *PNJ* (2010) 27 VR 146, in which the Court indicated that it was a mistake to treat as relevant features which were outside the accused's control and merely reflected the setting in which the offending occurred. The Committee supports the approach taken by the New South Wales Court of Criminal Appeal in *R v PWD* [2010] NSWCCA 209 which held that the institutional setting in which the abuse occurred was relevant to considering the admissibility of tendency evidence for the reasons set out in that judgment, particularly at paragraphs [77]–[90].²³⁵⁸

In relation to whether there should be a specific provision in favour of joint trials, the Committee submitted:

The Committee submits that there should be no specific provision made in favour of joint trials. To institute any presumption in favour of joint trials would be to reduce judicial discretion to an untenable extent.²³⁵⁹

The Committee also provided comments on the model Bill as follows:

- Further consideration of the rules relating to tendency and coincidence evidence ought to be undertaken by law reform commissions.²³⁶⁰
- The amendments are not limited to child sexual assault matters, but the impact of the reforms in prosecutions for other offences has not been fully canvassed.²³⁶¹
- The proposed amendments do not simplify the law; they introduce 'new, often broadly defined tests that are profoundly uncertain in ambit' and they are 'unnecessarily complex and sweeping. A better approach may be to adopt the recommendations of Counsel Assisting' by amending the balancing test in section 101 so that the probative value of the evidence need only outweigh its prejudicial effect.²³⁶²
- The first limb of the test for admissibility is too broad and removes the requirement for a contextual and fact-specific analysis of the evidence.²³⁶³

- As the test applies generally, it might have the perverse effect of allowing an accused to rely on tendency evidence to improperly impugn the behaviour or state of mind of a complainant or witness.²³⁶⁴
- The expansion of credibility evidence and the interaction with the credibility rule is unclear.²³⁶⁵
- The amendments do not adequately safeguard against the potential unreliability or unfairness of tendency and coincidence evidence, including because they exclude the operation of sections 135 and 137, the trial judge is not given sufficient discretion to exclude evidence, they overlook the fundamental concern that tendency and coincidence evidence may be used for improper reasoning, and there will be circumstances where directions do not cure any potential unfairness.²³⁶⁶
- While acknowledging that an acquittal is not necessarily coterminous with innocence, allowing evidence of acts for which a person has been correctly acquitted is aberrant.²³⁶⁷

Legal Aid NSW

In its submission in response to the Consultation Paper, Legal Aid NSW submitted:

Legal Aid NSW agrees with the Law Council's suggestion that the [Royal] Commission's preliminary views on tendency and coincidence evidence and joint trials be referred to the Australian Law Reform Commission, given the fundamental implications of any reform for all criminal proceedings. In the alternative, we support the current NSW position on tendency and coincidence and joint trials, based on the advice prepared for the Royal Commission [by Tim Game SC, Julia Roy and Georgia Huxley] that:

the tests regarding the admission of tendency and/or coincidence evidence in Australia are for the most part appropriate and strike the right balance between ensuring relevant and probative evidence is placed before the jury and protecting an accused's right to a fair trial.²³⁶⁸ [Reference omitted.]

Legal Aid NSW also provided comments on the model Bill as follows:

- The provisions have significant implications for the criminal and civil justice system in New South Wales and in particular for the rights of accused persons in all criminal proceedings.
- The issue of tendency and coincidence reforms should be further considered by the ALRC.²³⁶⁹

Victoria Legal Aid

In its submission in response to the Consultation Paper, Victoria Legal Aid submitted:

VLA considers that the current threshold of ‘significant probative value’ in the UEA is appropriate. The [Royal] Commission’s research shows that tendency and coincidence evidence is a powerful form of evidence which significantly increases conviction rates. Therefore, in most cases it will reach the threshold of significant probative value. This research has also shown the particularly powerful way that tendency and coincidence evidence can affect the jury’s assessment of guilt or innocence.

Therefore, it is important that appropriate safeguards are in place to ensure that this evidence is used in an appropriately reasoned way given the presumption of innocence. In our view, the current test for admitting this evidence only where the ‘probative value of the evidence substantially outweighs the prejudicial effect it may have on the defendant’ is considered to be an appropriate safeguard.

There has also been significant reform of the UEA around context, relationship and tendency evidence with a lowering of the threshold for the admission of such evidence. Any further reduction of thresholds around the admission of such evidence risks imbalance that could lead to injustice and wrongful convictions. Therefore, VLA does not consider that further reform is warranted.²³⁷⁰

Victoria Legal Aid also discussed the distinction between tendency and coincidence evidence. It agreed with the observations of Counsel Assisting that there is ‘inherent overlap’ between tendency and coincidence evidence but submitted:

they should remain distinct forms of evidence under the Uniform Evidence Act (UEA). Whilst the admissibility process is similar, they are conceptually two very different forms of evidence – one based purely on probabilities, the other propensity of human nature drawn from the jury’s life experiences.²³⁷¹

Victoria Legal Aid agreed that there is often considerable overlap between tendency and coincidence evidence, particularly in institutional settings, but submitted that it may not always overlap so neatly even in institutional settings.²³⁷² Further, Victoria Legal Aid submitted:

Outside of the institutional setting, or in relation to other sexual offending, the differences are more apparent. It would therefore be undesirable to have two different approaches, particularly where there is little need, for instance if the restriction in the Victorian case of *PNJ v DPP* [2010] VSCA 88 was not operating. Without a clear delineation between these two different reasoning processes it is possible for the jury to become naturally and understandably confused and impermissible cross reasoning may occur.

As we do not know how juries reason with these two different concepts, VLA considers that more jury research is required in this area before any changes are made, noting that this appears to have been beyond the scope of the Royal Commission's Jury Reasoning Research.

If further relaxation of the statutory distinctions was contemplated, careful jury directions would need to be provided to explain the different reasoning processes and when they could and could not be used. This would both enable the use and prevent the misuse of these two different reasoning processes.²³⁷³

Australian Lawyers Alliance

The media reported comments made by the Australian Lawyers Alliance in relation to the model Bill. Mr Barns, the criminal justice spokesman for the Australian Lawyers Alliance, was reported as making comments to the following effect:

- The Bill will mean more evidence gets in and that means the danger of wrongful convictions.
- The jury gets swamped with this material and they think 'Oh well, he's done it before, he must have done it this time, we'd better convict him'.
- It will create an increased risk of innocent people going to prison.
- The Royal Commission is not best placed to make suggestions about fairness in criminal trials. It has heard 'horror stories' from victims for three or four years and has advocated a particular perspective, but it is not best placed to give advice on fairness in criminal trials. It is very dangerous.²³⁷⁴

Dr Andrew Morrison RFD SC, the Australian Lawyers Alliance spokesman on the Royal Commission who gave evidence in Case Study 46 but not in relation to issue of tendency and coincidence evidence and joint trials, was reported as making comments to the following effect:

- The model Bill was too broad and would apply nationally to all crimes, not just those involving child sexual abuse.
- The reforms would seriously undermine the right to a fair trial in Australia.
- There are very real risks that such reforms would lead to convictions and prison sentences for innocent people.
- The Royal Commission has gone too far with the draft Bill. Reforming evidence laws is outside of its terms of reference and the proposed Bill presents a serious risk to the Australian legal system.²³⁷⁵

Mr Barns was interviewed by Mr Hamish Macdonald on Radio National's *Breakfast* program on 22 December 2016. In that interview, Mr Barns said that:

[The changes in the model Bill are] dangerous because what they do is extend the law to allow the possibility that a person who has been charged with an offence but the matter's never been proceeded [with] or they've been acquitted or no conviction entered – either in Australia or in a foreign court – that information could be used against them in a criminal trial. That undermines the presumption of innocence that person has. It allows – particularly in relation to foreign courts – for information to be used in circumstances where the foreign court process may not have been as rigorous as the Australian court.

And so it's weakening the protections that are available to an accused person in crimes which in our society seem to be in some cases treated more seriously than murder.²³⁷⁶

In response to a question whether he could give an example of where this kind of evidence had led to wrongful convictions, Mr Barns said:

Well I think there's a woman in Victoria, Mrs Greensill, who was a teacher who was – a number of historic sex abuse allegations put to her. And there were many, many allegations put. She ended up going to the Court of Appeal and being acquitted.²³⁷⁷

Mr Macdonald asked Mr Barns about the case of John Dennis Maguire, which is discussed in section 24.1. Mr Barns said: 'It's a rare case. The legal system is not perfect.'²³⁷⁸

Mr Barns said that the rights of an accused person have to be treated with great care because:

the consequences of being charged with these types of offences and wrongly convicted are catastrophic, because of the way our society deals with sex abuse cases.²³⁷⁹

Mr Barns referred to the diminution of the rights of the accused over recent years. Mr Barns also raised concerns about charges that were not proceeded with, or acquittals, being used against an accused. Mr Barns also raised concerns about Working with Children Checks and said that 'There is no balance at the moment because we've had this – we've gone from one extreme and we're going to the other extreme'.²³⁸⁰

In relation to the current laws for tendency and coincidence evidence, Mr Barns said:

the current system which does allow for prior acts of an accused person to be put before a jury, that has been the law for some time. I find that problematic, but that's the law as it stands. I don't see any great need to change it. And I'm just disturbed that we're relying on a – I know it was a large survey that was done, but it was mock jurors and we've also got to look at the question of does there need to be a change. You can look at the Maguire case. That was an extreme case in my view. Yes there've been other cases like it, but I can tell you, in practice in this area, most of these cases you will get – you will struggle to get an argument for severance. In other words severance [indistinct] trial up. Most cases now proceed on the basis that you'll have three or four, five allegations all heard by the one jury.²³⁸¹

Mr Barns said:

I think we have gone from – we certainly have gone from – to a complete lack of respect for victims and the law being very difficult. We are moving in a direction to make it easier to get convictions, but if we head down this path of being able to use the fact that a person is simply being charged with an offence that's never been proceeded with or they've been acquitted, if we get to use that in cases I think that takes it to another extreme.²³⁸²

In response to a question as to whether there are more appropriate reforms or whether the law should be left as it is, Mr Barns said:

We say – and look the Royal Commission says in its discussion paper, it maybe that the current settings are appropriate. But this – there is a broader trend in Australia here which is saying that juries should hear about prior convictions of people, that they should hear about prior criminal history, their interactions with police. Let's be very very careful here because as I say the consequences for a person of being falsely accused and then being convicted in sex cases Hamish, are catastrophic. I mean we don't have a murder register.

If you're released from prison after you've done time for murder, you go back out into the community. If you're convicted of a sex offence, even if you're a young person, you are placed on a register with enormous restrictions on you for many many years, in some cases life in some jurisdictions.²³⁸³

27.4.7 Judiciary

We received a number of submissions in response to the Consultation Paper providing the views of members of the judiciary. One of those submissions, from his Honour Judge Berman SC, a judge of the District Court of New South Wales, has been published. The other submissions are confidential.

In relation to tendency and coincidence evidence, Judge Berman stated:

I agree that, particularly in cases of child sexual assault where ordinarily it is the word of the complainant against the word of the offender, tendency and coincidence evidence, where available, in [sic] necessary for a jury to make a proper assessment as to the credibility of both allegations and denials. As I said in a recent judgment:

In a case where the jury will need to evaluate the credibility of a student who alleges that the accused acted on a sexual interest in him in a particular way, it is significantly probative that other complainants, also students at the school where the accused held a position of authority, allege that the accused has acted on a sexual interest in them as well – even if the precise way in which the accused acted differs.²³⁸⁴

However, Judge Berman expressed some doubt as to whether any legislative change is required in New South Wales, stating:

I am not sure, however, whether any legislative change is required in New South Wales. Recent decisions of the Court of Criminal Appeal, including *Hughes v R* [2015] NSWCCA 330 demonstrate the extent to which the Crown is able to rely on tendency evidence in child sexual abuse cases. Of course the High Court has granted special leave in *Hughes* so things may change and legislation may be required after all.²³⁸⁵

Judge Berman also expressed his agreement with the proposition that a similarity in behaviour should not be required before tendency evidence is admitted. He stated:

Evidence that an accused has had various forms of sexual connection with, for example, boys between the ages of 10 and 13, can be used to establish a sexual interest in boys of that age. It would be a rare offender who decided to give expression to that sexual interest in only one way. That is consistent with ordinary human behaviour – those who have a sexual interest in another person will ordinarily engage in quite dissimilar acts in expressing that sexual interest.²³⁸⁶

One of the confidential submissions providing the views of some members of the judiciary expressed continuing concern about the risk of unfair prejudice to the accused from the unfettered admission of evidence led on a tendency or coincidence basis and expressed doubt that the Jury Reasoning Research is sufficient to establish that there is not such a risk.²³⁸⁷

Another confidential submission providing the views of some members of the judiciary submitted that, particularly in cases of child sexual assault, where ordinarily it is the word of the complainant against the word of the offender, tendency and coincidence evidence, where available, is necessary for a jury to make a proper assessment as to the credibility of both allegations and denials.²³⁸⁸

27.4.8 Academics

Two submissions in response to the Consultation Paper from academics addressed the issues of tendency and coincidence evidence and joint trials in some detail.

Professor Cossins

Professor Annie Cossins – one of the authors of the Jury Reasoning Research – expressed support for a simple test of relevance for the admissibility of tendency or coincidence evidence, stating:

In my opinion, the need for another test of relevance, in the form of the significant probative value test under ss97 and 98 of the UEL [Uniform Evidence Law], is an unnecessary requirement since, logically speaking, if the evidence in question is considered to be relevant under s55, it is impossible to objectively measure whether the probative value of the evidence is significant or non-significant. Judges must rely on intuition and their subjective point of view in trying to deal with a test that is logically impossible to apply in practice. One person's significance will be another person's insignificance based on their own, limited experiences and knowledge of child sexual abuse and child sex offender behaviour.

Reverting to a simple test of relevance will do away with the artificiality of the significant probative value test since the real issue in a child sexual abuse trial is the probative value of the evidence versus its likely prejudicial effect.²³⁸⁹

Professor Cossins expressed doubt that judges would cease to look for similarities in the evidence even if a test of relevance was introduced. She suggested that providing guidance as to the type and extent of similarities required might avoid different jurisdictions focusing on different aspects of the circumstances and the sexual acts.²³⁹⁰

Professor Cossins set out the amendments to the significant probative value test recommended by the National Child Sexual Assault Reform Committee in 2010, which focused on removing any requirement for 'striking similarities'.²³⁹¹ Professor Cossins also suggested amendments to achieve a similar reform if the Royal Commission recommends removal of the significant probative value test in favour of a simple test of relevance under section 55 of the Uniform Evidence Act.²³⁹²

In relation to whether issues of concoction, contamination or collusion should be left to the jury, Professor Cossins referred to the High Court's decision in *IMM* but suggested that specific provision may be needed to make it clear that these issues cannot be taken into account at the admissibility stage.²³⁹³ Professor Cossins set out amendments recommended by the National Child Sexual Assault Reform Committee in 2010 to address this issue and to create a presumption in favour of joint trials.²³⁹⁴

In relation to whether any reforms should apply specifically to child sexual abuse or institutional child sexual abuse offences or whether they should be of general application, Professor Cossins submitted:

I cannot think of a sound reason to confine any proposed reforms to a specific type of child sexual abuse case. In fact, it would be detrimental for non-institutional child sexual abuse cases to be treated differently to institutional child sexual abuse cases such that the latter cases were subject to special rules compared to the former cases. In other words, it would not be in the interests of justice for the rules of evidence to discriminate between different types of child sexual abuse cases to the detriment of those complainants who were not sexually abused in an institutional setting. Because there is evidence to show that child sex

offenders offend in a number of different contexts, it is not possible to reliably classify offenders according to the context in which they sexually abuse children (a school versus a home environment, for example).

I expect there will be many lawyers who will argue that the rules of evidence should apply to all criminal cases in the same way. However, the Consultation Paper has made out the case that child sexual abuse cases are a unique group of criminal cases that require special treatment not only because of the unique vulnerability of victims of child sexual abuse, but also because the secretive and hidden nature of the crime means that the usual types of corroborative evidence (medical, forensic, eyewitness) is typically unavailable such that these trials are often based on the word of the complainant versus the word of the defendant. It is counterintuitive, therefore, to exclude what is usually the only available type of supporting evidence available – the evidence of other complainants.²³⁹⁵

Professor Hamer

Professor David Hamer is the author of the survey of the legal treatment of tendency, coincidence and relationship evidence in England and Wales, New Zealand, Canada and United States, discussed in Chapter 26. Professor Hamer made a submission in response to the Consultation Paper, gave evidence in Case Study 46 and made a submission in response to the model Bill.

Should the law be reformed?

In his submission in response to the Consultation Paper, Professor Hamer expressed support for the approaches to admissibility of tendency and coincidence evidence in New South Wales and Western Australia. He stated:

Broadly speaking, in my view the more lenient approaches to admissibility that are currently being taken (for example, in NSW and WA) appear about right. However, the law is applied very unevenly, and within Australia (for example, the common law in Queensland, and some NSW and Victorian courts applying the Uniform Evidence Law (UEL)) an inappropriately stringent approach is taken to tendency and coincidence evidence. At the same time, the law as it currently operates appears needlessly complex, with the development of principles which bear no relation to inferential logic.²³⁹⁶

In relation to the common law test for admissibility, Professor Hamer submitted:

The common law admissibility test is extremely problematic. To gain admission, it seems, the evidence must be so probative that there is '[no] rational view of the evidence that is consistent with the innocence of the accused': *Pfennig* (1995) 182 CLR 461, 483. This test appears to be extremely stringent as it is based upon the criminal standard of proof. It seems to conflate and confuse probative value and proof. Perhaps its stringency may be tempered by the fact that the probative value assessment is contextual; other evidence, such as the direct evidence of the complainant may help reach the threshold. Part of the problem with the test is its incoherence.

However, a case like *Phillips* (2006) 225 CLR 303 demonstrates how it may be productive of injustice. Six (young adult women) complainants made similar allegations of sexual assault. The counts were joined at trial with cross admissibility and the defendant was convicted on most the counts. This was upheld on appeal to the Queensland Court of Appeal (QCA). But the High Court criticised the QCA for applying *Pfennig* too weakly. Holding that '[t]he similarities relied upon were not merely not "striking", they were entirely unremarkable' (at [56]), the High Court held that the evidence was wrongly admitted, ordered a retrial and released the defendant on bail. On release, the defendant promptly committed further offences. This should not have been a surprise. The evidence clearly supported the proposition that the defendant had a strong propensity for sexual assault. While the common law may only now apply in Queensland, this still requires attention for that jurisdiction.²³⁹⁷

Professor Hamer identified some criticisms of the Western Australian approach but also the need to consider fairness to the prosecution and the community to ensure that child sexual abuse offences can be prosecuted effectively. He submitted that:

The test [under section 31A of the *Evidence Act 1906* (WA)] is open to criticism on the basis that it is incoherent and contrary to the fundamental principles of criminal justice to suggest that there might be a public interest in deliberately running the risk of an unfair trial.

This criticism is valid. However, this is not to say that the fair trial concept is purely for the defendant's benefit pointing, inevitably, towards the exclusion of potentially prejudicial evidence. 'In determining the practical content of the requirement that a criminal trial be fair, regard must be had "to the interests of the Crown acting on behalf of the community as well as to the interests of the accused"' [*Dietrich* (1992) 177 CLR 192, 335 (Deane J), quoting from *Barton* (1980) 147 CLR 75, 101]. Clearly, it is in the interests of the prosecution and the community that child sexual assault be prosecuted effectively. Given the nature of child sexual assault the prosecution's task is often extremely difficult. These trials are often word-against-word battles of credibility where the prosecution (appropriately) carries a very heavy burden of proof. The evidence of other alleged victims can be extremely valuable in such cases. It may be perceived as unfair for an overly stringent exclusionary rule to deny the prosecution access to this evidence. It is this kind of consideration that has led legislatures and courts to reject the stringency of the High Court's exclusionary rule in *Pfennig*, and which leaves the High Court's attachment to the rule in *Phillips* so open to criticism. A bipartisan conception of fair trial would confirm that the admissibility determination takes into account the prosecution's need for the evidence, given the nature of the case. In sex offences cases in particular, tendency and coincidence evidence is particularly valuable, and fair trial principles require that account be taken of this in determining admissibility.²³⁹⁸ [References omitted.]

In relation to whether Australia should follow the English approach, Professor Hamer submitted:

The English legislation, like the UEL, has generated masses of appeals. While the English approach may provide a useful direction for reform, it would require some refinement. The English reforms, in effectively dropping the exclusionary rule for propensity evidence, are pretty radical. I am not sure that Australia should go that far.²³⁹⁹

The validity of concerns in relation to unfair prejudice

In relation to unfair prejudice, Professor Hamer submitted that ultimately it is an empirical question as to whether juries overvalue evidence.²⁴⁰⁰ He referred to the Jury Reasoning Research and the great lengths to which the researchers went to give realism to the experiments; however, he also referred to the problem that mock jurors know that ‘their “verdict” posed no risk of locking up an innocent defendant or freeing a serial paedophile’, and he noted that prior convictions or admissions, which were not tested in the Jury Reasoning Research, may carry a greater risk of moral prejudice than disputed allegations.²⁴⁰¹

However, Professor Hamer also submitted that there are other reasons to discount concerns over prejudice. He stated:

Tendency and coincidence evidence is more probative than many courts appreciate. This, in itself, suggests that concerns over unfair prejudice are often exaggerated simply because, as probative value increases, there is less room for the evidence to be overvalued.²⁴⁰²

In response to a request to explain his submission that the degree of prejudicial risk arising from tendency or coincidence evidence may have been overstated, Professor Hamer said:

Essentially, all evidence in a criminal trial, the point of it – or much of the evidence, anyway, the evidence that goes to the central issues – is to discriminate between guilt and innocence.

Now, evidence that the defendant has committed similar offences in the past – some people suggest, well, that’s not very probative because knowing that the defendant has committed this offence in the past doesn’t mean they are going to commit the offence again. Now, recidivism rates aren’t that high. People that have committed offences in the past often don’t go on to commit further offences. So evidence of this kind, evidence that the defendant has committed offences like this in the past, has low predictive value and it follows that it has low probative value.

Now, I think that view is mistaken because, as I said, the purpose of the evidence is to distinguish between guilt and innocence, and evidence that the defendant has committed this kind of offence in the past, even though it doesn’t have very much predictive value, can still point very strongly towards the hypothesis of guilt because it’s much more consistent with guilt than it is with innocence. So in terms of the evidence discriminating between the two hypotheses, it points much more strongly to guilt than innocence.

The reason for that is that, as was said in *Pfennig*, if the defendant was innocent, it would be a remarkable coincidence to find that the defendant had a prior conviction for a similar kind of offence. If the defendant was innocent, it would be remarkable to find that the defendant had a prior conviction for this kind of offence, because not many people do. You know, not many people commit child sexual offences.

So, really, in order to determine the probative value, you don't just look at the predictive value; you don't just look at the recidivism rate ...²⁴⁰³

In response to a question as to whether he is effectively simply saying that this evidence is very probative, Professor Hamer said:

That's right. In fact, it is so probative that I think the concern that juries overweigh the evidence is a bit misguided. There is a bit of an assumption, I think, in the common law, and perhaps this is flowing through to some of the decisions under the uniform evidence law – a bit of an assumption that the problem with evidence of prior convictions, evidence of other allegations, tendency evidence, coincidence evidence, isn't only that juries might overweigh it; as well as that, a related problem is concerns about the cogency of the evidence as well, concerns that the evidence doesn't actually have that much probative value.

I think that that tradition of the common law is a bit misguided because I think actually the evidence can have a great deal of probative value, more than has traditionally been recognised, I think.²⁴⁰⁴

In relation to whether there is a risk of the jury misusing such evidence, Professor Hamer said:

I think it is a difficult question to answer. I think that if you can explain to juries in simple terms what the risks are – and I don't mean that to sound patronising to juries, but I think there is always a danger with jury directions that they become too convoluted and complex. But if you can explain in simple terms what the dangers are, I think we should have some faith that juries can avoid those risks. Whether they can be excluded altogether I'm not sure.²⁴⁰⁵

Professor Hamer suggested that there is more room for prejudice to operate where the evidence is less probative.²⁴⁰⁶ He suggested that how horrendous the other offences are may influence the risk of prejudice, contrasting the abduction and child sexual offences in *Pfennig* with traffic and speeding offences.²⁴⁰⁷ In relation to prior convictions, Professor Hamer suggested that they might potentially be much more prejudicial than evidence of other allegations, although they might also remove the risk of juries thinking that they should punish the accused for crimes he committed on other occasions but for which he was not punished.²⁴⁰⁸

The first limb of the test for admissibility

Professor Hamer submitted that the probative value of prior offending has to be correctly understood, in spite of difficulties of predicting offending behaviour and low recidivism rates. He stated:

The likelihood of a defendant, with a prior conviction, reoffending is only one element of the probative value of that prior conviction. This likelihood needs to be compared with the likelihood of someone without a prior conviction committing the offence. Prior conviction evidence is probative, not because it is highly probable that someone with a prior conviction is likely to reoffend, but because such a person is far more likely to commit an offence than someone without a prior conviction. Recidivism rates, while not incredibly high, are far higher than crime rates. Probative value is a 'comparative judgment', and its comparative nature suggests that tendency and coincidence evidence can have considerable probative value.²⁴⁰⁹ [Reference omitted.]

In relation to the admissibility test, Professor Hamer submitted that there 'is something to be said for the New Zealand approach', which avoids the complexity of the tendency/coincidence distinction and adopts a symmetrical weighing of probative value against prejudicial risk.²⁴¹⁰ Professor Hamer suggested that there is benefit in the guidance the New Zealand legislation provides in assessing probative value and prejudicial risk, although he stated:

There is scope for this guidance to be improved and expanded so as to discourage conservative courts from seeking to continue with their pre-existing stringent approaches to admissibility.²⁴¹¹

Requirements for similarity

In relation to the approach taken by courts applying the test for admissibility under the Uniform Evidence Act and the degree of similarity required, Professor Hamer submitted:

As the courts have recognised, the admissibility tests require an 'evaluative judgment' (*Ellis* (2003) 58 NSWLR 700 [94]–[95]) turning on the 'facts and circumstances of the particular case' (*Hughes* [2015] NSWCCA 330 [189]). As a consequence, whether or not a particular test ends up being all that stringent to a large extent depends upon the approach taken in the individual case. The evaluative nature of the judgment creates scope for different courts to apply the same statutory test more or less stringently. Since each decision turns, to some extent, on the facts of the individual case, it is difficult to generalise about whether different courts are applying the test differently. However, it does appear that this is occurring. ...

Courts taking the more stringent approach demand more numerous and distinctive similarities between the other misconduct and the charged offence for the evidence [to] accrue sufficient probative value for admission. Echoing the HCA in *Phillips* ..., similarities in location, acts, victim age are downplayed as, 'in reality, unremarkable circumstances that

are common to sexual offences against children’, and insufficient for admission: *AE* [2008] NSWCCA 52 [42]. The less stringent approach, by contrast, recognises that, while ‘[s]ome features may be “commonplace” with allegations of this kind ... that does not deny them significance’: *BC* [2015] NSWCCA 327 [99] (Beech-Jones J).²⁴¹² [Reference omitted.]

In comparing the more stringent approach to admissibility to the approaches in other jurisdictions, Professor Hamer suggested that other jurisdictions do not require similarity in the way that is required in Australian jurisdictions. He submitted:

The more stringent approach seems out of step with other common law jurisdictions. Indeed, it seems that even the more lenient Australian approaches are stricter than approaches taken in comparator jurisdictions. At common law, the House of Lords indicated that, for admissibility, the court would not necessarily require shared features that are anything more than the ‘stock in trade’ of the paedophile: *DPP v P* [1991] 2 AC 447, 461. Under the Criminal Justice Act 2003 (UK) propensity evidence gains admission without having to satisfy a special admissibility test, however, the court must be satisfied that the evidence of other misconduct does demonstrate a probative propensity. Because child sexual assault is viewed as ‘unusual behaviour’ in and of itself, the court will quite readily consider a propensity to be established on the basis of limited evidence, for example a single prior conviction without striking similarity: *Hanson* [2005] 2 Cr App R 21 [49]. In New Zealand’s Evidence Act, propensity evidence must be more probative than prejudicial to gain admission. Evidence of child sexual assault satisfies this test quite readily since ‘sexual activity with children is in itself unusual, even where it does not involve unusual acts’: *Robin* [2013] NZCA 105 [25]; see also *Smith* [2010] NZCA 361 [17]; *Vuletitch* [2010] NZCA 102 [38].²⁴¹³

Professor Hamer stated that the less stringent approach to admissibility is preferable. In response to a question about his concerns about the English approach and his preference for the New Zealand approach, Professor Hamer said:

Well, the appeal of the New Zealand approach is largely its simplicity. There is just a single admissibility test: probative value should outweigh prejudicial risk.

The New Zealand legislation also does have guidance similar to that provided in *Handy* ... where there is a bit of a checklist of things that the trial judge can look for in weighing up probative value, and I think that is quite useful. Perhaps that could be improved.²⁴¹⁴

In response to a question as to whether he supported the checklist approach in order to limit discretion and give guidance, he said:

It is more on the guidance point rather than limiting discretion, because I don’t think it would effectively limit discretion. In fact, if you have a checklist of half a dozen or more factors, there’s heaps of room for discretion to operate still. I think it’s just useful guidance because, in some cases, I think judges and appeal courts miss things.²⁴¹⁵

Professor Hamer also gave evidence that in England and New Zealand there is clear guidance from the courts that there is no need for anything too distinctive in order for tendency or coincidence evidence to be admitted, and it is generally sufficient that the person has committed or is alleged to have committed child sexual offences in the past.²⁴¹⁶

Professor Hamer submitted that the notion that child sex offenders are highly specialised in their offending is not borne out by empirical studies, which suggest that, in many respects, child sex offenders display considerable versatility.²⁴¹⁷

Professor Hamer also expressed the opinion that the search for distinctive similarities is a bit misguided. He said:

if you look at the empirical evidence as to the behaviour of child sexual offenders, they don't specialise to that degree. In the case of Alexander, which I was asked to have a look at prior to the hearing today, the prosecution listed I think 20 similarities running from A down to P. It just seems to me that many of those similarities – you don't need to go to that level of detail because offenders don't specialise to that degree. It seems like a waste of time pursuing that level of detail.²⁴¹⁸

Professor Hamer agreed that there should be some similarity. He referred to the case of *Sokolowskyj v The Queen*²⁴¹⁹ (*Sokolowskyj*), where the evidence of prior convictions was held on appeal to be too dissimilar such that it should have been excluded, and suggested that even with little similarity – such as in *Sokolowskyj* – there might still be probative value, albeit much less probative value than if the prior convictions were for similar offences.²⁴²⁰

In answer to a question as to whether, in England and New Zealand, a prior offence against a boy would be admitted where the charge related to offending against a girl, Professor Hamer said that he believed it would.²⁴²¹ He also referred to the empirical evidence showing a degree of specialisation in the behaviour of child sex offences but not a great deal of specialisation.²⁴²² In relation to gender, he said:

There is some degree of specialisation between the gender of victims, but there's also quite a bit of crossover. So the empirical evidence suggests that it isn't unusual at all to commit these offences against both boys and girls.²⁴²³

The second limb of the test for admissibility

Professor Hamer was critical of the asymmetry – requiring the probative value of the evidence to *substantially* outweigh its prejudicial effect – in the second limb of the test for admissibility. Professor Hamer submitted:

The asymmetry in s 101, skewing the test towards exclusion, appears unjustifiable. The test can be viewed as a cost/benefit assessment where the evidence will be rejected even where the benefit (probative value) outweighs the cost (prejudicial risk).

The asymmetry displays a conservative respect for what was ‘one of the most deeply rooted and jealously guarded principles of our criminal law’ (*Maxwell v DPP* [1935] AC 309, 317). This conservatism appears unjustified.²⁴²⁴

In response to a question about his view of this asymmetry, Professor Hamer gave the following evidence:

this is a balancing test, probative values balanced against the risk of unfair prejudice. There are a couple of other places where that test appears in the [Uniform Evidence] Act. Essentially that’s a cost-benefit analysis, and it makes sense on a cost-benefit analysis that where the benefits outweigh the costs, then you make a decision or take whatever step you are considering.

To require that the benefits substantially outweigh the costs before that step is taken, before the evidence is admitted, doesn’t really make sense. There’s an asymmetry there, and the effect of the asymmetry is that you can have evidence, the benefits of which outweigh the costs, and yet they are still excluded because the benefits don’t substantially outweigh the costs.²⁴²⁵

Professor Hamer suggested that the asymmetry largely reflects the common law’s traditional stance against propensity or bad character evidence.²⁴²⁶ Professor Hamer also gave evidence that the tests for admissibility in England (under the common law as it applied before the Criminal Justice Act reforms), Canada and New Zealand are more symmetrical.²⁴²⁷

Concoction, contamination and collusion

In relation to whether issues of concoction, collusion or contamination should be left to the jury, Professor Hamer submitted that the High Court’s decision in *IMM* has left the matter unsettled and complex, with the majority judgment appearing contradictory. Professor Hamer submitted that this area calls for legislative simplification and clarification, and he suggested that the minority judgments from *IMM* are preferable such that the trial judge should not feel compelled to assume that the evidence is credible and reliable, but the evidence should be taken at its highest.²⁴²⁸

Standard of proof

In his submission in response to the Consultation Paper, Professor Hamer submitted that tendency reasoning now faces obstacles because of the requirement to direct the jury that, in order to use the tendency evidence, the jury must be satisfied beyond reasonable doubt both that the accused committed the other misconduct and that the accused has the tendency to commit such misconduct.²⁴²⁹ Professor Hamer submitted that there is no need to subject a tendency inference to the criminal standard of proof, unless perhaps it is indispensable to proof of an element of the offence²⁴³⁰ and, where there are independent allegations from multiple alleged victims, it is clear that the tendency inference will not be indispensable.²⁴³¹

Prior convictions and acquittals

In relation to whether evidence of prior convictions should be admissible to prove the commission of the other offences, Professor Hamer stated that such evidence is admissible in Canada and England ‘apparently without raising any grave concerns of injustice’.²⁴³² He submitted that such evidence should be admissible, although some qualification may be required to deal with prior convictions that have been overturned or are under appeal.²⁴³³

In relation to whether a prior acquittal should prevent the prosecution being able to use evidence that the accused committed the offence for tendency or coincidence purposes, Professor Hamer outlined the conflicting positions taken in Australian jurisdictions and in Canada, New Zealand and England. Professor Hamer stated that there is no bar to relying on allegations previously resulting in acquittals in England, and the House of Lords decision which adopted this approach illustrates the importance of not imposing such a bar.²⁴³⁴

Scope of reform

In relation to whether reforms should apply specially to child sexual abuse, or institutional child sexual abuse offences, or whether they should be of general application, Professor Hamer submitted:

As a matter of principle, on a matter as significant as this, the reforms should be general. To treat institutional child sexual assault differently from inter-familial child sexual assault, or child sexual assault differently from adult sexual assault or non-sexual child abuse would appear unprincipled. The goal should be for simple, principled reform that is justifiable across the board. However, the general principles will take into account the differences between different kinds of cases. Consistently with fair trial principles, account may be taken of the important role that tendency and coincidence evidence plays in child sexual assault cases, given the dearth of other evidence. The increased need for the evidence in such cases can play a role in the probative value assessment.²⁴³⁵

Distinction between tendency and coincidence evidence

In relation to the distinction between tendency and coincidence evidence, Professor Hamer submitted:

Courts complain about the complexity of the law governing tendency and coincidence evidence. One increasing source of complexity is the emphasis placed upon the distinction between tendency and coincidence reasoning. As a matter of the logic of inference, the significance of the distinction is unclear. Courts’ suggestions that coincidence evidence is more dependent upon similarity while tendency evidence should be subject to special proof requirements are unsubstantiated. There are clear arguments for dispensing with the distinction, or at least diminishing its significance.²⁴³⁶

Professor Hamer discussed the structural distinction between tendency and coincidence evidence:

- Tendency reasoning typically proceeds sequentially from evidence of the accused's other misconduct to an inference that the accused possesses a tendency to commit such misconduct and then to an inference that the accused committed the charged offence.
- Coincidence reasoning typically operates more holistically so that allegations of other offences are pooled together with the direct evidence relating to the charged misconduct and the prosecution argues the improbability of similar lies, such that the accused is guilty.²⁴³⁷

However, Professor Hamer questioned how important the difference is between the sequential tendency inference and the holistic coincidence inference:

- Both acquire probative value from the same considerations (for example, proximity in time and place, similarity, the number of occurrences, the surrounding circumstances et cetera).
- Propensity (or tendency) reasoning is based on the idea of coincidence, with the trial judge in *Pfennig* observing that '[t]he more unusual the type of crime, the more difficult it may be to accept mere coincidence as a reasonable explanation' for the accused possessing a tendency matching the alleged offence.
- Coincidence reasoning often appears to rely on the accused's tendency to commit the relevant type of misconduct, as possession of the tendency provides the expectation of consistency and continuity in the accused's behaviour, which makes it more probable that the accused committed the similar offences on different occasions.²⁴³⁸

Professor Hamer stated:

The strong similarities between the tendency and coincidence inferences call into question the significance of the distinction is [sic] in the UEL. And yet the distinction seems to be carrying increasing weight. In *Page*, for example, the Victorian Court of Appeal said that 'coincidence evidence will ordinarily need to exhibit a greater level of similarity, or commonality of features, than is required for tendency evidence' [[2015] VSCA 357 [53]]. These propositions appear to be based on legislative language rather than a proper understanding of inference structure.²⁴³⁹ [Reference omitted.]

In his evidence in Case Study 46, Professor Hamer expanded on his submission in relation to the validity of the distinction between tendency and coincidence evidence and again noted that other jurisdictions do not draw the distinction.²⁴⁴⁰

Following the public hearing in Case Study 46, Professor Hamer provided the Royal Commission with a copy of a chapter he has written on the similarities and differences between tendency and coincidence evidence for publication in a book that is to be published in 2017.²⁴⁴¹

In the chapter, Professor Hamer expands on his argument that there is a genuine difference between the inferences arising from tendency evidence and coincidence evidence respectively, but there is also considerable overlap, and the same evidence implicating the accused in misconduct other than the charged offence will generally be available for either form of reasoning. He suggests that sequential tendency reasoning is more readily available (or has a ‘natural form’) where there is no dispute about the accused committing the other misconduct – for example, because it is admitted or is the subject of a prior conviction – and holistic coincidence reasoning is more readily available (or has a ‘natural form’) where the accused disputes the other misconduct – for example, where there are multiple complainants alleging the same type of offences.

Professor Hamer argues that, beyond the natural forms, the structural difference between the two types of reasoning should have no consequences; neither inference is inherently stronger than the other, and the probative value of tendency evidence has a coincidence component. Professor Hamer further argues that the distinctions that courts draw between tendency and coincidence reasoning are unwarranted, referring to both the claim that coincidence evidence is more dependent on similarity than tendency evidence and the requirement that each step in sequential tendency reasoning be proved beyond reasonable doubt. He concludes:

Differential rules like these, diverge from the logic of inference, [and] are entirely counterproductive. They generate meaningless complexity in the law, encourage game-playing by counsel, and can only confound the rational inference processes of juries.²⁴⁴²

Model Bill

In his submission in response to the model Bill, Professor Hamer reiterated his preference for the New Zealand approach to admissibility, balancing probative value against prejudicial effect. He suggested it would be simpler in drafting and to apply.²⁴⁴³ Professor Hamer also expressed support for including guidance on assessing probative value and prejudicial effect, as is done in the New Zealand legislation, although he suggested the New Zealand provisions could be improved upon.²⁴⁴⁴ Professor Hamer expressed a preference for the second alternative in the model Bill, replacing tendency and coincidence rules with a single propensity rule.²⁴⁴⁵

Professor Hamer’s other specific comments include the following:

- Proposed section 94(5)(a) may not go far enough to gain ready admission of prior convictions; it may override section 91 but leave open arguments that prior convictions should be excluded under the hearsay rule in section 59 and the opinion rule in section 102. Professor Hamer suggests that the approach in section 103(2) of the Criminal Justice Act of England and Wales may be simpler and clearer.²⁴⁴⁶
- Proposed section 95A(1) is awkward. Section 95A(1)(a) appears to be addressed to credibility and should be removed. Section 95A(1)(b) is desirable in that it deems a class of propensity evidence to be admissible. Section 95A(1)(c) appears to be largely redundant, adding to the concept of importance only by reference to ‘in the context of the proceeding as a whole’, and should be removed.²⁴⁴⁷

- Proposed section 95A(2), which leaves issues of credibility and reliability to the jury, risks incorporating the ambiguities of the majority of the High Court in *IMM*. Professor Hamer reiterated his support for the minority's approach. If the provision is to be included, he suggested it should be a general provision applying to all admissibility issues under the Uniform Evidence Act.²⁴⁴⁸
- Proposed section 98A allows reference only to unfairness to a defendant and not to the prosecution. In this respect, it is narrower than the existing test in section 101 and narrower than the tests in sections 135 and 137. It might mean that the slightest risk of unfairness to the defendant would lead to discretionary exclusion since there is no need that this risk outweigh the probative value or benefits to the prosecution. If this approach remains, it may be preferable to rely on the mandatory exclusion in section 137 rather than introduce another exclusion in unclear and novel terms.²⁴⁴⁹
- There may be uncertainty as to whether conduct in respect of which the defendant has been acquitted can be relied upon as tendency or coincidence evidence. Provision should be made for this evidence to be admissible.²⁴⁵⁰
- Provision should be made to prevent juries being directed that tendency evidence cannot be used unless the other misconduct and the tendency are proved beyond reasonable doubt. The *Jury Directions Act 2015* (Vic) contains such a provision.²⁴⁵¹

28 Discussion and conclusions

28.1 The need for reform

28.1.1 Introduction

We are satisfied that the current law needs to change to facilitate more admissibility and cross-admissibility of tendency and coincidence evidence and more joint trials in child sexual abuse matters.

We expressed this view in the Consultation Paper on a provisional basis. Nothing we have heard since we published the Consultation Paper, including in submissions in response to the Consultation Paper and in Case Study 46, has changed our opinion. Indeed, our view has been reinforced by what we have heard, and we are now satisfied that the current law not only needs to change but needs to change as a matter of urgency.

We are persuaded that, given the scope of our Terms of Reference, we should limit our recommendations for reform to criminal prosecutions for child sexual abuse offences and not include other criminal offences or civil litigation. We discuss our reasons for this and the scope of the reform we recommend in section 28.2.

The reasons we gave in the Consultation Paper for the provisional opinion we had formed at that time are set out in section 27.2. We discuss in this chapter our reasons for the final opinion we have now formed in favour of reform.

28.1.2 The relevance of tendency and coincidence evidence

Fundamentally, we consider that the law in this area has become unnecessarily complicated and unfairly protective of the accused. The common law and various statutory provisions have developed to exclude relevant evidence, and the tests for admissibility have developed in ways that give the accused unwarranted protection against the possibility of conviction, resulting in injustice to complainants and the community.

As we discussed in section 25.1, the common law has not restricted the admission of tendency or coincidence evidence because it is irrelevant in determining whether the accused is guilty of the offences charged. Rather, the exclusions reflect a concern that the jury will consider it to be *too* relevant and will give it a greater weight than it deserves.

In an article published in 1932–1933, Mr Julius Stone, then a doctoral student at Harvard Law School and later Challis Professor of Jurisprudence and International Law at the University of Sydney from 1942 to 1972, traced the history of the exclusion of similar fact evidence in England.²⁴⁵²

Stone argued that, although the rule excluding similar fact evidence was said to be fundamental in English criminal justice, this was not the case. Having discussed the cases and leading texts to 1850, he concluded as follows:

The foregoing examination of the writers and cases prior to 1850 leads to the conclusion that whenever the evidence of similar facts offered was relevant to any specific fact or issue upon which the jury has to make up its mind, it was admitted.²⁴⁵³

That is, it was only evidence that was relevant *merely* by propensity reasoning – the accused has a disposition to commit such crimes, therefore he probably committed the crime charged – that was excluded.²⁴⁵⁴ If the evidence was relevant to some specific issue – including, most relevantly for child sexual abuse cases, to corroborate the evidence of a material witness – it was admissible.²⁴⁵⁵

Stone then traced the cases after 1850, including *Makin v Attorney General for New South Wales*,²⁴⁵⁶ through to what was then the present day – 1932–1933 – and concluded that they could be ‘pronounced free of any stigma of innovation’.²⁴⁵⁷ That is, the test remained that evidence of similar facts was admissible if relevant otherwise than through disposition, or to state it as a rule of exclusion:

Evidence which is relevant merely as showing that a person has a propensity to do acts of a certain kind is not admissible to prove that he did any such acts.²⁴⁵⁸

Stone argued that the English courts had encountered difficulties in their more recent cases because judges and writers had mistakenly identified fixed categories for admissibility of similar fact evidence, when the earlier cases had not sought to limit admissibility in this way.²⁴⁵⁹

In child sexual abuse prosecutions, evidence that the accused has committed child sexual abuse on occasions other than those the subject of the charge in question – regardless of whether the accused admits or denies the other occasions or has been convicted in respect of them – will be corroborative of the evidence of the complainant if the complainant has identified the accused as the person who committed the abuse. This does not involve evidence that is relevant merely by propensity reasoning.

Mere propensity reasoning might arise, for example, if a complainant of child sexual abuse alleged abuse but could not identify the perpetrator. If the evidence that the accused had committed child sexual abuse offences before was led to invite the jury to reason that he has a disposition to abuse children and therefore he abused the complainant, this would be mere propensity reasoning.

Even in these circumstances, the evidence might move beyond evidence that is relevant merely by propensity reasoning, for example, if the occasions of abuse were sufficiently similar or distinctive to suggest that they were committed by the same perpetrator. It might be in this sort

of case – where the complainant cannot identify the accused – that ‘striking similarity’, ‘unusual features’, ‘underlying unity’, ‘system’, ‘pattern’ or ‘signature’ might be sought, although even here the need for such features should depend upon the other evidence.

The Uniform Evidence Act recognises that the probative value of tendency or coincidence evidence should be assessed ‘having regard to the other evidence adduced or to be adduced’ by the prosecution (unless it has significant probative value by itself): sections 97 and 98.

In child sexual abuse prosecutions, the most important ‘other evidence’ typically will be the direct evidence of the complainant detailing the abuse allegedly committed by the accused.

There may be evidence, other than tendency or coincidence evidence, that corroborates the complainant’s evidence – for example:

- **evidence of first or earlier complaint:** a witness might be able to give evidence of the complainant telling them about the alleged abuse, perhaps some years previously if there has been a delay in reporting to police
- **evidence of opportunity:** a witness might be able to give evidence that the complainant spent time with the accused at the time of and in circumstances consistent with the alleged offending
- **evidence corroborating particular details of the complainant’s account:** witnesses might be able to give evidence about the particular occasion on which the abuse is alleged to have occurred; about the layout of the place where the abuse is alleged to have occurred; that the accused had access to a vehicle at the time of the alleged abuse that matched a vehicle described by the complainant in relation to the alleged abuse; that the complainant’s behaviour changed around the time of the alleged abuse et cetera.

Such evidence is relevant to what are usually the key issues for the jury to determine – did the alleged abuse occur and was it committed by the accused. Such evidence, if it in fact corroborates the complainant’s account, makes it more likely that the complainant’s account is true and the accused committed the offence. Typically, none of this evidence would be sufficient on its own or in combination with other corroborating evidence to convict the accused because it is not direct evidence that the abuse occurred or that the accused committed it. Rather, this evidence gets its relevance from its ability to corroborate aspects of the complainant’s direct evidence of the abuse by the accused.

The relevance of tendency or coincidence evidence can be assessed in the same way. If the complainant alleges that the accused sexually abused him or her, this is more likely to be true if the accused sexually abused another child or other children.

28.1.3 The probative value of tendency and coincidence evidence

The probative value of the tendency or coincidence evidence – or the extent to which the tendency or coincidence evidence makes the complainant’s evidence more likely to be true – may depend upon a range of factors, including similarities between the occasions or nature of the abuse, similarities between the victims of abuse, how close in time the occasions of abuse occurred, whether there were any distinctive features of the abuse or its circumstances and the like.

The courts have struggled particularly with issues of similarity and dissimilarity between occasions of alleged abuse, whether relating to characteristics of the alleged victims, the particular acts of abuse, the accused’s conduct leading up to or following the alleged abuse, the location or nature of the occasion of the abuse or other elements.

However, this struggle seems on occasion to overlook the fact that the probative value of the tendency or coincidence evidence should be assessed in the context of the issues and the other evidence in the trial.

Typically, tendency or coincidence evidence contributes to the evidence against the accused. How much work it has to do will depend on the strength of the other evidence. In a child sexual abuse prosecution, this would typically see the direct evidence of the complainant corroborated by evidence that the accused has abused, or is accused of abusing, another child or other children.

Where the tendency or coincidence evidence is not required to establish the identity of the accused – typically because the complainants have each named the accused as their abuser – it is not clear why any particular level of similarity between incidents of proven or alleged child sexual abuse is required in order for the tendency or coincidence evidence to have significant probative value. It is even less clear why any distinctiveness in the offending would be required.

For example, in *PNJ v DPP*²⁴⁶⁰ (*PNJ*), the Victorian Court of Appeal referred to the fact that each complainant had alleged that the accused committed the same three types of sexual acts on them (requiring the complainant to masturbate the accused, the accused masturbating the complainant and the accused requiring the complainant to perform oral sex on the accused) and continued:

The allegation that such acts were committed is, sadly, unremarkable. It is a commonplace in sexual offending of this kind, and cannot be said to distinguish the applicant’s offending from that of any other such offender. The position might have been different if the evidence had disclosed surrounding circumstances which could be seen to be distinctive and which were common to the accounts given by the various complainants ... There is no distinctive feature which can be seen to recur. There is no ‘pattern’.²⁴⁶¹

If the coincidence evidence in *PNJ* was being relied upon to prove the identity of the accused as the perpetrator of the acts, identifying distinctive features is likely to have been important. However, each complainant had identified the accused as the perpetrator. It is not at all clear why the evidence will have significant probative value only if the accused offended in particularly distinctive ways.

As we stated in the Consultation Paper, we agree with Counsel Assisting's criticism of the decision in *PNJ*: while the court says that allegations of such acts of sexual abuse are 'sadly, unremarkable', this does not undermine the significance of a number of complainants making allegations against one particular accused. As Counsel Assisting stated, 'the force of the coincidence evidence lies in a number of complainants making an allegation against a particular person in authority'.²⁴⁶²

Of course, if there are more similarities in the incidents or the alleged behaviour of the accused is particularly distinctive, the tendency or coincidence evidence might have a much higher degree of probative value. But even with no similarities beyond the incidents involving acts of child sexual abuse, it should be obvious that the evidence would still have significant probative value in those cases where the identity of the accused is not in issue. After all, this is the reason that the courts and the legislature have created rules protective of its admission in an accused's trial. The two most important similarities are already present – *sexual* offending against a *child*.

We are satisfied that a search for additional similarities or distinctiveness in circumstances where the tendency or coincidence evidence is not being relied on to prove the identity of the accused is unwarranted. It is not required in order for the tendency or coincidence evidence to be relevant – that is, capable of rationally affecting the assessment of the accused's guilt – or to have significant probative value – that is, it could rationally affect the assessment of the probability of the accused's guilt to a degree that need not be 'substantial' but must be 'important' or 'of consequence'.²⁴⁶³

It is also not warranted on the basis of what we know about child sexual abuse offending, both within and outside of institutional contexts.

In the Consultation Paper, we stated that we knew enough about institutional child sexual abuse – including from the examples we considered in Case Study 38 and from the research report by Dr Karen Gelb, *A statistical analysis of sentencing for child sexual abuse in institutional contexts* (Sentencing Data Study), discussed in Chapter 34 – to understand that some perpetrators of institutional child sexual abuse offend against multiple victims, including in some cases both girls and boys and children of quite different ages, and that they offend in a variety of ways.²⁴⁶⁴ We have also seen many examples of offending in different contexts – institutional, familial and others – by the same offender.

Examples from our case studies involving proven or alleged abuse of girls and boys include the following:

- **Case Study 16**, in relation to principles, practices and procedures of the Melbourne Response adopted by the Catholic Archdiocese of Melbourne and their application in responding to victims of child sexual abuse and allegations of child sexual abuse against personnel of the Catholic Archdiocese of Melbourne including Father Kevin O'Donnell: In 1995, Father O'Donnell was convicted of 11 counts of indecent assault against 10 boys and two girls between 1954 and 1972.²⁴⁶⁵
- **Case Study 17**, in relation to the response of the Australian Indigenous Ministries, the Australian and Northern Territory governments and the Northern Territory police force and prosecuting authorities to allegations of child sexual abuse which occurred at the Retta Dixon Home:²⁴⁶⁶ Two women, AKU and AJW, and three men, AKV, Mr Kenneth Stagg and Mr Kevin Stagg, gave evidence that they were sexually abused by Mr Donald Henderson while they were children living at the Retta Dixon Home. AKU also gave evidence that she saw Mr Henderson take a boy to a public toilet at a Speedway in Darwin and that she was told by her brothers that Mr Henderson had sexually abused the boy in the toilet. Mr Henderson was a houseparent at the home, and the alleged abuse ranged from tickling children to derive sexual pleasure to forced masturbation of Mr Henderson and sodomy.
- **Case Study 18**, in relation to the response of the Australian Christian Churches and affiliated Pentecostal churches to allegations of child sexual abuse: In 2000 and 2014, Kenneth Sandliands was convicted of 19 counts of indecent assault against students at Northside Christian College and St Paul's Anglican Primary School. The counts were in relation to a number of female students and at least one male student.²⁴⁶⁷
- **Case Study 26**, in relation to the response of the Sisters of Mercy, the Catholic Diocese of Rockhampton and the Queensland Government to allegations of child sexual abuse at St Joseph's Orphanage, Neerkol: Two women, Ms Diane Carpenter and Ms Margaret Campbell, and a man, AYN, gave evidence that they were sexually abused by an employee of the Orphanage, Mr Kevin Baker.²⁴⁶⁸ Ms Campbell also gave evidence that she saw Mr Baker abuse a boy.
- **Case Study 28**, in relation to the response of the Catholic Diocese of Ballarat and other Catholic Church authorities in Ballarat to allegations of child sexual abuse against clergy or religious: Father Gerald Ridsdale pleaded guilty to four charges of indecent assault of a female under the age of 16; 24 charges of indecent assault on a male person under 16 years; one charge of carnal knowledge of a girl of or above the age of 10 years and below the age of 16; and, one charge of buggery of a male under 14 years. The offending occurred between December 1961 and December 1980.²⁴⁶⁹
- **Case Study 37**, in relation to RG Dance and the prosecution of Grant Davies: Davies pleaded guilty to 28 counts on the indictment and to 19 other child sexual offences.²⁴⁷⁰ Most of his victims were girls, but four of the counts on the indictment related to his abuse of a boy, BZS, who gave evidence in the public hearing.²⁴⁷¹

- **Case Study 46**, in relation to the prosecutions of ‘Alexander’: As discussed in section 24.9, 21 complainants, including 18 men and three women, accused ‘Alexander’ of sexually abusing them as children. The alleged abuse of 13 or 14 of the complainants occurred in an institutional context within the meaning of the Royal Commission’s Terms of Reference, across two different institutions. The other seven or eight complainants had been neighbours of ‘Alexander’.

Dr Gelb’s statistical analysis of the 283 cases of institutional child sexual abuse in the sentencing database found that 11, or 3.9 per cent, involved offending against both male and female victims.²⁴⁷² Dr Gelb noted that one factor that might affect this figure was the high representation of single-sex boys’ schools in the database.²⁴⁷³

Dr Gelb undertook a qualitative analysis of sentencing remarks to assess the extent to which offenders engaged in a ‘variety’ of offending behaviours. She found that, in 49.4 per cent of cases, the offending varied to some degree – for example, including combinations of masturbation and fellatio, or fondling and penetration. One case involved kissing, masturbation, fellatio and intercourse with one victim and fondling of a second victim.²⁴⁷⁴

Another case involved a range of offending against multiple victims:

The offending took many forms over the years. The first victim (1976) and the second victim (1977) were both subjected to fondling and masturbation. By the third victim, naked simulated intercourse was involved. The fourth was also a victim of masturbation, while the fifth and sixth were subjected to indecent touching. The seventh victim (1979) was involved in mutual masturbation with other boys present and in 1983 was forced to fellate the offender. In 1985, another victim was involved in mutual masturbation. In 1986, three female victims were digitally penetrated at the offender’s desk, in front of the class. One of these victims was also forced to masturbate the offender and he committed cunnilingus on her. In this case, there is both an escalation of offending and a wide variety of specific types of offending.²⁴⁷⁵

Dr Gelb concluded:

among offenders with multiple victims, there is frequently a variety of offending behaviour taking place; specialisation in specific behaviours appeared to be less common. While the large proportion of cases with unknown data for this measure means the results must be treated with caution, the data do indicate that offending variety is common among these offenders.²⁴⁷⁶

A number of our case studies provide examples of a single perpetrator being convicted or accused of committing child sexual abuse in a number of different ways.

The following examples are taken from Case Study 36, in relation to the response of the Church of England Boys' Society (CEBS) and the Anglican Dioceses of Tasmania, Adelaide, Brisbane and Sydney to allegations of child sexual abuse. They show a significant variety of offending without any clear pattern of escalation either with a particular victim or through the course of the offending. While there are some similarities in some of the occasions, there are also differences, and nothing stands out as particularly distinctive. In each case, the offender pleaded guilty and the facts on which they were sentenced were agreed facts:

- **Tasmania:** Garth Hawkins was a parish priest who had some involvement in CEBS activities and was one of the abusers identified in this case study in the Diocese of Tasmania.²⁴⁷⁷ In 2003, Hawkins pleaded guilty to, and was convicted of, child sexual abuse offences against seven boys, including offences relating to the survivors from whom we heard in Case Study 36 – BYF, Mr Steven Fisher and BYH.²⁴⁷⁸ In 2004, he pleaded guilty to another child sexual abuse offence against another boy.²⁴⁷⁹

The comments of Underwood J on passing sentence in 2003 record that:

- the offending ranged across four counts of maintaining a sexual relationship, three counts of sexual intercourse with a young person, one count of indecent assault and two counts of carnal knowledge
- the offending occurred across 10 years from 1974 to 1984
- three victims were 13, three were 15 and one was 17 years of age
- the first offending was against a 13-year-old boy and involved fondling, providing alcohol, oral and anal sex and digital penetration, with sexual offending against this victim continuing for two years
- the second offending was on a camping trip, where Hawkins fondled a 15-year-old boy
- the third offending was against another 15-year-old boy and involved providing alcohol, oral and anal sex and indecent assault, with sexual offending against this victim continuing for some years, while the fourth offending, at about the same time, was against a 13-year-old boy, who was given alcohol and indecently assaulted
- the fifth offending was against a 13-year-old boy, who was given alcohol and indecently assaulted on at least four occasions, while the sixth offending, at about the same time, was against a 15-year-old boy, who was sexually assaulted by anal intercourse on four occasions
- the final offending sentenced in 2003 was against a 17-year-old boy, involving anal and oral intercourse.²⁴⁸⁰

- **Queensland:** John Elliot was a CEBS leader in Queensland and Tasmania and the CEBS Chief Commissioner in both states. In March 2002, Elliot pleaded guilty in a negotiated plea to offences against five boys aged between 10 and 13 years committed in Queensland between 1970 and 1973. There were 10 counts of sodomy and 18 counts of indecently dealing with boys under 14.²⁴⁸¹ Later in 2002, Elliot pleaded guilty to eight further offences in relation to two boys, including the survivor BYB, who gave evidence in Case Study 36.²⁴⁸²

District Court Judge Howell's remarks on sentencing Elliot in March 2002 record that:

- all of the victims were obviously vulnerable in that they all had no father figure – their fathers being dead or their parents' marriage having broken down – and Elliot's behaviour involved 'gradually breaking down the morals of the boys concerned followed by further, more serious corrupting behaviour'
- the 10 counts of sodomy were committed against one boy
- the acts of indecent dealing, including fellatio, were committed against the other four boys.²⁴⁸³

District Court Judge Howell's remarks on sentencing Elliot in February 2003 record that this offending happened some years after the offending dealt with in the earlier sentence and it did not involve any counts of sodomy.²⁴⁸⁴ BYB gave evidence that from when he was aged around nine until when he turned 13 he saw Elliot on at least a weekly basis and that on nearly all of these occasions Elliot sexually abused him.²⁴⁸⁵

- **New South Wales:** Simon Jacobs was a CEBS leader who was involved with the Christ Church St Ives CEBS and later the CEBS group at St Swithun's in Pymble. In 2010, Jacobs pleaded guilty to 11 child sex offence charges involving six boys, including two survivors – BYC and Mr Wayne Guthrie – who gave evidence in Case Study 36.²⁴⁸⁶

District Court Judge Garling's remarks on sentencing in 2011 record:

- the first victim was offended against for some four years from 1977 to 1980, with offending involving masturbation
- offending against the second victim included holding his penis while he urinated, tongue kissing, masturbation and oral sex
- Jacobs babysat the third victim, assisted him with his homework and bought him expensive gifts; Jacobs took naked photographs of the victim and shaved his genitals and legs; the offending included representative charges of masturbation and oral sex; the offending progressed to include buggery, occurring about 20 times a year over three years

- Jacobs bought presents for the fourth victim and took photographs of him in a state of undress; the offending involved masturbation, naked photographs, requiring the victim to touch himself and kissing
- offending against the fifth victim involved masturbation
- offending against the sixth victim involved anal intercourse on the first occasion, masturbation and oral sex on the second occasion and anal intercourse on the third occasion
- the offending occurred at various locations, including on CEBS camps, at the offender's home, at the home of the offender's parents, in the offender's car, in a victim's home, in the church hall and on a trip with a victim's family
- the victims ranged in age from 10 to 14 years.²⁴⁸⁷

In December 2016, the New South Wales Court of Criminal Appeal dealt with a sentencing appeal in *Denham v R*.²⁴⁸⁸ The case provides another example of a range of offending against multiple victims. Denham is former Catholic priest and schoolteacher. In 2010, he was charged with and convicted of a large number of child sexual assault offences committed between about 1968 and 1986 in respect of 39 victims, including those the subject of offences included on Form 1s. Following the 2010 proceedings, a further 18 victims and survivors reported to police, and Denham was charged with and convicted of offences concerning these further 18 victims.

In its judgment, the court (Payne JA, Fagan and N Adams JJ) stated:

The sheer scale of the offending of this applicant, reflected in the agreed facts in the 2010 and 2015 proceedings, is difficult to summarise.

Whilst we have carefully taken into account all of the agreed facts from the 2010 and 2015 proceedings, the seriousness of the abuse meted out to almost 60 young boys over many years by the applicant makes concise description difficult.²⁴⁸⁹

The court set out a selection of the agreed facts to illustrate the scale and scope of the offending. That selection of facts shows that, while the victims were all boys:

- the offending ranged across offences of indecent assault, buggery and acts of indecency
- some offending occurred in the victim's home, while other offending occurred in the priests' quarters, the classroom or the offender's office at the school
- some offending involved physical violence, in some cases accompanied by caning, but some offending did not involve physical violence
- in one case the buggery was committed by inserting a cane in the victim's anus, while in other cases the offender used his penis

- some offending involved threats; in another case the offender paid the victim \$10 after committing buggery on him
- one victim was aged somewhere between five and eight years of age when the offending occurred; other victims were aged between 12 and 15 years.²⁴⁹⁰

We have also seen examples of offending, proven or alleged, in a variety of contexts – that is, offending in institutional, familial and other contexts.

The prosecutions of ‘Alexander’, discussed in section 24.9, arose from allegations of child sexual abuse against 13 or 14 children within two different institutions and against another seven or eight children who had been neighbours of the accused.

Another example is *R v Brown*,²⁴⁹¹ which involved a successful Crown appeal against inadequacy of sentence. The offender pleaded guilty to 27 counts of child sexual abuse and asked for a further 20 offences to be taken into account on various Forms 1.

The charged offences were:

- two counts of buggery
- four counts of homosexual intercourse with a male aged between 10 and 18
- two counts of committing an act of indecency with a male
- one count of committing an act of gross indecency
- one count of indecent assault
- one count of sexual intercourse without consent
- 16 counts of assault on a male accompanied by an act of indecency.

The offences on Forms 1 were:

- six charges of aggravated act of indecency with a person under the age of 16 years
- five charges of homosexual intercourse with a person aged between 10 and 18 years
- five charges of indecent assault of a male
- three charges of committing an act of indecency with a male person
- one charge of committing an act of gross indecency.

There were a total of 20 victims, 19 of whom were identified in the charged offences with one additional victim specified in a charge on a Form 1. The offences were committed over a period of about 22 years, between 1974 and 1996, when the offender was aged between 24 and 45 years.

Some victims came into contact with the offender when the offender ran youth groups at local Anglican churches. Another victim came into contact with the offender when the victim was resident in an Anglican Church boys’ home as a ward of the state and the offender was allowed to take the victim home for the school holidays. One victim was introduced to the offender by

a friend of the victim's. One victim met the offender through another Anglican Church. In other cases, the offender became a friend of victims' parents or other family members. The offender joined a Celtic pipe drum band and met more of his victims there. Other victims were allowed to help out in the offender's grocery store or were paid to perform chores for the offender.

In Case Study 39, in relation to the response of certain football (soccer), cricket and tennis organisations to allegations of child sexual abuse, BXA gave evidence about her sexual abuse by her soccer coach, BXK. In 2001, BXK was acquitted of charges relating to BXA. In 2002 and 2003, allegations came to light that BXK had sexually abused children other than BXA. In 2004, following two trials, BXK was convicted of child sexual offences against a number of children. In 2004, he pleaded guilty to further charges.²⁴⁹² None of these children, other than BXA, was involved in soccer.²⁴⁹³ Offending against these other children did not occur in an institutional context within the meaning of our Terms of Reference.

Another offender who came to our attention in the course of our inquiries was Geoffrey Robert Dobbs. Dobbs is one of the most extreme offenders among those who have come to our attention, in terms of the number of his victims, his variety of offending and the variety of contexts in which he offended.

In 2003, Dobbs pleaded guilty to 116 child sexual abuse offences committed against 62 victims over a period of nearly 30 years. He was 48 years of age when he was convicted and sentenced to indefinite detention. The evidence against him included more than 500 hours of videotapes of his offending, and it was believed that many of his victims had not come forward or been identified. His victims were aged one to 15 years, and all were girls. Dobbs' offending including contact and non-contact offending.

Dobbs came into contact with his victims in a number of contexts, including:

- through his and his wife's activities in several church communities, including through volunteering with the Boys and Girls Brigades and church youth camps
- through his role as a gymnastics coach
- socially, as neighbours or where Dobbs or his wife were friends with or a work colleague of the victim's parents
- through family connections
- while Dobbs was holidaying in caravan parks, where he offended against strangers.

Dobbs' indefinite sentences were discharged in 2015 and two concurrent 15-year sentences were substituted for them.

The variety of offending revealed in the cases we have examined and the research we commissioned is generally supported by the academic literature.

In her article 'The behaviour of serial child sex offenders: Implications for the prosecution of child sex offences in joint trials', Professor Cossins reviewed research examining the 'crossover behaviour' of child sex offenders – that is, the extent to which offenders chose victims that varied in terms of gender, age and relationship to the offender.²⁴⁹⁴ Professor Cossins noted a study using self-reporting from child sex offenders from 1988 showing that 20 per cent of sex offenders crossed over between male and female victims, 23.3 per cent crossed over between children related to them and unrelated victims, and just over 42 per cent crossed over between age groups (children, adolescents and adults).²⁴⁹⁵ Professor Cossins noted that other studies have found significant minorities of child sex offenders admitting to abusing victims from both sexes, with proportions ranging from 21 per cent to 63 per cent.²⁴⁹⁶

In a chapter published in 2015, Professor Hamer summarised the relevant empirical work which identified features, including the following:

- Child sex offenders are 'specialised generalists' in that they tend to commit a range of offences but are more likely to commit their specialist offence (a child sexual offence) than any other offence.
- Sex offenders tend to confine themselves to one victim type – child or adult – although those who offend against adolescent victims might switch to either adult or child victims.
- Within child sexual abuse offending, offenders tend to offend either within or outside the family, with little crossover.
- Studies are mixed as to whether offenders are consistent or differ in terms of the age and gender of the victim.
- A recent study suggests greater consistency in terms of the gender of the victim and the level of violence but greater variation in the nature of sexual acts and the victim's age.²⁴⁹⁷

28.1.4 Understating the probative value of tendency and coincidence evidence

The law reform commissions that have considered tendency and coincidence evidence in relation to the Uniform Evidence Act seem to us to have both *understated* the probative value of tendency and coincidence evidence and *overstated* the risk that such evidence will unfairly prejudice the accused.

In proposing draft provisions for the Uniform Evidence Act, the Australian Law Reform Commission (ALRC) recommended that evidence of a person's past conduct should only be admitted for tendency or coincidence reasoning if the acts, events or circumstances of the charged act and the other occasion were 'substantially and relevantly similar'.²⁴⁹⁸ The Uniform Evidence Act adopted the 'significant probative value' test instead of the ALRC's recommended approach.

When the ALRC, New South Wales Law Reform Commission (NSW LRC) and Victorian Law Reform Commission (VLRC) reconsidered the Uniform Evidence Act in 2005 in the *Uniform Evidence Law report*, they did not recommend reverting to the ALRC's original proposal. However, they endorsed the ALRC's 1985 views of the psychological research.²⁴⁹⁹ They stated:

The law has always been concerned with the potential to overestimate the value of, and to be improperly influenced by, evidence of tendency, coincidence, credibility and character. The approach of the law is supported to a considerable extent by a substantial body of psychological research, described in some detail in the Interim Report of the previous Evidence inquiry, ALRC 26.²⁵⁰⁰ [Reference omitted.]

They stated:

the psychological research has demonstrated that evidence of character or evidence relevant to character generally has a low probative value.²⁵⁰¹

The ALRC's discussion in 1985 of the psychological research is lengthy and can be reviewed in detail at paragraphs 795 to 800 of the *Evidence (interim report)*. The following statement in paragraph 394 in relation to the character of the accused represents a fair summary of the ALRC's conclusions:

Unsound Theoretical Basis. The theory of personality underlying the admission of character evidence, premised on the existence of stable 'traits', has not been supported by empirical research. A person's 'character' is not so highly integrated as to motivate trans-situational consistency of behaviour. Rather, valid predictions about human behaviour are unlikely unless an individual is placed in similar situations.²⁵⁰²

It is not clear to us that this theory of personality does underlie the admission of tendency or coincidence evidence.

Tendency or coincidence evidence does not rely on *prediction* of behaviour at all. It relies on proven or alleged behaviour of the accused that has or is alleged to have already occurred. Also, tendency or coincidence evidence does not rely on *consistency* of behaviour beyond the particular occasions under consideration. Tendency or coincidence evidence does not rely on an argument that the accused *always* abuses children, whether generally or in particular circumstances.

It may also be the case that the relevant theories in psychology have been developed further over the last 30 years. Writing in 2014, Redmayne summarised the 'person-situation' debate in social psychology and concluded:

Today, the person-situation debate is more or less over. The rather predictable consensus is that both persons and situations are important factors in explaining behaviour ('interactionism'). When one looks at behaviour over significant time periods, aggregating across situations, even the psychologists who tend to be associated with situationism agree that there are inter-individual differences in behaviour ...²⁵⁰³ [Reference omitted.]

Redmayne also suggested that the significance of situations as an important influence on behaviour should not be overstated because:

- how a person characterises a situation will depend on their personality
- people have some control over the situations they find themselves in
- situations are not static but are shaped by people.²⁵⁰⁴

These considerations resonate particularly strongly for us, having examined many institutional contexts in which perpetrators of child sexual abuse have sought out situations – and, indeed, have created or manipulated situations – to provide themselves with opportunities to sexually abuse children.

Psychologists may well be correct to reject descriptions of people in terms of broad traits – such as honest or dishonest, introverted or extroverted, aggressive or polite – without reference to specific situations.²⁵⁰⁵ However, tendency or coincidence evidence is not relied on to prove broad traits – it is always referring to specific situations, both that in respect of which the accused has been charged and the other situation or situations in which the relevant tendency or coincidence evidence is found.

Indeed, and perhaps ironically, the only character evidence that seems to rely on the existence of stable 'traits' is *good* character evidence given by or on behalf of the accused. For example, under section 110 of the Uniform Evidence Act, evidence may be led by the defence to prove that the accused 'is, either generally or in a particular respect, a person of good character'.

Redmayne analysed recidivism data in England and Wales²⁵⁰⁶ and argued that previous convictions 'are probative because people with previous convictions are more likely to commit crime than those without previous convictions'.²⁵⁰⁷ He argued that character evidence in a trial operates comparatively, so low recidivism rates do not prevent it from being powerful evidence.²⁵⁰⁸

In relation to serious offences, which include sexual offences including child sexual abuse offences, Redmayne stated:

In light of the fact that recidivism is generally less common for more serious offences, some writers have argued that previous convictions for these offences have little probative value if used to prove commission of the same offence. This implies, counter-intuitively, that if a person on trial for murder has a previous conviction for murder, that conviction

would say little about whether he had committed the current offence. The argument fails to grasp that what really matters is ... a comparative judgment: whether the person with the murder conviction is more likely than other people to commit murder. ... the question is whether the person has a comparative propensity to commit crime.²⁵⁰⁹

Having considered comparative propensity data for England and Wales, Redmayne concluded:

They suggest that a person with a recent previous conviction for a particular offence is considerably more likely than a person without a previous conviction to commit such an offence: previous convictions therefore have considerable probative value as proof of guilt.²⁵¹⁰

Professor David Hamer has drawn on the work of Redmayne in relation to comparative propensity. As he stated in his submission in response to the Consultation Paper:

The likelihood of a defendant, with a prior conviction, reoffending is only one element of the probative value of that prior conviction. This likelihood needs to be compared with the likelihood of someone without a prior conviction committing the offence. Prior conviction evidence is probative, not because it is highly probable that someone with a prior conviction is likely to reoffend, but because such a person is far more likely to commit an offence than someone without a prior conviction. Recidivism rates, while not incredibly high, are far higher than crime rates. Probative value is a 'comparative judgment', and its comparative nature suggests that tendency and coincidence evidence can have considerable probative value.²⁵¹¹ [Reference omitted.]

Noting the limitations on data and methodology, Professor Hamer calculated some possible comparative propensity figures for child sexual assault offences in New South Wales. The figures suggest that a prior child sexual abuse conviction may possess significant probative value in that a person with a prior conviction for child sexual abuse is far more likely to commit a child sexual offence than a person without a prior conviction.²⁵¹²

The idea of comparative propensity appears to work particularly well in cases where there is no issue that the crime occurred, but the issue is whether the accused committed it: that an accused with a relevant criminal record is more likely to have committed the crime than someone without such a record helps to identify the accused as the person.

If the issue is whether the crime occurred at all – which is typically the issue in child sexual abuse prosecutions – the connection may not be as readily apparent. However, this is where it is particularly important to remember that the value of the tendency or coincidence evidence must be determined in light of the other prosecution evidence.

For example, Redmayne drew a parallel between how evidence of previous convictions works and how motive evidence works. Proof that the accused had a motive to kill the victim increases the probability of the accused's guilt for the murder even though 'the vast majority of people with a motive to kill do not go on to commit murder'. This is because people with a motive to kill are more likely to kill than those without a motive to kill: it is the comparative element which creates probative value.²⁵¹³

Evidence that established that the accused had a motive to kill would not by itself be sufficient to prove that the accused committed the murder. Similarly, evidence that the accused had or was accused of having committed other child sexual abuse offences would not by itself be sufficient to prove that the accused committed the child sexual abuse offence the subject of the charge. However, in both cases, the evidence is inculpatory – it makes it more likely that the accused committed the offence charged.

We have not sought to test the validity of Redmayne's calculation of comparative propensity, so we do not place weight on a numerical proof of the relevance of prior convictions. However, it is interesting work and we note that it may warrant further consideration by law reform commissions if they consider these matters at some time in the future.

28.1.5 Overstating the risk of unfair prejudice

The common law's concern that the jury will consider tendency or coincidence evidence to be *too* relevant and will give it a greater weight than it deserves is also reflected in the Uniform Evidence Act provisions and other statutory admissibility tests applying in Australian jurisdictions.

As discussed in section 25.1, the common law considers the evidence to be highly, and often unfairly, prejudicial to the accused. It is thought that the process of reasoning may be no more than 'well, he committed the other offence, so he must be guilty of this one too'. This reasoning is built on assumptions about how juries will view such evidence. We discussed in section 25.1 the way courts have said that tendency or coincidence evidence may cause unfair prejudice.

As discussed in section 25.2, in the Consultation Paper we referred to a number of reasons which cast doubt on at least the strength, and possibly also the validity, of the courts' concerns.

A number of jury research studies have been cited by the law reform commissions and others as providing evidence of unfair prejudice arising from evidence of bad character. We have reviewed these jury research studies and we discuss them below. We also discuss our conclusions in relation to the report *Jury reasoning in joint and separate trials of institutional child sexual abuse: An empirical study* (Jury Reasoning Research) and in relation to the validity of concerns about unfair prejudice.

Jury research studies cited by law reform commissions, texts and in the High Court

Jury research studies cited by the ALRC

In the ALRC's *Evidence (interim report)*, the ALRC discussed the difficulty of determining the ability of juries to assess evidence. The ALRC referred to studies of mock juries and comparisons of jury verdicts with the views of the judges, lawyers and police involved in the cases. The ALRC suggested that, while the studies '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)', 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'²⁵¹⁴ (references omitted). However, on the basis of the studies the ALRC did conclude as follows:

The studies do, however, suggest that we should be reluctant to admit evidence of bad character.²⁵¹⁵

The ALRC cited 19 publications.²⁵¹⁶ We reviewed these publications and we have summarised each publication in Appendix J.

As discussed in section 25.5.3, the Jury Reasoning Research identified a number of significant limitations with prior jury research studies as follows:

- They studied verdicts from individual mock jurors and not from mock juries.
- They focused on conviction rates.
- They did not study jury deliberation or jury reasoning.
- They did not assess whether verdicts were reached using permissible reasoning.
- They did not assess whether verdicts involved unfair prejudice to the accused.²⁵¹⁷

Many of those significant limitations apply to most of the studies cited by the ALRC. We note also that 18 of them date from the 1960s and 1970s, with the other study published in 1983.

However, the real shortcoming for these purposes in the publications cited by the ALRC is that none of them assesses evidence that could be regarded as tendency or coincidence evidence in circumstances where tendency or coincidence evidence is admissible. The most relevant studies assess the impact of prior convictions on jury verdicts but in circumstances where study participants were not allowed to use tendency or coincidence reasoning and they were given no directions or other assistance from the judge or counsel in using the information they have been given, other than effectively being told not to use it. These studies do not shed any useful light on how juries reason in relation to tendency or coincidence evidence or whether their reasoning involves any unfair prejudice.

In summary, our findings on the 19 publications cited by the ALRC are as follows:

- Six of the 19 publications relate to the University of Chicago Law School Jury Project.²⁵¹⁸ This project was conducted in the 1960s and assessed judges' views of why juries reached a different verdict in trials to the verdict the judge would have reached had the judge determined the case. Another publication reported on a study comparing jury verdicts and the 'verdicts' of other participants in the legal system,²⁵¹⁹ somewhat similarly to the approach of the Chicago Law School Jury Project. It found more frequent disagreement with jury acquittals than convictions.
- Three of the 19 publications relate to or foreshadow the London School of Economics Jury Project.²⁵²⁰ It was conducted in the early 1970s. One of the rules of evidence tested in the project was the rule rendering the accused's previous convictions inadmissible. The research concluded that the admission of previous convictions increases the chance of a guilty verdict but only if the convictions are for offences similar to that charged, although the jury gave real weight to an instruction to disregard relevant previous convictions wrongly admitted.

This research is of limited assistance in relation to evaluating the effect of tendency and coincidence evidence on juries, including because:

- the rule required exclusion of what would now be considered tendency and coincidence evidence
 - the evidence of previous convictions was introduced by being 'let slip' by another witness or co-defendant, or by admissions by a co-defendant
 - the evidence was not explained to the juries in terms of tendency or coincidence reasoning and they were given no directions allowing them to use it for such reasoning (some juries were instructed to disregard it)
 - the research did not evaluate mock jury deliberations to determine how they reasoned and whether their reasoning revealed any unfair prejudice.
- Two publications reported on two studies in the 1970s examining a Canadian provision that allowed the criminal record of an accused person to be entered as evidence if the accused chose to give evidence.²⁵²¹ The Canadian provision did not allow the record to be used for reasoning in the nature of tendency or coincidence evidence; rather, it was said to go only to credibility, such that a person who has been convicted of an offence may be thought more likely to give untrue evidence than a person who has not been convicted of an offence. The first study found that the effect of the criminal record was statistically significant and that the judge's instructions not to use the convictions to determine guilt had no effect. The second study found that the criminal record did not have a statistically significant effect on individual mock juror verdicts but it did have an effect on mock juries.

The research is of limited assistance in relation to evaluating the effect of tendency and coincidence evidence on juries, including because:

- the law being tested did not allow tendency and coincidence evidence or tendency and coincidence reasoning
 - the evidence was not explained to the juries in terms of tendency or coincidence reasoning and juries were not given any directions as to how they could use it (some juries were instructed to disregard it)
 - in fact, the convictions would appear to support tendency or coincidence reasoning – the charge was for breaking and entering and the prior convictions were for breaking and entering and possession of stolen property – and should cause persons to consider it more likely that the accused committed the offence charged
 - even with the information on prior convictions, the mean mock juror result was approximately three on a scale of seven,²⁵²² with three representing ‘probably guilty’, which would be insufficient for a conviction in any event
 - the study was very small (48 mock jurors spread across all variations), and the trial materials consisted of a summary of approximately 400 words
 - the research did not evaluate mock jury deliberations to determine how they reasoned and whether their reasoning revealed any unfair prejudice.
- One publication reported on a 1970s study with student mock jurors assessing the impact of jurors hearing a wrongly recorded telephone intercept that was inculpatory of the accused.²⁵²³ Some student mock jurors were told it was inadmissible and others were told it was admissible. There were weak and strong versions of the case. The researchers concluded that the evidence, when ruled inadmissible, caused bias for the mock jurors in the case with weak evidence but not in the case with strong evidence. The authors acknowledged limitations of the study, including that the recording of the telephone intercept would have been ruled inadmissible and not heard by the jury.
 - Two publications related to two studies, one in the late 1960s and the other in the early 1970s, measuring the influence of the character of the victim and the character of the defendant on mock juries.²⁵²⁴ However, the studies adopted scenarios with certainty of guilt and assessed the extent to which the various combinations of either positive or negative traits of the victim or defendant affected how student mock jurors would sentence the defendant. The second study found that, if asked to give a commitment to be impartial, student mock jurors overcompensated and sentenced the socially and physically unattractive defendant to less severe sentences.²⁵²⁵
 - Four publications reported on studies measuring factors unrelated to character:
 - One publication reported on a 1970s study assessing different definitions of reasonable doubt and the effect of requiring unanimous or majority verdicts.²⁵²⁶
 - One publication reported on a very large mock jury study in the early 1980s, which evaluated jury deliberations as well as verdicts, in relation to the impact of requiring unanimous or majority verdicts.²⁵²⁷

- One publication reported on a 1970s study of mock jurors to test whether male and female jurors respond differently to male and female defendants.²⁵²⁸
- One publication reported on a 1970s study assessing the impact of the physical attractiveness of the defendant on student mock jurors of the opposite sex.²⁵²⁹

Jury research studies cited by the ALRC, NSW LRC and VLRC

The ALRC, NSW LRC and VLRC summarised the psychological research referred to in the ALRC's *Evidence (interim report)* in relation to unfair prejudice as follows:

In sum, the psychological research shows that: ...

- people tend to infer, from limited knowledge of a person, general personality traits which thereafter colour their perception of that person's behaviour ('the halo and reverse halo effects');
- jurors will be less reluctant to convict an accused if they are informed of an accused's previous misconduct and/or convictions, because they feel either that the gravity of their decision is lessened or that there is some basis for punishment, even if they are not convinced the accused committed the crime charged ('the regret matrix').²⁵³⁰ [Reference omitted.]

The ALRC, NSW LRC and VLRC also stated:

The prejudicial effect of evidence of previous misconduct has been confirmed in research conducted by the Law Commission of England and Wales involving magistrates and mock juries. In relation to mock juries it was found, among other things, that information of a previous conviction for indecent assault on a child can be particularly prejudicial whatever the offence charged and will have a significant impact on the jurors' perception of the defendant's credibility as a witness. In relation to magistrates, the study concluded that:

In general the results indicate that information about previous conviction is likely to affect magistrates' decisions despite their awareness of the dangers and their efforts to avoid bias. These findings did not offer confidence that the rules on admitting previous convictions can be safely relaxed for magistrates anymore than for juries.²⁵³¹ [References omitted.]

This is a reference to research conducted by Lloyd-Bostock in England and Wales, funded by the Home Office at the request of the Law Commission as part of its inquiry into the previous misconduct of the defendant.²⁵³² The ALRC, NSW LRC and VLRC also referred to further research on juries and the prejudicial effect of character evidence, referring to an article by Hunt and Budesheim.²⁵³³ We reviewed these studies and we have summarised each of them in Appendix K.

The paper by Lloyd-Bostock reported on an experimental study using mock jurors and mock juries and testing the impact on mock jurors' verdicts of revealing an accused's prior convictions.²⁵³⁴ The author stated that the results of the study 'indicate that the information evokes stereotypes of typical criminality, and that caution over revealing a defendant's criminal record is well justified'.²⁵³⁵

The main difficulty in drawing any conclusions relevant to tendency or coincidence evidence from this study is that it tested the effects of revealing prior convictions in circumstances where prior convictions were inadmissible for tendency or coincidence reasoning, such that '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'.²⁵³⁶

The information about the prior convictions 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 (that is – for credibility and not for tendency or coincidence purposes).

The study did not analyse mock jury deliberations, although the mock juries did deliberate, and the study collected verdicts and other ratings from the mock jurors before and after deliberations.²⁵³⁷

One variation of the mock trial tested evidence being given of a recent or old conviction for indecent assault on a child, although none of the charges were for child sexual abuse offences.

The results included the following:

- There was a statistically significant higher likelihood of guilt for the recent similar previous conviction trials before and after deliberation.²⁵³⁸
- 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.²⁵³⁹
- In relation to verdicts, the initial majority position before deliberation was always not guilty and deliberation generally reduced the number of guilty verdicts.²⁵⁴⁰
- 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.²⁵⁴¹

The author concluded in part that:

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.²⁵⁴²

It seems to us that the difficulty with this conclusion is that the study does not reveal anything about the mock jurors' or the mock juries' reasoning processes, so it cannot say whether they reasoned in a way that revealed *unfair* prejudice to the accused. We consider that a recent similar previous conviction *should* increase the likelihood of guilt – and it is unsurprising to us that the mock juries either did not understand or did not follow a direction that it is relevant to credibility only.

The study by Hunt and Budesheim²⁵⁴³ tests mock jurors' responses to character evidence introduced in accordance with the Federal Rules of Evidence applying in the United States. They explained the Federal Rules of Evidence as allowing the defence to choose whether to introduce positive character evidence and, if they do choose to do so, the prosecution's ability to rebut the defence's good character evidence but only in relation to the character traits introduced by the defence.²⁵⁴⁴

This experiment tested the use mock jurors make of character evidence (which in Uniform Evidence Act jurisdictions in Australia is provided for independently of tendency or coincidence evidence). The researchers 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 [character evidence] 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.²⁵⁴⁵

The researchers concluded that the defence 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.

It does not appear to us that this research casts any light on jury reasoning in relation to tendency or coincidence evidence.

Jury research studies cited in Cross on Evidence

Cross on evidence,²⁵⁴⁶ a leading Australian evidence law text, also refers to jury research in discussing the 'nature of the problem' in relation to similar fact evidence. It states:

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. It is likely both to help prove the guilt of the accused, and to prejudice the jury. The prosecution justifiably seeks its inclusion for the former purpose, and the defence equally justifiably seeks its exclusion for the latter reason.²⁵⁴⁷ [Reference omitted.]

The footnote at the end of the first sentence is as follows:

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* ...²⁵⁴⁸

We reviewed these studies in the course of reviewing the studies referenced by the ALRC in *Evidence (interim report)* and by the ALRC, NSW LRC and VLRC in their *Uniform Evidence Law report*. We have repeated our summaries of them in Appendix L.

The experiments in the London School of Economics Jury Project considered prior convictions under laws that did not allow for such evidence to be admitted.²⁵⁴⁹ We summarised our reasons for considering this research to be of limited assistance in relation to evaluating the effect of tendency and coincidence evidence on juries above when we discussed the ALRC's citation of publications in relation to this project.

The study by Purves and McCabe reported on the views of counsel, solicitors and judges as to why particular juries acquitted and categorised the reasons.

The table to which *Cross on evidence* particularly referred is reproduced as Table 28.1.

Table 28.1: Percentage of defendants with and without previous convictions^{*2550}

| | 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: $p = < .001$

The authors of this study stated that '[f]rom 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'.²⁵⁵¹ However, the important aspect to understand here is that the information about prior convictions was obtained by the researchers, but the juries were *not* informed that an accused had prior convictions: the existence of the prior convictions cannot be thought to have influenced the juries' verdicts because they did not know about them. They would usually have been informed of the *absence* of any prior convictions, so perhaps a clean record encouraged a verdict of not guilty, but the reverse does not arise.²⁵⁵²

It is therefore not clear to us why *Cross on evidence* cites this table as relevant to confirming the belief that tendency and coincidence evidence – or evidence of bad disposition – is very influential in its effect on a jury.²⁵⁵³ It seems to us to say nothing at all about the impact of evidence of a prior conviction on jury reasoning.

We have already discussed the study by Lloyd-Bostock, which was also cited by the ALRC, NSW LRC and VLRC, above.

Jury research study cited by Justice Kirby

In *Zoneff v R*,²⁵⁵⁴ a decision of the High Court concerning an appeal in relation to directions given by a judge of the District Court of South Australia with respect to evidence that the accused gave in his trial on charges of false pretences and fraudulent conversion which the jury could have inferred to be false, Kirby J referred to empirical research about the impact of judicial instructions on the decision-making of jurors.²⁵⁵⁵ In relation to evidence that the law considers prejudicial, he stated:

The law presumes that triers of fact are able to disregard the prejudicial aspects of testimony and adjust appropriately the weight to be attached to such evidence on the basis of its 'probative value'. However, such empirical studies as have been performed on jurors' abilities to follow judicial instructions, and to divide and sanitise their minds concerning impermissible uses of evidence, have yielded results which are substantially consistent. They cast doubt on the assumption that jurors can act in this way.²⁵⁵⁶
[References omitted.]

Justice Kirby cited jury research by Schaefer and Hansen.²⁵⁵⁷ We reviewed this study, and we discuss it in Appendix M.

The experiment reported in this research caused difficulties for the researchers in interpreting any results because their expectation that there would be relatively few guilty verdicts in the 'control' condition was not borne out. It should be noted that this study used psychology students as mock jurors, so they in no way replicated the composition of real juries.

The researchers reported an unexpected result in the study as follows:

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.²⁵⁵⁸

As discussed above, we would not be surprised by findings that mock jurors find it difficult to apply limited use directions which require them to consider similar fact evidence in relation to credibility only and not in relation to likelihood of guilt.

It may be that Kirby J cited this research more for the extensive literature review it contains – which includes many of the research studies we discuss in appendices J, K and L – and not for the experiment reported in the study.

Jury Reasoning Research

The Jury Reasoning Research is discussed in section 25.3. Concerns and criticisms in relation to the Jury Reasoning Research expressed in submissions in response to the Consultation Paper and in evidence given by witnesses in Case Study 46 are set out at length in section 25.3.5. The researchers' response to the concerns and criticisms is also set out in section 25.3.5, together with detail of the peer review process followed in relation to the Jury Reasoning Research, which we do not repeat here.

As the researchers' response indicates, many of the concerns and criticisms are not well founded.

We are satisfied that the Jury Reasoning Research has considerably more validity in terms of informing a consideration of issues in relation to the admissibility of tendency and coincidence evidence than the jury research studies cited by the law reform commissions and others, discussed above.

A number of the concerns and criticisms set out in section 25.3.5 are about the length or lack of reality of the mock jury trials used in the Jury Reasoning Research.²⁵⁵⁹ It is true that no mock jury research can replicate a real jury trial. However, as researchers are not permitted to observe the deliberations of real juries in real trials, mock jury research is the best method available. We are satisfied that there is no more realistic mock jury research than that conducted in the Jury Reasoning Research. Indeed, all the jury research studies cited by the law reform commissions and others have far greater limitations than the Jury Reasoning Research. The Jury Reasoning Research is the strongest research conducted in terms of the size, selection and composition of its mock juries, and the presentation of its mock trials.

We do not understand the New South Wales Law Society's criticism directed at the absence of a 'ground truth'.²⁵⁶⁰ There is no 'ground truth' in any real trial, and there is no 'ground truth' in any of the jury research studies cited by the law reform commissions and others.²⁵⁶¹ The jury research cited with apparent approval by the New South Wales Law Society (which is not relevant to tendency or coincidence evidence or joint trials) does not have any 'ground truth'.²⁵⁶²

The Bar Association of Queensland submitted that the higher conviction rates in the tendency evidence trial and the joint trial 'vindicate the fears of unfair prejudice to the defendants'.²⁵⁶³ It stated that the 'tendency evidence (of similar conduct against two other boys) was not capable of proving the specific acts charged' and that the 'inescapable conclusion is that the higher conviction rate was influenced by the other similar allegations led in evidence'.²⁵⁶⁴

We do not understand why the Bar Association of Queensland considers that this vindicates the fears of unfair prejudice. Certainly, there is 'prejudice' to the accused in the sense that the evidence of similar conduct against two other boys is inculpatory in that it makes it more likely that the accused committed the offences charged, but this is not unfair – this is exactly how tendency or coincidence evidence is relevant and has probative value, as discussed above.

Unless the Bar Association of Queensland takes the view that tendency or coincidence evidence is irrelevant (which is a position even more restrictive than the most restrictive position adopted at any time by the common law), we do not understand how this objection can be made. If the Bar Association of Queensland submission reflected a view that tendency evidence is irrelevant – it stated 'none of the additional [tendency] evidence could logically help prove the specific acts alleged by other complainants' – we reject that submission without reservation.

What the results of the Jury Reasoning Research show, as set out in Figure 25.1 in section 25.3.4, is that, where there was no tendency evidence, the juries thought that the accused probably did commit the charged offences against the complainant with the moderately strong case, but they could not be satisfied beyond reasonable doubt, so they acquitted – as they must and should – even though they thought the accused was probably guilty. The tendency evidence enabled them to be satisfied of the accused’s guilt beyond reasonable doubt, so they convicted.

We consider that this is exactly how tendency or coincidence evidence is intended to be used by juries and should be used by juries. Combined with the Jury Reasoning Research’s findings that no verdict was based on impermissible reasoning, that there was negligible unfair prejudice to the accused in the joint trials or trials where tendency evidence was admitted, and that the jury verdicts were logically related to the probative value of the evidence,²⁵⁶⁵ the outcomes across the trials illustrate that the tendency evidence was used by the juries as it should have been and without unfair prejudice to the accused.

Some of the concerns and criticisms expressed in submissions appear to reflect a concern that mock jurors will not necessarily state their prejudices, whether in deliberations or in answering questionnaires.²⁵⁶⁶

As discussed in section 25.3.5, we consider that the researchers’ study design provided a strong test of unstated prejudices. However, the strongest ‘reassurance’ comes from what real juries do in real trials:

- The comparatively low conviction rates in child sexual abuse cases demonstrate that real juries acquit persons accused of child sexual abuse offences at comparatively high rates. Comparatively low conviction rates in real trials are not compatible with a view that juries – unconsciously or implicitly – reason impermissibly on the basis of character.
- The rate at which offenders are convicted of at least one but not all child sexual assault offences with which they were charged demonstrates that real juries distinguish between different counts and the evidence in relation to those counts, even where they have determined that the offender is guilty of at least one child sexual assault offence. The rate of convictions of at least one but not all child sexual assault offences is not compatible with a view that juries – unconsciously or implicitly – reason impermissibly on the basis of character.

We discuss data on convictions and acquittals further below.

Mr Peter Morrissey SC and Mr Stephen Odgers SC expressed concerns that a mock jury trial cannot test the emotional response that occurs in a real trial because the mock jurors know that they are participating in research and not in a real trial.²⁵⁶⁷ Again, we consider that the comparatively low conviction rates provide ample reassurance that juries are not overwhelmed by emotional responses or by their abhorrence of child sexual abuse offences. If juries did not reason permissibly about allegations of child sexual abuse but instead reacted emotionally and with horror or with undue sympathy for the complainant, a far higher conviction rate could be expected.

We also consider that the fact that juries convict on some counts and acquit on others provides reassurance that they are not convicting impermissibly on grounds of bad character. If juries were reacting emotionally on the basis of the accused's bad character, it could be expected that, once they had decided beyond reasonable doubt that the accused had committed one or some of the child sexual abuse offences for which he was being tried, they would convict him of the other child sexual abuse offence or offences for which he was being tried, even if they could not reach a guilty verdict by permissible reasoning processes. Available data supports the view that this is not what is happening in real trials. We discuss data on convictions and acquittals further below. The Law Council of Australia and Mr Odgers raised concerns that the Jury Reasoning Research did not test the impact of prior convictions for child sexual abuse offences and that evidence of prior convictions – or admitted behaviour reflecting prior convictions – is likely to be particularly unfairly prejudicial.²⁵⁶⁸

We agree that, if time had permitted, it would have been useful to extend the Jury Reasoning Research to include scenarios that tested the impact on reasoning of the admission of prior convictions or admitted facts reflecting prior convictions. However, the Jury Reasoning Research was already substantially larger than prior jury research studies and there was not time to make it substantially larger again to enable the proper testing of additional scenarios.

By testing scenarios that involved multiple allegations of child sexual abuse – rather than prior convictions or admissions – the Jury Reasoning Research tested the circumstances that have arisen in a number of the cases we have examined and that have been the subject of considerable discussion in the first week of Case Study 38 and in Case Study 46. For example, the prosecutions of John Maguire, Philip Doyle, Francis Cable, Norman Poulter, David Rapson, Graham Noyes, FAD, 'Alexander' and John Rolleston, discussed in Chapter 24, involved the admissibility of evidence from multiple complainants and not evidence of prior convictions or admissions. Similarly, the admissibility issues in *Velkoski v The Queen*²⁵⁶⁹ and *R v PWD*²⁵⁷⁰ concerned multiple complainants and not prior convictions or admissions. The prosecutions of CDV in Western Australia, discussed in section 24.7, initially involved multiple complainants and then, on the retrial of some of the counts, involved the admission of CDV's convictions on the other counts that were not the subject of the retrial.

The data on the rate at which offenders are convicted of at least one but not all child sexual assault offences with which they were charged provides some reassurance on the absence of prejudice arising from convictions. In these cases, the jury has determined that the offender is guilty of at least one child sexual assault offence, but does not convict the offender of one or more other child sexual assault offences. We discuss this data further below.

Data on convictions and acquittals

It is not just mock jury research that can inform our understanding of how juries deal with child sexual abuse prosecutions. Jury deliberations can only be studied in mock jury research, because research is not permitted in relation to the deliberations of juries in real trials. However, data on the outcomes of real trials also gives us important information about child sexual abuse prosecutions.

As discussed in Chapter 2, the criminal justice system is often seen as not being effective in responding to crimes of sexual violence, including adult sexual assault and child sexual abuse, both institutional and non-institutional. We identified the following features of the criminal justice system's treatment of these crimes:

- lower reporting rates
- higher attrition rates
- lower charging and prosecution rates
- fewer guilty pleas
- fewer convictions.²⁵⁷¹

As discussed in Chapter 2, we obtained further data from the New South Wales Bureau of Crime Statistics and Research (BOCSAR) to better understand conviction and acquittal rates in New South Wales courts.

Table 28.2 shows the outcomes for court appearances for child sexual assault offences in the different New South Wales courts. The table shows the outcomes for all appearances (including guilty pleas and withdrawn matters).²⁵⁷²

Table 28.2: Child sexual assault offences, New South Wales courts, 2012–2016 – all matters²⁵⁷³

| | Total number of matters | Convicted of all relevant offences (%) | Convicted of at least one but not all relevant offences (%) | Convicted of no relevant offences (%) |
|------------------|-------------------------|--|---|---------------------------------------|
| Supreme Court | 4 | 50 | 0 | 50 |
| District Court | 1,215 | 34 | 33 | 32 |
| Local Court | 1,015 | 33 | 18 | 49 |
| Children's Court | 370 | 27 | 35 | 38 |
| Total | 2,604 | 33 | 27 | 40 |

Table 28.3 compares the overall conviction rate for child sexual assault offences against other types of offences, specifically all other sexual assault matters, assault, robbery and illicit drug matters.

Table 28.3: Comparative table – total matters and conviction rates for child sexual assault (CSA) offences and other offence categories, New South Wales courts, 2012–2016²⁵⁷⁴

| | CSA offences | | Sexual assault (non-CSA) | | Assault | | Robbery | | Illicit drugs | | All offences | |
|------------------|--------------|-----------|--------------------------|-----------|----------------|-----------|--------------|-----------|---------------|-----------|----------------|-----------|
| | Total | % | Total | % | Total | % | Total | % | Total | % | Total | % |
| Supreme Court | 4 | 50 | 5 | 60 | 69 | 55 | 39 | 67 | 13 | 54 | 430 | 76 |
| District Court | 1,215 | 68 | 817 | 47 | 2,624 | 71 | 2,468 | 83 | 4,128 | 90 | 14,457 | 86 |
| Local Court | 1,015 | 51 | 1,524 | 51 | 89,326 | 70 | 468 | 50 | 59,678 | 95 | 462,933 | 90 |
| Children's Court | 370 | 62 | 142 | 49 | 8074 | 75 | 1,955 | 66 | 1,806 | 93 | 27,877 | 88 |
| Total | 2,604 | 60 | 2,488 | 50 | 100,093 | 70 | 4,930 | 73 | 65,625 | 94 | 505,697 | 89 |

In Table 28.3, the conviction rate includes all matters that were finalised by findings of guilty, whether to one, some or all charges and pleas of guilty. The conviction rate also includes where the defendant was found not guilty of the original charges on the indictment but pleaded guilty to other charges, although the guilty pleas must be to other offences within the same category (that is, if the defendant is originally charged with a child sexual assault offence, the plea is only included in the conviction rate if the plea is to another child sexual assault offence).

The overall conviction rate for sexual assault offences that are not child sexual assault offences (that is, sexual assault offences against adults) is lower than that for child sexual assault offences (50 per cent as against 60 per cent). A possible explanation for this is that, in addition to the fact that, like child sexual assault offences, these are generally word against word cases, in adult sexual assault cases the disputed issue is often the presence or absence of consent.

The conviction rate for assault matters is higher than for child sexual assault matters (70 per cent as against 60 per cent). That is notwithstanding that, in many assault cases, the identity of the offender may well be an issue in the case, whereas this is rarely the case for child sexual assault matters.

The conviction rate for illicit drug matters is significantly higher than for child sexual assault matters (94 per cent as against 60 per cent). This is likely to be because, in a substantial number of drug cases, offenders will be found to have the drugs on them, making proof of the offence much simpler than in child sexual assault matters, and the cases are more likely to end with a guilty plea.

It is also noted that the overall conviction rate for all offences is 89 per cent. This reflects the volume of offences that are rarely contested, including drug offences and traffic offences.

These low conviction rates for child sexual abuse offences would not be a reason to consider law reform if we were satisfied that many complainants of child sexual abuse are lying or mistaken, but this is not the case. Similarly, with lower reporting rates and lower charging and prosecution rates, we have seen nothing to suggest that particularly marginal cases are being prosecuted.

Data on the outcomes of real trials also gives us important information about whether juries are distinguishing between counts in child sexual abuse prosecutions. This consideration helps to inform an assessment of whether juries are affected by unfair prejudice such that, when they convict an accused for one child sexual abuse offence, they will (unfairly) convict them for any other child sexual abuse offences with which they have been charged.

We obtained from BOCSAR the following data in relation to child sexual assault matters finalised at a defended hearing (that is, excluding any matters dealt with by guilty plea, withdrawal of charges or the like) over four years from July 2012 to June 2016:

- in all New South Wales courts – Table 28.4
- in the New South Wales District Court, which is the main trial court for child sexual abuse offences tried on indictment in New South Wales – Table 28.5.

While some of these matters may have been tried by a judge sitting alone and without a jury – or by a magistrate in the Local Court and Children’s Court – these matters include all jury trials.

The tables include breakdowns of the percentage of matters where the defendant was facing multiple charges on the indictment and was convicted of some but not all charges. This indicates that the fact-finder, whether jury, magistrate or judge sitting alone, found that some matters were proven and some were not proven, either through an acquittal or a hung jury.

The column showing the percentage of matters where the defendant was convicted of all relevant charges includes matters where the defendant was facing only one charge and was found guilty. The column showing where the defendant was convicted of no relevant charges includes both matters where the defendant was acquitted and where there was a hung jury on all matters.

Table 28.4: Child sexual assault offences, New South Wales courts, 2012–2016 – matters finalised at a defended hearing or at trial²⁵⁷⁵

| | Total number of matters | Convicted of all relevant offences (%) | Convicted of at least one but not all relevant offences (%) | Convicted of no relevant offences (%) |
|------------------|-------------------------|--|---|---------------------------------------|
| Supreme Court | 1 | 0 | 0 | 100 |
| District Court | 408 | 25 | 24 | 51 |
| Local Court | 264 | 43 | 4 | 53 |
| Children’s Court | 52 | 35 | 12 | 54 |
| Total | 725 | 32 | 16 | 52 |

Table 28.5: Child sexual assault offences, New South Wales District Court, 2012–2106 – matters finalised at a defended hearing or at trial, year by year²⁵⁷⁶

| | 2012–13 | 2013–14 | 2014–15 | 2015–16 |
|---|---------|---------|---------|---------|
| Total number of matters | 73 | 99 | 94 | 142 |
| Convicted of all relevant offences (%) | 29 | 23 | 24 | 24 |
| Convicted of at least one but not all relevant offences (%) | 27 | 25 | 22 | 23 |
| Convicted of no relevant offences (%) | 44 | 52 | 53 | 54 |

Table 28.5 shows that:

- approximately half of all child sexual assault matters finalised at a defended hearing in the New South Wales District Court are finalised by the accused not being convicted of any child sexual assault offence. This reflects both acquittals and hung juries
- approximately one-quarter of all child sexual assault matters finalised at a defended hearing in the New South Wales District Court are finalised by the accused being convicted of all child sexual assault offences with which he or she was charged – this includes matters in which the accused was charged with only one child sexual abuse offence
- in approximately one-quarter of all child sexual assault matters finalised at a defended hearing in the New South Wales District Court, the accused is convicted of at least one child sexual assault offence but is not convicted (whether because of an acquittal or a hung jury) on one or more other counts of child sexual assault with which he or she was charged.

This data does not support a hypothesis that juries are engaging in unfairly prejudicial reasoning. When faced with one or more counts of child sexual abuse, this data suggests that the jury is as likely to acquit as to convict. Even where the accused is convicted of at least one child sexual assault offence, the accused stands a good chance of not being convicted on all the child sexual assault offences with which he or she has been charged.

This data suggests that juries are distinguishing between counts on the indictment and the evidence that relates to the respective counts. Juries are not assuming that someone they have determined to be guilty of at least one child sexual assault offence must be guilty of the other child sexual assault offences with which he or she has been charged. This data is not compatible with a concern that juries will improperly reason that child sex offenders must be guilty of other child sexual abuse offences with which they are charged.

Greensill v The Queen

So far as we are aware, in the course of or in connection with our consultations in relation to criminal justice issues, only one case has been raised as an example of where the admission of tendency or coincidence evidence has led to a wrongful conviction.

As noted in section 27.4.6, Mr Greg Barns, the criminal justice spokesman for the Australian Lawyers Alliance, was interviewed by Mr Hamish Macdonald on Radio National's *Breakfast* program on 22 December 2016 in relation to the Australian Lawyers Alliance's criticisms of the model Bill. In response to a question whether he could give an example of where this kind of evidence had led to wrongful convictions, Mr Barns said:

Well I think there's a woman in Victoria, Mrs Greensill, who was a teacher who was – a number of historic sex abuse allegations put to her. And there were many, many allegations put. She ended up going to the Court of Appeal and being acquitted.²⁵⁷⁷

Victoria Legal Aid also cited the case of *Greensill v The Queen*²⁵⁷⁸ in its submission in relation to the Victorian course of conduct charge, discussed in section 11.5. It made the following statement:

Whilst an overwhelming majority of sexual offence complaints are genuine, there are a small number of cases where allegations will be made that are incorrect, false or exaggerated. Requiring reasonable particulars that are able to be tested in the courts is one way to guard against the possibility of improper convictions, as it allows an accused to produce exculpatory evidence (for example, alibi evidence).²⁵⁷⁹ [Reference omitted.]

The footnote to this statement reads:

The case of *Greensill v The Queen* [2012] VSCA 306 is an example of the importance of this balancing exercise. Ms Greensill's conviction for sexual offending against two young boys was overturned by the Victorian Supreme Court of Appeal primarily on the basis that the evidence disclosed a real likelihood that the two complainants collaborated, and a real possibility of concoction.²⁵⁸⁰

In *Greensill v The Queen*,²⁵⁸¹ the Victorian Court of Appeal allowed Mrs Greensill's appeal against her convictions for child sexual offences, quashed the convictions and entered verdicts of acquittal.

Mrs Greensill was convicted of nine counts of indecent assault, seven involving 'RS' and two involving 'SC' following a trial in the County Court. She was acquitted of a further 11 counts of indecent assault, also involving RS and SC. The offences were alleged to have occurred in 1979, when Mrs Greensill taught at a primary school in Melbourne and RS and SC were students in her class. Each was eight years old.

The indecent assaults in respect of which Mrs Greensill was initially convicted involved what was referred to as the 'tent incident'. The tent incident involved the earliest alleged offences, which were alleged to have occurred on an occasion when RS and SC stayed overnight in a tent in the backyard of Mrs Greensill's house following a bonfire party. Both were present for at least most of the tent incident and gave evidence that the accused was involved in simultaneous sexual activity with them both and abused each of them in the presence of the other.²⁵⁸²

The indecent assaults in respect of which Mrs Greensill was acquitted by the jury involved nine counts involving RS and two counts involving SC, with alleged offences occurring at Mrs Greensill's home and at school. There was no independent support for RS or SC's evidence on these counts. The Court of Appeal stated that it may 'safely be concluded that the jury regarded the evidence of RS and SC as mutually supportive' in relation to the tent incident.²⁵⁸³

The prosecution served tendency and coincidence evidence notices in the trial, and counsel for Mrs Greensill agreed that the evidence of the two complainants was cross-admissible as tendency and coincidence evidence as outlined in the prosecution notices.²⁵⁸⁴ The trial judge directed the jury that each complainant gave direct evidence about the tent incident, both in relation to the abuse alleged by the particular complainant and what he witnessed in relation to the other complainant. It was only in relation to the counts other than the tent incident – that is, the counts on which Mrs Greensill was acquitted – that the issue of tendency or coincidence evidence arose. The trial judge directed the jury in relation to coincidence reasoning only and also outlined the defence argument that the similarities in the complainants’ account arose because they colluded to fabricate their story in order to sue the accused.²⁵⁸⁵

The grounds of appeal against conviction were that:

- the guilty verdicts are unreasonable or cannot be supported having regard to the evidence
- there is fresh evidence – essentially a statement by RS subsequent to the trial which gave a very different account of events, including the tent incident
- the trial judge erred in failing to give any direction in relation to the significant forensic disadvantage suffered by Mrs Greensill as a result of the delay between the alleged offending in 1979 and Mrs Greensill’s arrest in March 2008.²⁵⁸⁶

The Court of Appeal upheld the appeal on the basis of fresh evidence which the Court of Appeal found the jury may well have regarded ‘as impinging markedly on RS’s credibility generally, and specifically on the plausibility of the evidence of the tent incident’ and may well have led the jury to acquit Mrs Greensill on the counts relating to RS.²⁵⁸⁷ As the jury probably found the evidence of RS and SC to be mutually supportive, this fresh evidence may well have led the jury to acquit Mrs Greensill on the counts relating to SC.²⁵⁸⁸ On this basis, the Court of Appeal found that there had been a substantial miscarriage of justice.²⁵⁸⁹

The Court of Appeal gave the following reasons for according a verdict of acquittal instead of a retrial:

- most importantly, Mrs Greensill had completed all but two and a half months of the non-parole period of her sentence by the time the appeal reached the Court of Appeal
- 33 years had elapsed since the alleged offences
- in its assessment, the evidence against Mrs Greensill was weak.²⁵⁹⁰

The Court of Appeal assessed the evidence and had a reasonable doubt about the guilt of Mrs Greensill on each count; considered that the jury should also have experienced doubt;²⁵⁹¹ and identified nine reasons for concluding that the verdicts were unsafe and unsatisfactory.²⁵⁹²

The significant points to note here about this matter are:

- Mrs Greensill relied on the fact that she was a person of good character, and she had no prior or subsequent convictions²⁵⁹³ – the only allegations against her were the counts on the indictment
- issues in relation to tendency or coincidence evidence or reasoning, or other evidence of bad character, or joint versus separate trials did not arise in the Court of Appeal’s decision; they did not form any part of the grounds of appeal or the decision in the appeal
- the provisions in the model Bill would have had no impact on this trial.

It is unclear to us how Mr Barns could have put forward this matter as an example of where this kind of evidence – whether limited to tendency or coincidence evidence within the meaning of the Uniform Evidence Acts or expanded to include bad character evidence more broadly – had led to wrongful convictions. While there was some reliance on tendency and coincidence evidence in the trial, this was not disputed by the defence and it was not raised in the grounds of appeal or in the Court of Appeal’s decision.

There is no suggestion in the Court of Appeal’s decision that the wrongful conviction of Mrs Greensill was caused by the admission of tendency or coincidence evidence or the use of tendency or coincidence reasoning. The case would not have been affected by reforms to increase the admissibility of tendency and coincidence evidence or the availability of joint trials.

Conclusions in relation to unfair prejudice

We are satisfied that concerns that tendency or coincidence evidence carries a high risk of unfair prejudice to the accused are misplaced.

A number of factors contribute to our satisfaction that the risk of unfair prejudice to the accused arising from tendency or coincidence evidence has been overstated and that, in fact, this risk is minimal. These factors include:

- comparatively low conviction rates for child sexual abuse offences, which show that juries are not overwhelmed by emotion or horror at the nature of the offences charged
- data showing that juries regularly return different verdicts on different counts²⁵⁹⁴
- the experience of the Uniform Evidence Act jurisdictions in loosening the common law restrictions on admissibility of tendency or coincidence evidence, which is not suggested to be causing wrongful convictions
- the findings of the Jury Reasoning Research, which was conducted by reference to the law as it applies in New South Wales²⁵⁹⁵

- the experience of Western Australia in more readily admitting tendency or coincidence evidence, including evidence of prior convictions or admissions reflecting prior convictions, which is not suggested to be causing unfair convictions – indeed, Mr Moses gave evidence that the president of the Western Australian Bar Association said he was not aware of any injustices in relation to the application of the test for admissibility in Western Australia²⁵⁹⁶
- the experience of England and Wales in allowing much greater admissibility of evidence of the accused’s bad character, again without any evidence being given or submission made to us that this is causing wrongful convictions.

The comparatively low conviction rates and the different verdicts on different counts show how difficult it can be for the jury to be satisfied beyond reasonable doubt of the accused’s guilt, in spite of the complainant’s direct evidence of the abuse and the complainant’s evidence being accepted as credible and reliable, at least on one or more counts.²⁵⁹⁷

We do not suggest that there will never be a wrongful conviction in a child sexual abuse prosecution in which tendency or coincidence evidence is admitted. Wrongful convictions can occur in any type of prosecution – although available data suggests that they are rare.²⁵⁹⁸ They can occur in child sexual abuse prosecutions where the admissibility or use of tendency or coincidence evidence is not in issue – for example, *Greensill v The Queen* discussed above – so there is no reason to doubt that they could occur in child sexual abuse prosecutions where the admissibility of tendency or coincidence evidence was in issue under any test for admissibility.

The accused is protected against wrongful conviction in any prosecution – whether for child sexual abuse offences or other offences and whether or not tendency or coincidence evidence is admitted – by the right (either absolute or with leave) to appeal against conviction on the basis that the guilty verdict is unreasonable and could not be supported by the evidence.²⁵⁹⁹

28.1.6 The importance of tendency and coincidence evidence in child sexual abuse prosecutions

Tendency and coincidence evidence is particularly important in many child sexual abuse prosecutions. A very real difficulty in these prosecutions is that they are typically ‘word against word’ cases, which makes it more difficult for the jury to be satisfied beyond reasonable doubt of the accused’s guilt.

As the DPP for the Australian Capital Territory told the public hearing in Case Study 46:

The problem with sexual assault is that, of its nature, it is committed in private, and so it is fundamentally a different crime type, and tendency is, therefore, a very useful additional piece of evidence. ...

So it is a very different crime type. We probably wouldn't run word-on-word cases in a lot of other crime type areas, but we run them in sexual assault cases because of the public interest in doing that. So that really does indicate an imperative to see if any assistance can be gained through the tendency provisions.²⁶⁰⁰

In their report *Family violence: A national legal response*, the ALRC and NSW LRC, citing the 1997 ALRC and Human Rights and Equal Opportunity Commission report *Seen and heard: Priority for children in the legal process*, stated:

when the complainant's credibility is attacked in a separate trial, 'evidence that would support his or her credibility is disallowed and the jury are kept in ignorance of the fact that there are multiple allegations of abuse against the accused'. This is a situation which may appear to offend common sense and experience and have the potential to cause unfairness and injustice.²⁶⁰¹

We are satisfied that there have been unjust outcomes in the form of unwarranted acquittals in institutional child sexual abuse prosecutions as a consequence of the exclusion of relevant evidence in the form of tendency and coincidence evidence. We are also satisfied that these unjust outcomes are not limited to prosecutions in relation to child sexual abuse in an institutional context. The data we discussed above in relation to convictions and acquittals gives us good reason to be confident that this problem extends beyond the particular examples of prosecutions for child sexual abuse offences in institutional contexts that we have examined.

As we stated in the Consultation Paper, we agree with Counsel Assisting's observation in relation to the first week of the public hearing in Case Study 38 that:

A number of the case studies examined during the public hearing suggest there have been unjust outcomes in criminal trials in Australian courts involving the sexual abuse of children in institutional settings. Of fundamental concern is the unwarranted severance of indictments where there is more than one complainant. In circumstances where an accused has occupied a position of authority in an institutional setting and where there are a number of separate allegations of sexual abuse, a decision that a separate jury should hear each complainant's account can often distort the true picture and be quite misleading. The case studies of Maguire and Noyes are good examples.²⁶⁰²

In the prosecutions of John Maguire, discussed in section 24.1, the 17 counts relating to six complainants were determined in separate trials, and no tendency or coincidence evidence was allowed. Although the sexual offences were all alleged to have been committed during the years 1983 to 1985, when Maguire was a housemaster at St Joseph's College in Hunters Hill, Sydney, and the complainants were boarders in the year 7 dormitory at the college, the juries in the six trials, and two retrials following hung juries, did not hear of more than the allegations of one complainant. As CDR said in his evidence to the public hearing, 'Maguire's word against one victim is very different to Maguire's word against eight victims'.²⁶⁰³

In the prosecutions of Graham Noyes, discussed in section 24.6, the 53 counts relating to 10 complainants were ordered to be tried in 10 separate trials. After three acquittals, in the fourth trial a conviction was obtained on six counts in relation to one complainant when the prosecution was permitted to call two similar fact witnesses. This fourth jury was the only jury that was permitted to hear of more than the allegations of one complainant. The Crown discontinued the outstanding charges.

We consider that the prosecutions of Norman Poulter, discussed in section 24.4, also provide a good example of circumstances where juries were prevented from gaining a true picture of the alleged offending. Instead of hearing of 14 counts of alleged child sexual abuse in respect of three complainants and three counts of alleged assault in relation to one of those four complainants and a fifth complainant, each jury in the two trials that ran only heard of the allegations of one complainant. This was despite all of the offences being alleged to have occurred between 1965 and 1976, when Poulter was an officer at the Bayswater Youth Training Centre, the Basin, which was part of the Salvation Army's Bayswater Boys Home.

We consider that the prosecutions of 'Alexander', discussed in section 24.9, also provide a good example of circumstances where juries were prevented from gaining a true picture of the alleged offending. Leaving aside the exclusion of the complainants who had been neighbours of the accused, the institutional offending was treated separately as between the two institutions. Of the six complainants who were residents of a particular Salvation Army boys' home in the 1970s through to 1980, four separate trials resulted in convictions only in respect of two of the three complainants in the joint trial (with a hung jury in respect of the other complainant in the joint trial) and three acquittals in the three separate trials that each related to only one complainant. None of these juries heard evidence of the true extent of the offending alleged against 'Alexander', even within that one institution.

Of course, a joint trial with the admission of tendency or coincidence evidence does not – and should not – guarantee a conviction on any or all counts. There may be many reasons why a jury will not convict on some counts when it convicts on other counts, including because of the relative strength of the evidence on each count and the jury's view of the reliability and credibility of the different complainants.

The joint trial of 'Alexander' which saw convictions in respect of two of the three complainants and a hung jury in respect of the other complainant is an example of a case where a joint trial did not result in convictions on all counts. In the joint trial of Philip Doyle relating to five complainants alleging abuse between 1980 and 2003, discussed in section 24.2, the first jury was hung on 38 counts and the court directed a verdict of acquittal on the remaining count. As a further example, following the New South Wales Court of Criminal Appeal's decision in *R v PWD* to allow a joint trial, PWD was acquitted on all counts.

However, the cases discussed above, where tendency or coincidence evidence was ruled inadmissible and joint trials were not allowed, provide clear examples of cases involving allegations of institutional child sexual abuse in which the evidence presented to the jury distorted the true picture and was quite misleading.

Even cases where a conviction is obtained may not provide justice for particular complainants or the community. The community's broader child protection concerns may be satisfied if the perpetrator is convicted of at least some charges and receives at least some punishment. The offender is likely to be prohibited from working with children and required to be a registered sex offender. But it can be devastating for the particular victim or victims whose allegations were not assessed by a jury with a true picture of what is alleged to have occurred. Such cases also understate the extent of the perpetrator's criminality, and he may receive a more lenient sentence that does not reflect the full criminality of his conduct.

For example, while Noyes was ultimately convicted of six counts in respect of one complainant in the fourth trial, these convictions do not reflect the full extent of his alleged criminality. A jury that was allowed to hear a more complete account of the offending alleged against Noyes may have convicted on more counts in relation to other complainants. Noyes was not necessarily convicted of the most serious counts he was facing (although the counts for which he was convicted were undoubtedly very serious). If a jury that was allowed to hear a more complete account of the alleged offending had convicted on other counts, the convictions and sentence following his fourth trial would not reflect the full criminality of his conduct.

Further, Mr Dennis Dodt was not given an opportunity to seek justice in relation to his allegations against Noyes. As the charges against Noyes relating to him were discontinued, Mr Dodt never had the chance to tell a jury what Noyes did to him.²⁶⁰⁴

Similarly, while Doyle was convicted in a retrial of 38 child sexual abuse offences against five complainants in the period from 1980 to 2003, he was acquitted of 21 child sexual abuse offences against two complainants in the 1960s. Had the jury in the prosecution relating to the 1960s offences heard evidence of the allegations from the 1980s to 2003, it might have had a more complete picture of the allegations against Doyle. If the jury had convicted on some or all of these other counts, the convictions and sentence following Doyle's trial on the 38 child sexual abuse offences for which he was convicted would not reflect the full criminality of his conduct.

In the prosecutions of FAD, discussed in section 24.8, the three counts of child sexual abuse relating to FAA were ordered to be heard in a separate trial with FAA as the only complainant. In spite of FAD facing allegations of child sexual abuse made by 13 complainants who had been parishioners and altar boys, and in spite of FAD being convicted of 44 offences committed against six boys, he was acquitted of the counts relating to FAA. FAA will never know whether a jury, if permitted to know of at least some of the other counts and complainants – perhaps the 31 charges FAD was convicted of relating to four other complainants who were abused by FAD at a similar time and in similar circumstances to those alleged by FAA – would have convicted in respect of the counts relating to FAA. The jury in FAA's separate trial did not get a true picture in relation to the offending alleged against FAD. FAA cannot be confident he received justice through the criminal justice system, and the community cannot be confident that FAD's convictions and sentence reflect the full criminality of his conduct.

Problems also arise for particular complainants where the counts in relation to them are severed or where their evidence would reveal that the accused has prior convictions or is facing other allegations. They may be restricted in the evidence they can give, and this may make the process of giving evidence more difficult for them. Similar restrictions may also affect other prosecution witnesses.

For example, in the prosecutions of Maguire, discussed in section 24.1, counts in relation to each of the six complainants were separated following the committal hearing and were heard in six separate trials and two retrials. CDR gave the following evidence in relation to the restrictions placed on his evidence because of the separate trials:

In about June 2004, I attended a meeting with the DPP to prepare me for the trial. During this meeting, the DPP explained various restrictions on the evidence I could give at the trial. I wasn't allowed to deviate from my statements and there were certain things that I wasn't allowed to talk about. For instance, I wasn't allowed to refer to the other complainants or the other separate trials. I believe this is why my third statement was ultimately excluded and only my first two highly edited statements were admitted at the trial.²⁶⁰⁵

Maguire was acquitted on the counts relating to CDR.

In the prosecutions of David Rapson, discussed in section 24.5, Mr James Brandt gave evidence about the difficulty he and his mother experienced in giving evidence when they were not allowed to mention their knowledge and discussion of Rapson's prior convictions in front of the jury. Mr Brandt gave the following evidence:

The DPP told me that I was not allowed to mention any of Rapson's prior convictions to the jury because of legal restrictions relating to prejudice. However, when I was giving evidence, the Defence kept questioning me about when I first disclosed the abuse to my mother and also about the conversation I had with my mother in about 1992 or 1993. I felt as if the defence were deliberately questioning me about these points because they knew, like I did, that I could not mention Rapson's prior convictions in front of jury. Because I could not answer openly I believe this affected the integrity of my evidence.

When my mother gave her evidence, the Defence questioned her about when she first became aware of my abuse. In her police statement, she spoke about seeing the article on Rapson's previous conviction in 1992 or 1993 and subsequently discussing it with me. Because this evidence related to Rapson's prior convictions, she was also not allowed to give this evidence to the jury. After my mother finished giving her evidence, she appeared from the courtroom visibly upset about not being able to tell her full story to prove that I was telling the truth.²⁶⁰⁶

Rapson was acquitted on the count relating to Mr Brandt.

As discussed in section 27.4.1, Professor Judy Cashmore gave evidence in Case Study 46 of an example of a 15-year-old girl who was interviewed for a research project and was affected by an order for separate trials. She had already been involved in an aborted trial. Professor Cashmore gave evidence that:

The offences that she was talking about had occurred in concert with a couple of offenders and a couple of other complainants. She was told that she could only refer [to] what had happened to her and with the one particular offender. Now, that made no sense to her and it also meant that she couldn't really tell her story in any way that had any integrity.

So she said, 'Look, I was sitting there and they asked me a question and I could see that the jury were looking at me and thinking why am I hesitating? "Does that mean that she's lying, that she can't get this together?"' – because she was trying to work out a way in which she could answer the question without aborting the trial. Now, that is not in any service of justice, I would argue.²⁶⁰⁷

In these cases, it is impossible to know whether or to what extent the restrictions on evidence affected the juries' view of the credibility and reliability of the complainants or other witnesses or ultimately the juries' verdicts on the relevant counts. What is clear is that, because of restrictions on tendency and coincidence evidence, the complainants and other witnesses were not able to give their best evidence, and we cannot be confident that the complainants were given a fair chance of obtaining justice.

28.1.7 Need for reform

We are satisfied that the current law in relation to tendency and coincidence evidence and joint trials must change to facilitate more admissibility and cross-admissibility of tendency and coincidence evidence and more joint trials in child sexual abuse matters. A number of considerations have led us to this conclusion, as follows:

- There are unwarranted acquittals in prosecutions for child sexual abuse offences. This is demonstrated through particular examples we have examined in our public hearings and more generally by the low conviction rates for child sexual abuse offences. Our public hearings are but a limited snapshot of the injustice of which we are aware. It is reasonable to conclude that there are many more. Unless one believes that many complainants of child sexual abuse are lying or mistaken about the abuse they allege, it is clear that many perpetrators of child sexual abuse are being acquitted.
- We are satisfied that tendency and coincidence evidence will often have a high probative value in relation to child sexual abuse offences, and we consider that the probative value of tendency and coincidence evidence generally has been understated, particularly in child sexual abuse prosecutions where the complainant has identified the accused as the perpetrator of the abuse.

- We are satisfied that the risk of unfair prejudice to the accused arising from tendency and coincidence evidence has been overstated – it is not borne out by outcomes in child sexual abuse prosecutions or experience in jurisdictions with more liberal approaches, and the Jury Reasoning Research found no evidence of unfair prejudice.
- We are satisfied that excluding tendency and coincidence evidence unfairly risks undermining the credibility and reliability of the evidence given by some complainants in the eyes of the jury.
- We do not consider it acceptable that the prospects of a complainant obtaining criminal justice can depend so significantly on the jurisdiction in which the child sexual abuse offences are prosecuted. Victims – and the community – are entitled to expect a consistency in the approach of each state and territory of Australia.

Tendency or coincidence evidence is particularly important in child sexual abuse prosecutions which are, typically, ‘word against word’ cases. We have examined a number of cases in which juries have been denied the opportunity to hear accounts that give the true picture of what is alleged to have happened. We are satisfied that there have been unjust outcomes in the form of unwarranted acquittals because of the exclusion of tendency or coincidence evidence.

There are other reasons for advocating reform in relation to the admissibility of tendency and coincidence evidence and joint trials. For example, a reason to support reform to encourage joint trials is that joint trials generally will be less traumatising for complainants in that they will know they are not alone and they can feel supported by the other complainants; there may also be less delay in finalising the prosecution. Another reason to support some sort of reform in this area – which could either encourage or restrict joint trials – is the need for certainty about the application of the evidence laws and the reduction of inconsistencies within jurisdictions.

These other reasons are important, but we would not place weight on them if we were not first satisfied of the high probative value of tendency and coincidence evidence and the absence of any significant risk of unfair prejudice to the accused from its admission.

Together, these considerations have led us to conclude that, currently, the criminal justice system is failing to provide adequate criminal justice for victims in relation to child sexual abuse offences because it is unnecessarily excluding tendency and coincidence evidence and unnecessarily preventing joint trials.

Recommendation

44. In order to ensure justice for complainants and the community, the laws governing the admissibility of tendency and coincidence evidence in prosecutions for child sexual abuse offences should be reformed to facilitate greater admissibility and cross-admissibility of tendency and coincidence evidence and joint trials.

28.2 Scope of recommended reform

We are satisfied that legislative reform is required.

Although the High Court's decision in *Hughes* addresses the meaning of 'significant probative value' and resolves the difference between New South Wales and Victoria in how it is applied, we do not consider that it has resolved all the difficulties we have identified. It is not clear to us that the majority's statement of the test for admissibility provides sufficient guidance for trial and appellate courts to be able to apply the test consistently with each other in an area of the law as 'vexed' as this.

Even if the majority's statement of the test for admissibility does give sufficient guidance to trial and appellate courts, it does not address the admissibility of tendency and coincidence evidence to the extent we consider is necessary in order to prevent injustice to victims of child sexual abuse, including institutional child sexual abuse, who seek justice through the criminal justice system.

The High Court's decision in *Hughes* is likely to lead to the greater admissibility of tendency evidence and to more joint trials where tendency evidence is cross-admissible, particularly in Victoria. However, it may make little difference to the position in the other Uniform Evidence Act jurisdictions, and of course it may have little if any effect on the position in the non-Uniform Evidence Act jurisdictions.

We are conscious of the evidence given in Case Study 46 that the problems are largely resolved. For example, Mr Game gave evidence that, while the courts have had problems with 'significant' in the significant probative value test, the problems are largely resolved and the outstanding issues may be addressed by the High Court in the *Hughes* appeal.²⁶⁰⁸ Mr Game suggested that the courts take years to take up a new evidentiary provision,²⁶⁰⁹ and Mr Morrissey suggested that practitioners in Victoria have less experience with the Uniform Evidence Act provisions, and the difference between New South Wales and Victoria will be resolved by the High Court.²⁶¹⁰

We do not consider the current position to be acceptable given that the Uniform Evidence Act has been in operation for some 20 years in New South Wales and seven years in Victoria. With hundreds of child sexual abuse trials proceeding each year in each jurisdiction, the law needs to be reformed without further delay.

It is also important to recognise that, other than in Queensland, the tests for admissibility of tendency or coincidence evidence are set out in legislation. If there are significant problems with how they are operating in practice – and we are satisfied that, with the exception of Western Australia, there are – then it is the responsibility of governments rather than the courts to address the problems by introducing amending legislation.

We are persuaded that, given the scope of our Terms of Reference, we should limit our recommendations for reform to criminal prosecutions for child sexual abuse offences and not include other criminal offences or civil litigation.

A number of submissions in response to the Consultation Paper expressed concern that we should not recommend more widespread reform in this area when our Terms of Reference are directed at child sexual abuse offences.²⁶¹¹

We do not propose to limit our recommendations to child sexual abuse in an institutional context. We see no justification for such a limit as a matter of principle or based on what we have learned about child sexual abuse in the course of this Royal Commission. Institutional offending is not a category of offending recognised in criminal law. It is also clear from the examples and data we discussed in section 28.1.3 that offenders do not necessarily limit themselves to institutional or non-institutional offending.

Our Terms of Reference recognise that any recommendations we make are likely to improve the response to all forms of child sexual abuse in all contexts, and we have no doubt that this is the case in relation to our recommendations on tendency and coincidence evidence and joint trials.

As a matter of principle, we consider that the reforms we recommend in relation to tendency and coincidence evidence and joint trials could safely be made in relation to all categories of offences and in relation to civil litigation. However, given the scope of our Terms of Reference, we do not make such a recommendation here.

A number of submissions in response to the Consultation Paper expressed support for us to recommend that the ALRC consider the issue of tendency and coincidence evidence again. We do not oppose the issue being referred to the ALRC and other law reform commissions for consideration.

However, we do not consider that such a review should be allowed to delay the reforms we recommend in relation to prosecutions for child sexual abuse offences. We have already outlined why we consider the reforms to be necessary, and we consider that they should be implemented without delay.

Also, we do not consider that any further review of the application of the reforms we recommend to prosecutions child sexual abuse offences is required. We have had the advantage of hearing from a broader range of interested parties and we have gained a greater understanding of the very real problems that are occurring in child sexual abuse prosecutions than would likely be possible in a law reform commission review of an aspect of evidence law as it applies generally across criminal and civil proceedings.

We note that the ALRC and NSW LRC considered the issue of joint trials in their report *Family violence: A national legal response*. They recommended a presumption in favour of joint trials in sexual offence proceedings wherever possible and noted that there is 'some reason to suggest that joint trials can be more frequently conducted without unfair prejudice to defendants'.²⁶¹² They referred to the VLRC's favourable evaluation of the Victorian reforms as they applied before the Uniform Evidence Act provisions commenced in Victoria. They also referred to the Western Australian provisions, stating that stakeholders 'suggested that the reforms in Western

Australia have been successful in ensuring that more joint trials proceed than would otherwise have been the case' and that the 'Commissions understand that there are very few challenges when the prosecution charges on joint indictments'.²⁶¹³

Their recommendation was in the following terms:

Federal, state and territory legislation should:

- (a) establish a presumption that, when two or more charges for sexual offences are joined in the same indictment, those charges are to be tried together; and
- (b) state that this presumption is not rebutted merely because evidence on one charge is inadmissible on another charge.²⁶¹⁴

In relation to tendency and coincidence evidence, they referred to the ALRC, NSW LRC and VLRC's *Uniform Evidence Law report*. Quoting the Queensland Law Reform Commission's report *The receipt of evidence by Queensland courts: The evidence of children, Report 55*, they stated:

In child sexual assault cases, however, it seems unfair to victims and their families that:

in so many cases the isolation of one child pitted against an adult alleged to be the perpetrator leads to acquittal of the adult, when at the same time there are other allegations of similar behaviour against the adult from other family members not before the Court, or when a history of such offending is known but excluded, or when the conduct is part of an alleged wider course of conduct, but evidence of which for one reason or another is excluded.²⁶¹⁵

In relation to whether they should recommend reform to address perceived over-reliance on 'striking similarities', they stated:

The real question is whether the tendency and coincidence rules should continue to apply to sexual assault proceedings involving multiple complainants or entirely different rules developed for this particular category of evidence. The Commissions are not convinced that a case has been made out for such special rules of evidence applicable only in sexual assault proceedings. Such rules would risk introducing complexity and uncertainty in uniform Evidence Acts jurisdictions.²⁶¹⁶

We have reached a different conclusion in relation to child sexual abuse offences.

We are mindful of the submissions and evidence we received expressing opposition to creating different laws of evidence for particular types of offences.²⁶¹⁷ We agree that this is not ideal, but we consider it a necessary alternative to doing nothing if governments do not wish to apply the reforms we recommend in relation to child sexual abuse offences to all offences. Doing nothing would continue the injustices and unfairness we have identified, with no certainty that a further law reform commission process would recommend reforming the law as we consider necessary.

We note that there are precedents for provisions to apply differently to some categories of cases. Even the Uniform Evidence Act provisions apply differently to criminal proceedings than civil proceedings.

In section 26.5, we outlined Professor David Hamer's discussion of the provisions in the United States that create specific provisions enabling more ready admissibility of propensity evidence in child sexual abuse offences. In particular, Federal Rules of Evidence 413 and 414 enable admission of evidence of other sexual assaults or any child molestation in relation to charges of sexual assault or child molestation, respectively. This enables the evidence to be 'considered on any matter to which it is relevant'.

Professor Hamer noted commentary that these provisions have been subject to widespread criticism²⁶¹⁸ but that justifications include studies that demonstrate the comparative propensity for sex offenders is particularly high²⁶¹⁹ and that it is necessary to overcome under-enforcement of child sexual assault and the associated difficulty in finding corroborative evidence.²⁶²⁰

We acknowledge that Professor Hamer also noted a number of difficulties arising in the application of these rules. These include technical issues due to the exhaustive lists of offences for which this type of evidence can be adduced and equally specific requirements for the prior offences, which may be too narrow to include some evidence of grooming or sexual elements in other offences (such as murder).²⁶²¹

However, we are satisfied that the current injustices are such that reform must proceed now in relation to child sexual abuse offences, even if it creates some difficulties on the margins and it cannot be as comprehensive as would be possible if the reform applied to all criminal proceedings.

There are also precedents for adopting different approaches in relation to child sexual abuse offences in other laws relevant to child sexual abuse prosecutions in some states. For example, in relation to special measures designed to assist complainants of sexual abuse though modifying usual procedures for giving evidence, New South Wales and Victorian legislation defines eligibility for special measures by offence type.²⁶²² (Legislation in other jurisdictions tends to define eligibility by characteristics of the witness, such as age and vulnerability.²⁶²³)

We also note that the ALRC and NSW LRC, in their report *Family violence: A national legal response*, recommended amending the Uniform Evidence Act to prevent the exclusion of tendency and coincidence evidence only because there is a possibility of concoction, collusion or suggestion, and they recommended that this provision apply only in sexual assault proceedings.²⁶²⁴

We acknowledge the concerns expressed by some interested parties that child sexual abuse offences may be charged on the same indictment as other offences. While it is less than ideal, we consider that the admissibility of tendency or coincidence evidence relevant to the child sexual abuse offences could be determined on a different basis to the admissibility of any tendency or coincidence evidence relevant to the other offences.

A more difficult issue arises in relation to offences that are not themselves child sexual abuse offences but that, in a particular case, are alleged to have been committed with a sexual element or motivation. For example, in the High Court's decision in *Pfennig v The Queen*²⁶²⁵ (*Pfennig*), the offence charged was murder. It was not known what, if anything, the offender had done to Michael Black before he killed him. The tendency evidence arose from Pfennig having previously been convicted on pleading guilty to the abduction and sexual assault of a boy, 'J'.

We propose that this difficulty be addressed, albeit imperfectly, by including murder or manslaughter offences in the scope of the reform where the victim was a child and the tendency or coincidence evidence is evidence of alleged or proven child sexual abuse offences.

Alternatively, these offences could be addressed by leaving them to be dealt with under current admissibility tests. In *Pfennig*, the tendency evidence was admissible even on the common law test stated by the High Court in that decision.

In contrast, when Pfennig was tried in 2016 for the murder of another child, Louise Bell, the evidence of Pfennig's previous convictions in relation to Michael Black and 'J' was ruled inadmissible even though the 'strong probative value' test for admissibility under section 34P of the *Evidence Act 1929* (SA) is less restrictive than the common law test.²⁶²⁶ The trial judge pointed to the temporal difference (the 'J' and Michael Black cases occurred within 12 months of each other, whereas Louise Bell was abducted some six years earlier); the difference between the victims, being boys (Michael Black and 'J') and a girl (Louise Bell); and the fact that the common aspect of luring boys into a van by subterfuge was not present in the Louise Bell case.²⁶²⁷ It should be noted that this was a case where the identity of the perpetrator was in issue; obviously, in the case of murder, there is no complainant to name the accused. Having excluded the tendency evidence, the trial judge, in a judge alone trial, found Pfennig guilty of the murder of Louise Bell.²⁶²⁸ We understand that Pfennig has been granted permission to appeal against the conviction.

28.3 The test for admissibility

It should be clear from our discussion of the need for reform that we have concluded that tendency or coincidence evidence generally has significant probative value in prosecutions for child sexual abuse offences (particularly where it is not being relied on to identify the accused).

Given our understanding of the probative value of tendency and coincidence evidence in child sexual abuse prosecutions, a test of 'significant probative value' should not often exclude such evidence.

However, we do not consider that 'significant probative value' can remain the test for admissibility under the Uniform Evidence Act because of its long, and we would say often unhappy, history of interpretation in Uniform Evidence Act jurisdictions. Even where the

evidence has been ruled admissible on appeal, there is often a detailed discussion of various points of similarity which we consider unnecessary. It is largely for this reason that we do not recommend adopting the Western Australian provisions even though they appear to work well in Western Australia.

Some witnesses in the public hearing in Case Study 46 discussed the possibility of including a checklist of relevant factors to guide the courts in assessing significant probative value.²⁶²⁹ We are not confident that this approach would resolve the problems with assessing significant probative value. It might make the problems worse if it is interpreted as a set of minimum requirements for admissibility.

We have concluded that the first limb of the test for admissibility should reflect a test of relevance but with some enhancement. In order to avoid the more practical concerns of the courts and others about collateral litigation and the jury being distracted from the issues in the trial, we consider that a test – drawing on the approach in England and Wales – that requires that the tendency or coincidence evidence be ‘relevant to an important evidentiary issue’ in the case should be adopted. (The *Criminal Justice Act 2003* in England and Wales uses ‘relevant to an important matter in issue’: section 101.)

Evidence that is ‘relevant to an important evidentiary issue’ in the case should be defined to include:

- 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
- evidence that is relevant to any matter in issue in the proceeding if the matter concerns an act or state of mind of the defendant and is important in the context of the proceeding as a whole.

This test would allow the admission of evidence of other proven or alleged child sexual abuse offences committed or alleged to have been committed by the accused, either as evidence that shows a propensity or as evidence relevant to an important matter in issue in the proceedings (being whether the alleged abuse occurred and whether the accused committed the alleged abuse).

In relation to the second limb of the test for admissibility, we do not accept the current unequal weighting of the test in favour of exclusion. That is, it is not clear why the probative value of the evidence should be required to ‘*substantially* outweigh’ the risk of unfair prejudice. We agree with Professor Hamer’s submission in response to the Consultation Paper in this regard, that:

The asymmetry in s 101, skewing the test towards exclusion, appears unjustifiable. The test can be viewed as a cost/benefit assessment where the evidence will be rejected even where the benefit (probative value) outweighs the cost (prejudicial risk). The asymmetry displays a

conservative respect for what was ‘one of the most deeply rooted and jealously guarded principles of our criminal law’ (*Maxwell v DPP* [1935] AC 309, 317). This conservatism appears unjustified.²⁶³⁰

We are satisfied that there should be provision made to enable a judge to exclude the tendency or coincidence evidence if it is more likely than not to result in the trial, as a whole, being unfair to the accused in a manner that will not be cured by directions.

The second limb of the test we recommend – allowing for the exclusion in criminal proceedings of tendency or coincidence evidence that has satisfied the first limb of the test – allows the court to refuse to admit tendency or coincidence evidence if the court thinks that both:

- admission of the evidence is more likely than not to result in the proceedings being unfair to the defendant
- 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.

If directions will remove the risk of unfairness to the defendant, the court should be required to give those directions rather than refuse to admit the evidence.

At both stages of the test for admissibility, we consider it necessary to expressly exclude the common law. The interpretation of the Uniform Evidence Act provisions to date demonstrates how difficult it has been for the courts to apply the statutory provisions without importing common law assumptions, particularly as to unfair prejudice.

We consider that, in addition to expressly excluding the common law, the explanatory material accompanying the amending legislation should make clear that the intention of the relevant government in introducing the amending legislation – and the relevant parliament if the amending legislation is enacted – is to increase the admissibility of tendency and coincidence evidence and to prevent it being excluded because of assumptions about it being unfairly prejudicial.

We also recommend that the possibility of concoction, collusion or contamination should not affect the admissibility of tendency or coincidence evidence and the court should apply the tests in relation to tendency and coincidence evidence on the assumption that the evidence will be accepted as credible and reliable. The impact of any evidence of concoction, collusion or contamination should be left to the jury.

We acknowledge the importance of the precedent established by the reforms implemented in the *Criminal Justice Act 2003* in England and Wales. The reforms have been operating in England and Wales for more than 12 years, and we have not heard any evidence or received any submission to the effect that their approach of allowing much greater admissibility of evidence of the accused’s bad character is causing wrongful convictions.

Recommendations

45. Tendency or coincidence evidence about the defendant in a child sexual offence prosecution should be admissible:
- a. if the court thinks that the evidence will, either by itself or having regard to the other evidence, be 'relevant to an important evidentiary issue' in the proceeding, with each of the following kinds of evidence defined to be 'relevant to an important evidentiary issue' in a child sexual offence proceeding:
 - i. 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
 - ii. evidence that is relevant to any matter in issue in the proceeding if the matter concerns an act or state of mind of the defendant and is important in the context of the proceeding as a whole
 - b. unless, on the application of the defendant, the court thinks, having regard to the particular circumstances of the proceeding, that both:
 - i. admission of the evidence is more likely than not to result in the proceeding being unfair to the defendant
 - ii. 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.
46. Common law principles or rules that restrict the admission of propensity or similar fact evidence should be explicitly abolished or excluded in relation to the admissibility of tendency or coincidence evidence about the defendant in a child sexual offence prosecution.
47. Issues of concoction, collusion or contamination should not affect the admissibility of tendency or coincidence evidence about the defendant in a child sexual offence prosecution. The court should determine admissibility on the assumption that the evidence will be accepted as credible and reliable, and the impact of any evidence of concoction, collusion or contamination should be left to the jury or other fact-finder.

28.4 Other issues

28.4.1 Separate categories of tendency evidence and coincidence evidence

We do not find the distinction between tendency evidence and coincidence evidence convincing. It is clear from a number of the cases we have examined, and particularly from the evidence given in Case Study 46 in relation to ‘Alexander’, that there is significant overlap between tendency reasoning and coincidence reasoning and the evidence that supports each type of reasoning.

We agree with Basten JA’s observation in *Saoud v R* that ‘there is an awkwardness in the separation of “tendency” evidence and “coincidence”’.²⁶³¹

We discussed in section 27.4.8 the detailed analysis Professor Hamer presented in support of dispensing with, or at least diminishing the significance of, the distinction between tendency and coincidence evidence. We see considerable merit in this analysis.

One of the advantages of removing the distinction between tendency evidence and coincidence evidence might be to prevent the evidence having to be ‘shoe-horned’ into one category or the other. It might also prevent the trial judge electing to allow the evidence on one basis but not on the other, particularly where it is capable of supporting both lines of reasoning.

However, we also accept the opinion of Mr Game that the prosecution, in seeking to have tendency or coincidence evidence admitted, should articulate and justify how the evidence relates to the issue.²⁶³² We also acknowledge the detailed guidance for practitioners suggested in the opinion of Mr Game, Ms Roy and Ms Huxley, discussed in section 27.4.5.

A disadvantage of removing the distinction between tendency evidence and coincidence evidence might be to make the task of articulating and justifying the admissibility of the evidence more difficult or less certain.

While there is little merit in maintaining what seems to be an artificial distinction, the distinction is not the primary source of the problems experienced in relation to the admissibility of tendency or coincidence evidence in prosecutions of child sexual abuse offences.

On balance, we have concluded that we should not recommend reform in relation to this aspect of tendency and coincidence evidence, although we anticipate that in due course the case for removal of the distinction will be made in another forum and relevant reform will follow.

28.4.2 Standard of proof

Generally, it is only the elements of the offence charged that, as a matter of law, must be proved beyond reasonable doubt.²⁶³³

The High Court's decision in *HML v The Queen*²⁶³⁴ (*HML*) provided little clarity as to the required standard of proof. Justice Gummow provided a useful summary of the different approaches adopted as follows:

Other members of this Court have concluded that the directions given to the jury in the trial of OAE were adequate and conformed to law. However, they come to their conclusions by different ways. Thus, Gleeson CJ would hold that, because the relevant evidence was provided for the explicit purpose of explaining 'context', and not as comprising an 'indispensable link' in proof of the elements of an offence charged, no separate treatment of the standard of proof was warranted. Heydon J considers that it is unnecessary to decide whether the criminal standard of proof has a wider application in cases such as the present, because whatever the case, the judges' summing up in each of the three appeals included a direction incorporating the criminal standard. This is so, notwithstanding that the ostensible purpose of these appeals was to settle that issue with an authoritative statement by this Court. Crennan J endorses a principle similar to that stated by Gleeson CJ, although she ultimately relies on the conclusion of Heydon J that directions incorporating the criminal standard were in fact given in the trial of OAE. It is apparent from the analysis of Kiefel J that her Honour considers that, because the relevant evidence was relied upon for a purpose other than 'disclosing [OAE's] sexual interest' in the complainant, a direction as to the criminal standard of proof was not required.

I support the conclusion of Hayne J. It is necessary and desirable for this Court to resolve the issue concerning directions to be given on the standard of proof applicable to evidence of 'uncharged acts' for the guidance of trial judges and intermediate courts still observing the common law in this respect. I would hold that wherever such evidence has been admitted under the *Pfennig* test and is propounded as relevant to a step in reasoning towards the accused's guilt of an offence charged, the jury must be told that they are to be satisfied beyond reasonable doubt that such evidence has been proved before they reason that the accused is guilty on the basis of it.²⁶³⁵

The New South Wales Court of Criminal Appeal determined that, following *HML* and in spite of the differences in reasoning in *HML*, tendency evidence should be required to be proved beyond reasonable doubt. Justice McClellan, with Hidden and Fullerton JJ agreeing, stated:

In *HML*, Gummow, Kirby, Hayne and Keifel JJ state (see Hayne J at [247]) that where evidence is tendered to prove a propensity, being the sexual interest of an accused in a complainant, the jury must be told that they must be satisfied of that interest beyond reasonable doubt (see also Howie J in *Toki* [2000] NSWSC 999; (2000) 116 A Crim R 536;

R v Hagerty [2004] NSWCCA 89; (2004) 145 A Crim R 138; Gipp at [76]; *R v TAB* [2002] NSWCCA 274; *R v RNM* [2005] NSWCCA 396. In *MM* [2000] NSWCCA 78; (2000) 112 A Crim R 519, this Court divided on the question). The four members of the High Court who reached this conclusion may not be entirely consistent in their reasoning (see Kirby J at [61] and Keifel J at [505]–[506]) and *HML* was decided having regard to the common law. *However, unless after full argument of the issue this Court or the High Court says otherwise, this Court should accept that in sexual assault cases the appropriate standard of proof of tendency evidence is beyond reasonable doubt.*²⁶³⁶ [Emphasis added.]

Victoria has made clear that tendency and coincidence evidence does not need to be proved beyond reasonable doubt. In its submission in response to the Consultation Paper, the Victorian Government stated that the *Jury Directions Act 2015* (Vic) provides that only the elements of an offence must be proven beyond reasonable doubt so that any circumstantial evidence – including tendency and coincidence evidence – no longer needs to be proved beyond reasonable doubt.²⁶³⁷ The Victorian Government submitted:

Requiring the jury to be satisfied beyond reasonable doubt of indispensable intermediate facts or uncharged acts unnecessarily complicates jury directions and the jury’s task and risks misleading the jury into focusing on factors other than whether the offence has been proved.²⁶³⁸

The relevant section of the Judicial College of Victoria’s *Criminal charge book* states:

At common law, tendency evidence adduced to show that the accused had a sexual interest in the complainant could not be used unless the jury was satisfied that the evidence proved that interest beyond reasonable doubt (*R v Sadler* [2008] VSCA 198; *DJV v R* [2008] NSWCCA 272; *DTS v R* [2008] NSWCCA 329; *JDK v R* [2009] NSWCCA 76; *R v MM* (2000) 112 A Crim R 519).

This common law rule has been abolished by the *Jury Directions Act 2015*. Under the Act, the only matters which must be proved beyond reasonable doubt are the elements of the offence and the absence of any defences. The judge may not direct the jury that any other matters need to be proved beyond reasonable doubt (*Jury Directions Act 2015* ss61, 62).²⁶³⁹

We agree with this approach. We see no reason to insist upon a particular standard of proof for a particular piece of tendency or coincidence evidence. We are satisfied that governments should introduce legislation to ensure that tendency and coincidence evidence is not required to be proved beyond reasonable doubt. The form of the legislation might vary, but legislating what jury directions are required in relation to proof beyond reasonable doubt – as Victoria has done – appears to be a suitable way of achieving the recommended reform.

Recommendation

48. Tendency or coincidence evidence about a defendant in a child sexual offence prosecution should not be required to be proved beyond reasonable doubt.

28.4.3 Admissibility of prior convictions and related conduct

We are satisfied that prior convictions for child sexual abuse offences should be admissible in prosecutions for child sexual abuse offences. Generally, it will be the facts of the prior offending rather than the fact of conviction that will be of most assistance to the jury.

The provisions in Western Australia permit prior convictions and evidence of the conduct underlying the convictions to be admitted. This was illustrated in the prosecutions of CDV, discussed in section 24.7. Mr Whalley, Consultant State Prosecutor with the ODPP for Western Australia, who was lead trial counsel in the first and second trials and represented the state in CDV's appeal, gave evidence that the fact of conviction is evidence of conduct within section 31A of the *Evidence Act 1906 (WA)*, so the fact of conviction is permitted to be admitted under section 31A. He said that Western Australian prosecutors routinely adduce evidence of the convictions and the facts underpinning the convictions, which is generally done by reference to the sentencing judge's findings of fact.²⁶⁴⁰

As we have stated above, the experience of Western Australia in more readily admitting tendency or coincidence evidence, including evidence of prior convictions or admissions reflecting prior convictions, is not suggested to be causing unfair convictions. Mr Moses gave evidence that the president of the Western Australian Bar Association said he was not aware of any injustices in relation to the application of the test for admissibility in Western Australia.²⁶⁴¹

Similarly, England and Wales allow the admission of prior convictions; and prior alleged offences even though the accused has been acquitted. No evidence has been given or submission made to us that the experience of England and Wales in allowing much greater admissibility of evidence of the accused's bad character is causing wrongful convictions.

The New South Wales Court of Criminal Appeal's 2014 decision in *RH v R*²⁶⁴² provides an illustration of the use of prior convictions in an institutional child sexual abuse case. In that case, in a jury trial in 2012, a foster father was convicted of a number of child sexual assault offences against two of his foster daughters. The accused had pleaded guilty in 2010 to five counts of aggravated indecent assault against a third foster daughter. Evidence of the conduct the subject of the guilty plea was put before the jury by way of an agreed statement of facts, and the accused, his wife, the victim and one of the complainants gave evidence about those offences.²⁶⁴³

On appeal, the offender argued that admission of the evidence caused him irreparable prejudice by making it ‘almost impossible’ for the jury to regard him as a credible or reliable witness.²⁶⁴⁴ The court rejected arguments that the evidence did not have significant probative value, including because of the periods of time between the offending and the difference in the nature of the acts. The court also rejected the argument that the admission of guilt was used to attack the accused’s credibility. Justice Ward (with Harrison and RA Hulme JJ agreeing) stated:

The very differences in the conduct the subject of the various complaints and the temporal gap between the offences [the subject of the prior conviction] (matters relied upon by the appellant to argue that the probative value of the evidence was diminished) are matters that tend against any conclusion that the plea of guilty would so smear the appellant as to deprive him of any credibility such that a properly directed jury could not be expected to be capable of properly assessing that tendency evidence.

... the real damage to the appellant’s credibility came from the fact that, in the witness box, he appeared to resile from the admissions that he had made as to the conduct against [the third foster daughter].²⁶⁴⁵

The prosecutions of Rapson, discussed in section 24.5, provide an example of the use of evidence in relation to a prior conviction in a Victorian trial. In the first week of the public hearing in Case Study 38, we heard evidence from CDU, who was the victim of the offences to which Rapson pleaded guilty in 1992. CDU gave tendency evidence at the 2013 and 2015 trials. CDU gave evidence about the restrictions placed on the evidence he could give in 2013 about Rapson’s prior convictions for abusing him: he was not allowed to reveal to the jury that Rapson had been convicted of offences against him.²⁶⁴⁶

CDU gave the following evidence:

I think that the jury not knowing about previous convictions of an accused when it relates to the same crime is wrong. I also felt very angry that whereas I wasn’t allowed to refer to the previous convictions during the evidence in the 2013 trial, when it came to sentencing, the defence lawyer argued that because Rapson has served a sentence of imprisonment in 1992 for offending around the same time as these charges, his sentence should be reduced. In 1992, Rapson’s sentence was roughly two years; mine to date is 20 years and still counting.²⁶⁴⁷

As stated above, we are satisfied that prior convictions for child sexual abuse offences should be admissible in prosecutions for child sexual abuse offences. As it will generally be the facts of the prior offending rather than the fact of conviction that will be of most assistance to the jury, admission of the prior convictions by way of a statement of admitted or agreed facts seems appropriate – unless the accused does not admit the facts.

The draft legislation we propose allows for the admission of prior convictions. It also allows for the admission of acts for which the defendant has been charged but not convicted.

This includes:

- acts that were proven but in respect of which no conviction was recorded
- acts in relation to which charges were withdrawn.

We see no reason why such acts should not be the subject of tendency or coincidence evidence. Acts that were proven but in respect of which no conviction was recorded should be no different from acts which have been the subject of prior convictions for the purposes of tendency or coincidence reasoning. We have seen cases in which charges were withdrawn for a variety of reasons, none of which reflected adversely on the merits of the complainant's complaint.

However, the draft legislation does not permit the admission of evidence of acts for which the defendant has been acquitted. Although we are satisfied that there have been unjustified acquittals in child sexual abuse prosecutions, we accept that admitting evidence in relation to acts for which the defendant has been acquitted raises a number of complex issues. An accused is entitled to the full benefit of an earlier acquittal, and the principles of finality, incontrovertibility and double jeopardy must be taken into account – although so too must be the public interest in prosecuting serious crimes.²⁶⁴⁸

We consider that there may be circumstances in which evidence of acts for which the defendant has been acquitted should be admissible. However, this was not the subject of detailed evidence before us and we are content to leave this issue for more detailed consideration by law reform commissions at some time in the future.

Recommendation

49. Evidence of:

- a. the defendant's prior convictions
- b. acts for which the defendant has been charged but not convicted (other than acts for which the defendant has been acquitted)

should be admissible as tendency or coincidence evidence if it otherwise satisfies the test for admissibility of tendency or coincidence evidence about a defendant in a child sexual offence prosecution.

28.4.4 Specific provisions for joint trials

We have decided not to recommend a specific presumption in favour of joint trials, independent of the cross-admissibility of evidence. On balance, we consider it to be unlikely to promote more joint trials in child sexual abuse prosecutions because, if the evidence is not cross-admissible, we consider it likely that the prosecution would not be willing to risk any resulting convictions being overturned on appeal.

We have considered the recommendation made by the ALRC and NSW LRC in their report *Family violence: A national legal response*, discussed in section 28.2, for a presumption in favour of joint trials in sexual offence proceedings wherever possible.²⁶⁴⁹ We strongly agree with the sentiment that there should be more joint trials. However, at least in relation to child sexual abuse offences, we are satisfied that this is better achieved through increasing the cross-admissibility of evidence from multiple complainants.

28.5 Draft legislation

The New South Wales Parliamentary Counsel's Office has again assisted us by drafting provisions to reflect the reforms we now recommend.

The draft provisions are drafted as amendments to the Uniform Evidence Act. We consider that the substance of the provisions is also suitable for enactment in non-Uniform Evidence Act jurisdictions as amendments to the relevant evidence legislation.

The draft provisions are set out in full in Appendix N.

The general approach of the test for admissibility proposed in the draft provisions is substantially similar to that put forward for consultation in the model Bill discussed in section 27.3.

The most significant change is that the reforms are now drafted to apply as special provisions for tendency or confidence evidence adduced against the defendant in child sexual offence proceedings. Although we have not encountered any cases of tendency or coincidence evidence being sought to be adduced against the complainant or other witnesses in prosecutions for child sexual abuse offences, we consider that the current rules should continue to govern any such evidence to avoid creating a lacunae.

The first limb of the test for admissibility is in proposed sections 96A, 97(1A)(a) and 98(1A)(b).

The effect of these provisions is that, in child sexual offence proceedings, tendency or coincidence evidence adduced against the defendant satisfies the first limb of the test for admissibility if the court thinks that the evidence, either by itself or having regard to the other evidence, will be relevant to an important evidentiary issue in the proceeding. Each of the following kinds of evidence is defined to be 'relevant to an important evidentiary issue' in a child sexual offence proceeding:

- 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
- evidence that is relevant to any matter in issue in the proceeding if the matter concerns an act or state of mind of the defendant and is important in the context of the proceeding as a whole.

We do not consider it necessary to retain the other kind of evidence that was included in model Bill put forward for consultation – that is, evidence that shows a propensity of the defendant to be untruthful if the defendant’s truthfulness is in issue in the proceeding – given that the provisions are now drafted as special provisions to apply in child sexual offence proceedings only.

The second limb of the test for admissibility is in proposed section 100A. It allows the court in a child sexual offence proceeding, on the application of a defendant, to refuse to admit tendency or coincidence evidence if the court thinks, having regard to the particular circumstances of the proceeding, that both:

- admission of the evidence is more likely than not to result in the proceeding being unfair to the defendant
- 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.

If directions will remove the risk of unfairness to the defendant, the court is required to give those directions rather than refuse to admit the evidence: section 101A(3).

Further, if tendency or coincidence evidence is admissible in a child sexual offence proceeding under these tests, it cannot be excluded under the general exclusionary provisions in section 135 or section 137 of the Uniform Evidence Act on the ground that it is unfairly prejudicial to the accused: section 101A(4).

The draft provisions explicitly exclude the common law in relation to propensity and similar fact evidence in relation to tendency or coincidence evidence against the defendant in a child sexual offence proceeding. Proposed section 96A(3) provides:

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 in a child sexual offence proceeding.

Further, in relation to the second limb of the test for admissibility, proposed section 100A(2) provides:

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.

In assessing admissibility, the court is required to assume that the evidence will be accepted as credible and reliable: section 96A(2). This is intended to have the effect of leaving any issues of collusion, concoction and contamination to the jury (or other fact-finder).

The draft provisions allow for the admissibility of evidence of prior convictions and evidence of acts for which the defendant has been charged but not convicted (except for acquittals).

As discussed in section 27.3, section 91 of the Uniform Evidence Act currently prevents evidence of a judgment or conviction, or a finding of fact, in a proceeding being admitted to prove a fact that was in issue in that proceeding. Section 92 of the Uniform Evidence Act currently provides for limited exceptions to the exclusionary rule in section 91.

The draft provisions propose an additional exception to section 91 by inserting the following as section 92(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.

Proposed section 96A(4) then provides:

... 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.

We envisage that this evidence would typically be admitted by way of an agreed statement of facts. If an agreed statement of facts could not be produced because the prior conviction arose from summary proceedings and there is no adequate record of the facts, the complainant in the earlier proceedings could give evidence of the offending or evidence could be given of the fact of the conviction itself. If an agreed statement of facts could not be produced because the defendant refuses to agree to it, evidence of the fact of the conviction and of any remarks on sentencing should be admitted.

As discussed in section 28.4.3, we are content to leave the issue of whether evidence of acts for which the defendant has been acquitted should be admissible for more detailed consideration by law reform commissions at some time in the future.

Finally, the draft provisions establish that tendency or coincidence evidence does not need to be proved beyond reasonable doubt. Proposed section 96A(5) provides:

Any fact that is relied on as tendency evidence or coincidence evidence about a defendant in a child sexual offence proceeding does not have to be proved beyond a reasonable doubt.

Recommendations

50. Australian governments should introduce legislation to make the reforms we recommend to the rules governing the admissibility of tendency and coincidence evidence.
51. The draft provisions in Appendix N provide for the recommended reforms for Uniform Evidence Act jurisdictions. Legislation to the effect of the draft provisions should be introduced for Uniform Evidence Act jurisdictions and non–Uniform Evidence Act jurisdictions.

28.6 The High Court’s decision in *Hughes*

28.6.1 Introduction

As noted above, on 14 June 2017, as this report was being finalised for printing, the High Court gave judgment in *Hughes v The Queen*.²⁶⁵⁰ We discussed the trial and the decision of the New South Wales Court of Criminal Appeal in section 23.2.3.

We have added this discussion here to outline the High Court’s reasons and to confirm that, in spite of the High Court’s decision in *Hughes*, we remain satisfied that the reforms we have recommended in this chapter should be made in order to prevent injustice to victims of child sexual abuse, including institutional child sexual abuse, who seek justice through the criminal justice system.

28.6.2 Facts and procedural history

We outlined the facts and the procedural history of *Hughes* in our discussion of the trial and the decision of the New South Wales Court of Criminal Appeal in section 23.2.3. In summary:

- Hughes was charged with 11 counts of sexual offences committed against five girls (JP, SH, AK, EE and SM),²⁶⁵¹ who were aged between six and 15 years at the time of the offending.²⁶⁵²
- The acts charged varied. They included digital penetration, procuring a girl to masturbate him, rubbing his penis against a girl and indecently exposing himself to girls.²⁶⁵³
- The prosecution adduced the evidence of each complainant and a number of other witnesses to prove tendencies identified as ‘having a sexual interest in female children under 16 years of age’ and using ‘his social and familial relationships ... to obtain access to female children under 16 years of age so that he could engage in sexual activities with them.’²⁶⁵⁴
- The tendency witnesses who were not the complainants included three women who described occasions when they had been at the accused’s home as young girls in which he had either touched them in a sexual way or exposed himself to them, and three women who worked with accused (‘the workplace tendency witnesses’) who described occasions, when they were in their late teens or early twenties, when the accused had inappropriately sexually touched them or exposed himself to them.²⁶⁵⁵
- The trial judge determined that, other than the evidence of the workplace tendency witnesses, the evidence of each complainant and the three non-complainants was admissible as tendency evidence in relation to each count. The workplace tendency evidence was admissible in relation to count 11 only.²⁶⁵⁶ The offence the subject of this count occurred in the workplace and involved the accused exposing himself to the complainant SM who was 12 or 13 years old.
- Hughes was convicted on 10 counts (1 – 9 and 11). In relation to count 10 the jury was unable to agree. The appellant was sentenced to 10 years and nine months imprisonment with a non-parole period of six years.²⁶⁵⁷
- The New South Wales Court of Criminal Appeal (Beazley P, Schmidt and Button JJ) dismissed the appellant’s (Hughes’) appeal to that court, holding that the tendency evidence had been rightly admitted because proof of the tendency made proof of the fact of the commission of the offence more likely to a significant extent.²⁶⁵⁸ In doing so, the court declined to follow the Victorian Court of Appeal in *Velkoski v The Queen (Velkoski)*,²⁶⁵⁹ holding that, consistently with a line of New South Wales authority, there is no requirement that the conduct evidencing the tendency display features of similarity with the charged conduct.²⁶⁶⁰

28.6.3 The High Court’s decision

Leave to appeal to the High Court was granted on two grounds.²⁶⁶¹

- Ground 1: The New South Wales Court of Criminal Appeal erred in concluding that the tendency evidence possessed significant probative value and was admissible pursuant to section 97 of the Evidence Act.

- Ground 2: The New South Wales Court of Criminal Appeal erred in rejecting the approach adopted in *Velkoski* to the assessment of that question.

The appellant (Hughes) conceded in the High Court that the tendency evidence on counts 1 and 2 in relation to JP and 3 to 6 in relation to SH was cross-admissible.²⁶⁶²

The High Court dismissed the appeal by a majority of four judges, with three judges dissenting. The majority comprised Kiefel CJ, Bell, Keane and Edelman JJ who joined in a single judgment. Each of the dissenting judges – Gageler, Nettle and Gordon JJ – wrote separate reasons.

The majority reasons – Kiefel CJ, Bell, Keane and Edelman JJ

Ground 2 – requirement of similarity

The majority dealt first with the second ground of appeal. They began with a discussion of the legislative history of section 97 and made two observations.

First, they observed that the ALRC considered that the rules precluding the adducing of evidence of bad character were supported by psychological research.²⁶⁶³ However, the majority's description of this research seems to indicate an awareness that these were studies of a general nature:

The research was concerned with the value of evidence of general behavioural traits such as honesty. A person's general disposition was found to be of little value as a predictive tool, whereas a person's behaviour in similar situations might justify prediction.²⁶⁶⁴

Secondly, they observed that one of the differences between the ALRC's recommended draft provision in relation to tendency evidence and section 97 as enacted in the Uniform Evidence Acts is the omission of the requirement of similarity. While that choice by the legislatures to omit the requirement of similarity is unexplained, it 'is a choice which makes the ALRC's reports less useful on this subject [the admissibility of tendency evidence] than on other subjects.'²⁶⁶⁵

Turning to *Velkoski*, the majority identified particular aspects of the Victorian Court of Appeal's reasoning they considered to be problematic.²⁶⁶⁶ First, the statement that requiring that significant probative value be assessed by the criterion of similarity of operative features protects against the risk of an unfair trial. Secondly, the statement that once the jury is satisfied that the acts relied upon as tendency have been committed, any resort to proof of the offender's state of mind to support tendency reasoning is impermissible and highly prejudicial.

The majority said:

These statements, couched in the language of the common law, do not stand with the scheme of Pt 3.6. They are apt to overlook that s 97 applies to civil and criminal proceedings. In criminal proceedings, the risk that the admission of tendency evidence may work unfairness to the accused is addressed by s 101(2). Moreover, s 97(1) in terms

provides for the admission of evidence of a person's tendency to have a particular state of mind. On the trial of a sexual offence against a young child, proof of that particular state of mind may have the capacity to have significant probative value.²⁶⁶⁷

The majority also took issue with the statement of the Victorian Court of Appeal that removing any requirement of similarity or commonality of features fails to give effect to 'what is inherent in the notion of significant probative value'. The majority held that this reasoning glossed the language of section 97(1)(b) and does not explain its 'inherent' meaning:²⁶⁶⁸

The circumstance that the text of s 97(1)(b) does not include reference to similarity or to the concepts of 'underlying unity', 'pattern of conduct' or 'modus operandi' is a clear indication that s 97(1)(b) is not to be applied as if it had been expressed in those terms. The omission of these familiar common law concepts is eloquent of the intention that evidence which may be significantly probative for the purposes of s 97(1)(b) should not be limited to evidence exhibiting the features so described.²⁶⁶⁹

The test for admissibility

The majority identified the test posed by section 97(1) as that stated by the New South Wales Court of Criminal Appeal in *R v Ford*: 'the disputed evidence should make more likely, to a significant extent, the facts that make up the elements of the offence charged'.²⁶⁷⁰ The only qualification to this statement was that it is not necessary that the disputed evidence has this effect by itself.²⁶⁷¹

This assessment requires consideration of first, the extent to which the evidence supports the tendency and, secondly, the extent to which the tendency makes more likely the facts making up the charged offence.²⁶⁷²

Consequently there is likely to be a high degree of probative value where:

- the evidence, by itself or together with other evidence, strongly supports proof of a tendency and
- the tendency strongly supports the proof of a fact that makes up the offence charged.²⁶⁷³

The majority acknowledged that the application of the test inevitably involves some uncertainty:

the open-textured nature of an enquiry into whether 'the court thinks' that the probative value of evidence is 'significant' means that it is inevitable that reasonable minds might reach different conclusions. This means that in marginal cases it might be difficult to know whether an appellate court might take a different view of the significance of the tendency evidence from a trial judge. This might result in the setting aside of any conviction and an order for a retrial.²⁶⁷⁴

However, the 'open-textured, evaluative task' required by section 97 involves the 'application of the same well-known principles of logic and human experience as are used in an assessment of whether evidence is relevant.'²⁶⁷⁵

Ground 1 – admissibility in this case

The majority held that the tendency evidence adduced in this case did possess significant probative value. Here the evidence:

as a whole was capable of proving that the appellant was a person with a tendency to engage in sexually predatory conduct with underage girls as and when an opportunity presented itself in order to obtain fleeting gratification, notwithstanding the high risk of detection.

An inclination on the part of a mature adult to engage in sexual conduct with underage girls and a willingness to act upon that inclination are unusual as a matter of ordinary human experience. Often, evidence of such an inclination will include evidence of grooming of potential victims so as to reveal a ‘pattern of conduct’ or a ‘modus operandi’ which would qualify the evidence as admissible at common law. But significant probative value may be demonstrated in other ways. In this case the tendency evidence showed that the unusual interactions which the appellant was alleged to have pursued involved courting a substantial risk of discovery by friends, family members, workmates or even casual passers-by. This level of disinhibited disregard of the risk of discovery by other adults is even more unusual as a matter of ordinary human experience. The evidence might not be described as involving a pattern of conduct or modus operandi – for the reason that each alleged offence involved a high degree of opportunism; but to accept that that is so is not to accept that the evidence does no more than prove a disposition to commit crimes of the kind in question.²⁶⁷⁶

In this case the force of the tendency evidence was not that it gave rise to a likelihood that the appellant, having offended once, was likely to offend again, but rather that a complaint of misconduct against him should not be rejected as unworthy of belief because it appeared improbable having regard to ordinary human experience.²⁶⁷⁷

Applying the two inquiries they had earlier identified as being required by the test under section 97, the majority held that the tendency evidence was properly admitted.²⁶⁷⁸

Further observations made by the majority

The majority judgment also contained a discussion of the ways in which they considered that the reception of tendency evidence may occasion prejudice. These were:

- The jury may fail to allow that a person who has a tendency to have a particular state of mind, or to act in a particular way, may not have had that state of mind, or may not have acted in that way, on the occasion in issue.
- The jury may underestimate the number of persons who share the tendency to have that state of mind or to act in that way.

- The risk that the assessment of whether the prosecution has discharged its onus may be clouded by the jury’s emotional response to the tendency evidence.
- Prejudice may be occasioned by requiring the accused to answer a raft of uncharged conduct stretching back, perhaps, over many years.²⁶⁷⁹

The majority also observed that different considerations may inform the probative value of tendency evidence depending on whether the fact in issue it is being led to prove is the identity of the person who committed the offence or the occurrence of the offence. Where it is being used to prove identity for a known offence the probative value will almost certainly depend on close similarity between the conduct demonstrating the tendency and the offence.²⁶⁸⁰

However, in trials for child sexual offences it is common for the complainant’s account to be challenged on the basis that it has been fabricated or that conduct has been misinterpreted. In these circumstances proof that the accused is a person who is sexually interested in children is likely to be influential to the determination of whether the reasonable possibility that the complainant has misconstrued innocent conduct or fabricated his or her account is excluded.²⁶⁸¹

Justice Gageler

Background to the tendency rule

For Gageler J the purpose of the tendency rule is to address a form of cognitive bias that inheres in inferential or inductive reasoning.²⁶⁸² This bias amounts to:

an inclination observable on the part of most persons to overvalue dispositional or personality-based explanations for another person’s conduct and to undervalue situational explanations for that conduct. The bias is towards overestimating the probability of another person acting consistently with a tendency that the person is thought to have – of treating the person as more consistent than he or she actually is.²⁶⁸³ [Reference omitted.]

This problem is separate to the danger arising from a tribunal of fact making improper use of the evidence.²⁶⁸⁴ That issue is accommodated within an evaluation of the evidence’s prejudicial effect.²⁶⁸⁵ Here the problem inheres in the reasoning process of a tribunal of fact making proper use of the evidence.²⁶⁸⁶ It appears that Gageler J differentiates the section 97 inquiry from the section 101 inquiry on this basis.

Justice Gageler considered that this understanding of the rule is consistent with the legislative history of section 97.²⁶⁸⁷ Justice Gageler recognised that the ALRC’s proposal for section 97 was not taken up, and that the legislative choice that was made cannot be explained by a choice to adhere to the common law.²⁶⁸⁸

However, Gageler J identified two significant aspects in relation to the choice made by the legislature:

- A higher threshold – significant probative value – was set for evidence used for tendency reasoning than for evidence generally – which is admissible if it is relevant.²⁶⁸⁹
- The legislature chose not to constrain the court in relation to matters that might be taken into account in forming the judgment that the tendency evidence met that higher threshold. In particular, tendency evidence was not to be limited to evidence of an act or state of mind occurring in circumstances substantially and relevantly similar to the act or state of mind and circumstances in issue.²⁶⁹⁰

Justice Gageler observed that the legislative history did not end with the enactment of the Uniform Evidence Act. The 2005 review by the ALRC, NSW LRC and VLRC referred to psychological literature which ‘confirmed and in some cases strengthened’ the ALRC’s previous analysis in 1985. The 2005 report contained no suggestion that the rules which had been in operation at that time for 10 years were anything other than an appropriate legislative response to the problems in relation to tendency evidence.²⁶⁹¹

The test for admissibility

Justice Gageler held that:

The tendency rule is ... best explained as confining the availability of tendency reasoning to evidence adjudged capable through the application of tendency reasoning of affecting the assessment of the probability of the existence of a fact in issue to an extent significant enough to justify the risk of cognitive error which tendency reasoning entails ...

... If the question is just how much more probable or improbable, the answer is enough to justify the ever-present risk that the objective probability will be subjectively overestimated.²⁶⁹²

Two considerations inform the degree to which tendency evidence is capable of rationally affecting the assessment of the probability of the existence of the fact in issue:

- The extent to which the evidence is capable of rationally affecting the assessment of the probability of the person having or having had a tendency to act in a particular way or to have or have had a particular state of mind. While this could be established by how a person acted on one or a small number of occasions, more commonly it will be demonstrated by a ‘pattern of behaviour’.²⁶⁹³
- The extent to which the tendency established by the evidence is capable of rationally affecting the assessment of the probability of the person having acted in a particular way or having had the state of mind alleged on an occasion in issue in the proceeding. An important element of this enquiry will be the specificity of the tendency and how precisely that tendency correlates to the act or state of mind the person having the tendency is alleged to have had on the occasion in issue.²⁶⁹⁴

In relation to *Velkoski*, Gageler J doubted the value of a debate cast in terms of whether the New South Wales or Victorian approach to admissibility was preferable. However, he drew attention to two statements made by the Victorian Court of Appeal in *Velkoski* which he considered ‘unobjectionable’.²⁶⁹⁵

- The statement that in order to be admissible the ‘evidence must possess sufficient common or similar features with the conduct in the charge in issue so as to demonstrate a pattern that cogently increases the likelihood of the occurrence of that conduct’.²⁶⁹⁶ Justice Gageler considered this statement captures ‘the purposive approach’ to the application of the rule he considered to be appropriate.²⁶⁹⁷
- The statement that ‘to determine whether the features of the acts relied upon permit tendency reasoning, it remains apposite and desirable to assess whether those features reveal “underlying unity”, a “pattern of conduct”, “modus operandi”, or such similarity as logically and cogently implies that the particular features of those previous acts renders the occurrence of the act to be proved more likely’.²⁶⁹⁸ Justice Gageler stated that this statement ‘fairly describes the ‘normal process of tendency reasoning’ but noted that it does not lay down an exhaustive test.’²⁶⁹⁹

Admissibility in this case

In this case, while the tendency notice was ‘elaborate ... at first sight’, it boiled down to ‘a tendency to have a sexual interest in female children less than 16 years of age and to engage in sexual activities with them by using his social, familial or working relationships to obtain access to them.’²⁷⁰⁰

Justice Gageler conceded that a grown man does not normally have a sexual interest in female children under 16.²⁷⁰¹ He further conceded that such a tendency is ‘so abnormal as to allow it to be said that a man shown to have such a tendency is a man who is more likely than other men to have engaged in a particular sexual activity with a particular female child on a particular occasion’.²⁷⁰² The issue for Gageler J was how much more likely. He felt that it was:

not easy to tell, in part because common experience provides no sure guide, and the abhorrence any normal person naturally feels for such a tendency highlights the risk that any subjective estimation of the likelihood will be greater than is objectively warranted.²⁷⁰³

It is not clear how this fits with Gageler J’s analysis that section 97 is addressed to the risks inherent in the *proper* use of tendency evidence, with section 101 addressing the *improper* use of tendency evidence. Being influenced by the ‘abhorrence any normal person naturally feels’ is not proper use of the evidence. It is being influenced by emotion rather than logic. Here, with respect, Gageler J appears to have conflated the two.

Justice Gageler said that the language of section 97 admitted the potential for judicial understanding of the probative value of particular tendencies to be informed by social science data and, accordingly, that judicial evaluations of probative value may change as more data comes to light. However, he said that no party had directed the court to material on actual probabilities in this case.²⁷⁰⁴

In these circumstances his Honour took ‘a conservative approach’ and was not satisfied that either a tendency to be sexually interested in female children, or a tendency to engage in sexual activity with female children opportunistically bears on the probability of the specific allegations ‘to an extent that can properly be evaluated as significant.’²⁷⁰⁵

Justice Gageler found that the evidence of JP, SH, AK and SM was properly admitted as tendency evidence.²⁷⁰⁶ The issue was the evidence of EE, which he said was ‘materially different’; the appellant’s interactions with EE could not be ‘characterised as indicative of a tendency to initiate fleeting physical sexual contact in circumstances in which he was at risk of detection’.²⁷⁰⁷ As the evidence of EE was admitted as tendency evidence in relation to the counts involving the other four complainants the consequence was that all the convictions should be quashed.²⁷⁰⁸

Justice Nettle

The ‘orthodox approach’

Justice Nettle would also have allowed the appeal. Justice Nettle held that ‘some of the evidence was not admissible as tendency evidence in support of some of the counts because it did not have significant probative value in relation to the facts in issue on those counts’.²⁷⁰⁹

Justice Nettle came to this view applying what he termed the ‘orthodox approach’ to section 97.²⁷¹⁰ This approach was heavily influenced by the common law approach to similar fact evidence. For example:

As was observed in *Hoch v The Queen*, in a different but related context, the probative force of similar fact evidence lay in similarities of offending, unusual features, some underlying unity, or a system or pattern that, as a matter of common sense and experience, increased the objective improbability of some event having occurred other than as alleged. The same logic applies to the question of the admissibility evidence of tendency evidence under s 97. To repeat, therefore, the mere fact that an accused has committed a previous offence, although relevant, is not, without more, significantly probative of the accused having committed another offence.²⁷¹¹ [References omitted.]

What that ‘something more’ might be was identified as including:

a logically significant degree of similarity in the relationship of the accused to each complainant; a logically significant connection between the details of each offence or the circumstances in which each offence was committed; a logically significant or recognisable modus operandi or system of offending; or, otherwise, some logically significant underlying unity or commonality, howsoever described ...²⁷¹²

Justice Nettle also identified the circumstances or factors that would not be sufficient to establish significant probative value. He considered that a tendency could not be established merely because the commission of a particular offence is unusual. Further, he said that child sexual offending was ‘anything but unusual’.²⁷¹³ He continued:

In truth, such offences [sexual offences by adults against children] are far more prevalent than the murder of young female children, and yet there can be no doubt that evidence that an accused had murdered a female child could not, without more, be regarded as having significant probative value in proving that the accused murdered another female child.²⁷¹⁴

It would not include the fact that an offender, as was alleged in this case, exploited opportunities to commit offences against children in his company.²⁷¹⁵ This is because ‘[i]n the scheme of things, sexual offences against children are most commonly committed opportunistically against children in an offender’s company’.²⁷¹⁶ There is no citation for this proposition and, with respect, it does not seem to address the common circumstances involving offenders grooming their victims over time.

Justice Nettle also contended that:

To allege a tendency to select victims of some vulnerability is not significantly probative of such an offence because, in one respect or another, all children are vulnerable to sexual exploitation and all sexual offences against children involve taking advantage of that vulnerability.²⁷¹⁷

Further, in rejecting the Crown’s argument that a feature of the identified tendency was that the offending was ‘brazen’, in the sense that it was committed where there was a high risk of being caught, Nettle J said:

Axiomatically, all criminal behaviour involves risk-taking and sexual offending in particular involves a very great degree of risk-taking. Consequently, to say that evidence of one offence is significantly probative of another simply because each involves risk-taking is facile.²⁷¹⁸

Admissibility in this case

Justice Nettle held that the circumstances of each complainant and the circumstances of offending alleged in counts 1 to 6 were sufficient, if accepted, to establish a tendency to take advantage of a position of custody, authority or control over female children staying in his home or where he was present in their homes to gratify his sexual interest in female children by committing essentially the same kinds of sexual offences against them.²⁷¹⁹

In relation to counts 7 to 9, while these offences also involved the accused taking advantage of a position of custody, authority or control to commit sexual offences against a female child, the nature and circumstances of the offending were ‘significantly different’ from those in counts 1 to 6. While this may have been sufficient for the purposes of section 97, Nettle J held that it would not have met the test in section 101.²⁷²⁰

Justice Nettle held that the acts in relation to count 10 occurred in the context of a 'reciprocated relationship' and in relation to count 11 these acts were dissimilar in nature to some of the other counts and occurred outside a domestic setting.²⁷²¹

Accordingly, the trial judge erred in holding that the evidence in relation to each count was cross-admissible.²⁷²²

Reasons not to depart from the 'orthodox approach'

After proceeding to examine the case law and legislative history of section 97, Nettle J held that there is 'no justification for lowering the bar'.²⁷²³

Justice Nettle suggested that a further reason for not lowering the bar is that:

as is apparent from the psychological studies which the Australian Law Reform Commission emphasised in 1985 and 2005, the fact of sexual offending is not, of itself, a sound basis for the prediction of further sexual offending. The probability of further offending depends on circumstantial and situational considerations of the kind that inform the orthodox application of s 97.²⁷²⁴ [Reference omitted.]

Justice Nettle reflected that until recently the orthodox view has prevailed, even in New South Wales.²⁷²⁵ He suggested that lowering the bar for the admission of tendency evidence is a matter for parliament. He said:

Certainly, Parliament could enact legislation that treats disparate sexual offences committed in different circumstances at different times in different places against different children as significantly probative of the commission of each other. Given the very extensive publicity and information which is nowadays devoted to sexual offences against children, it may be that Parliament will one day choose to do so. But, for the reasons already stated, it should not be thought that that was Parliament's purpose when enacting s 97.²⁷²⁶

He also referred to the fact that, despite the more recent ALRC review of the Uniform Evidence Act in 2005 and 'more recent proposals for reform', the legislature has never made any substantive amendment to section 97 to provide for greater admissibility than the orthodox approach allows. He said: 'Consistently, therefore, with the dialogue between the courts and Parliament that is manifest in the rules of statutory construction, it would be wrong to suppose that it had.'²⁷²⁷

The 'more recent proposals for reform' cited by Nettle J are:

- the model Bill we released for public consultation in November 2016 – discussed in section 27.3
- a proposal in an article by Professor Annie Cossins published in 2011 to allow admissibility of tendency and coincidence evidence in child sexual abuse prosecutions if the evidence shows the defendant has committed an act of a sexual nature against a child.²⁷²⁸

Justice Nettle also referred to the Western Australian test for admissibility, which was introduced by legislation in 2004.

Justice Gordon

Like Gageler and Nettle JJ, Gordon J concluded that the evidence of the complainant EE was not admissible on the other counts.²⁷²⁹ Accordingly Gordon J would have quashed the appellant's convictions on counts 1 to 9 and 11.

Justice Gordon 'substantially' agreed with the principles she identified in the judgment of Nettle J.²⁷³⁰ She said that those principles reflected three matters:

- 'the dangers attending the reception of tendency evidence that have long been recognised'²⁷³¹
- 'what Gageler J described as a "conservative approach"'²⁷³²
- 'if admission of the evidence is sought to be justified by describing the "tendency" in broad terms and without the kind of logically significant similarity, connection, underlying unity or commonality referred to earlier, evidence of any sexual misconduct, whether against an adult or a child, may be admitted as tendency evidence at the trial of offences against children'.²⁷³³

In relation to the third matter, we note that the evidence of the adult women who worked on the set of *Hey Dad...!* was admitted as tendency evidence in relation to count 11 only because that count concerned Hughes exposing his penis to SM in the workplace. If the more liberal approach allowed for 'any sexual misconduct', including 'against an adult', to 'be admitted as evidence at the trial of offences against children', this evidence would have been admitted in relation to all counts, rather than count 11 only.

28.6.4 Implications for reform

We welcome the majority's resolution of the differences between the New South Wales and Victorian approaches to the admissibility of tendency evidence under the Uniform Evidence Act in favour of the New South Wales approach.

We also welcome the majority's recognition that:

- the probative value of tendency evidence is to be considered either by itself or *together with other evidence* – which is particularly important where the complainants and other tendency witnesses have identified the accused as the perpetrator (or as the person who engaged in the conduct or had the state of mind the subject of the tendency evidence)

- the probative value of tendency evidence may be different where the fact in issue is whether the offence occurred – as is typically the case in child sexual abuse prosecutions – rather than the identity of the offender.

It seems to us with respect that the concerns expressed by the dissenting judges generally do not give sufficient recognition or weight to these considerations and the extent to which they ameliorate – or even eliminate – the common law’s concerns of unfair prejudice to the accused.

We also note the minority judges’ references to the reports by the ALRC, and the ALRC, NSW LRC and VLRC, and the social science research cited in them. We discussed this research at length in sections 28.1.4 and 28.1.5 and set out the reasons why we consider that it has led to both an understatement of the probative value of tendency and coincidence evidence and an overstatement of the risks of unfair prejudice in relation to tendency and coincidence evidence.

Returning to the reasons of the majority, it does not appear to us that the majority has adopted a test for admissibility as broad as the test we consider to be necessary.

Although the majority states that an ‘inclination on the part of a mature adult to engage in sexual conduct with underage girls and a willingness to act upon that inclination are unusual as a matter of ordinary human experience’,²⁷³⁴ the majority seems to require something more than this to establish significant probative value. While the evidence need not reveal a ‘pattern of conduct’ or a ‘modus operandi’ required at common law, the majority held that the tendency evidence in issue in the *Hughes* appeal:

showed that the unusual interactions which the appellant was alleged to have pursued involved courting a substantial risk of discovery by friends, family members, workmates or even casual passers-by. This level of disinhibited disregard of the risk of discovery by other adults is even more unusual as a matter of ordinary human experience.²⁷³⁵

If there had been additional allegations of abuse the subject of charges or tendency evidence that did *not* involve this substantial risk of discovery, it is not clear that the majority would have considered them to meet the significant probative value test. Similarly, it is not clear how the majority would treat a case in which there was evidence of abuse of both girls and boys. Would such evidence be admissible only if there was something more – such as a similarity in the circumstances of the abuse or a substantial risk of discovery?

It is not clear to us that the majority’s statement of the test for admissibility provides sufficient guidance for trial and appellate courts to be able to apply the test consistently with each other in an area of the law as ‘vexed’ as this.

Even if the majority’s statement of the test for admissibility does give sufficient guidance to trial and appellate courts, it does not address the admissibility of tendency and coincidence evidence to the extent we consider is necessary in order to prevent injustice to victims of child sexual abuse, including institutional child sexual abuse, who seek justice through the criminal justice system.

The High Court's decision in *Hughes* is likely to lead to the greater admissibility of tendency evidence and to more joint trials where tendency evidence is cross-admissible, particularly in Victoria. However, it may make little difference to the position in the other Uniform Evidence Act jurisdictions, and of course it may have little if any effect on the position in the non-Uniform Evidence Act jurisdictions.

Our reasons for concluding that the current law in relation to tendency and coincidence evidence and joint trials must change, stated at length in section 28.1 and summarised in section 28.1.7, continue to apply in spite of the High Court's decision in *Hughes*.

The scope of the High Court's decision was necessarily limited by the legislative provisions under consideration and the issues raised in the appeal. We remain satisfied that it is the responsibility of governments and parliaments, rather than the courts, to address the problems we have identified in relation to the admissibility of tendency and coincidence evidence.

Justice Nettle, in dissent, identified that parliaments could 'enact legislation that treats disparate sexual offences committed in different circumstances at different times in different places against different children as significantly probative of the commission of each other'.²⁷³⁶

Of course, this is not how we have recommended that the test for admissibility be framed, but we agree that parliaments can do this – and we recommend that Australian governments introduce amending legislation accordingly.

Endnotes

- 1 H Boxall and G Fuller, *Brief review of contemporary sexual offence and child sexual abuse legislation in Australia: 2015 update*, Australian Institute of Criminology, 2015, pp 3-64.
- 2 H Boxall and G Fuller, *Brief review of contemporary sexual offence and child sexual abuse legislation in Australia: 2015 update*, Australian Institute of Criminology, 2015, pp 3-26.
- 3 H Boxall and G Fuller, *Brief review of contemporary sexual offence and child sexual abuse legislation in Australia: 2015 update*, Australian Institute of Criminology, 2015, pp 7-26.
- 4 H Boxall, M Tomison and S Hulme, *Historical review of sexual offence and child sexual abuse legislation in Australia: 1788–2013*, Australian Institute of Criminology, 2014, p 10.
- 5 With the exception of South Australia, which amended gendered language in 1975: See H Boxall, AM Tomison and S Hulme, *Historical review of sexual offence and child sexual abuse legislation in Australia: 1788–2013*, Australian Institute of Criminology, 2014, p 97, Table 20.
- 6 See, for example, *Crimes Act 1900* (NSW) s 66EB, inserted in 2007, and s 66EB(2A), inserted in 2008.
- 7 *Crimes Act 1900* (NSW) ss 45-45A; *Crimes Act 1958* (Vic) ss 32-34A; *Criminal Code 1899* (Qld) ss 323A-323B; *Criminal Code* (WA) s 306; *Criminal Law Consolidation Act 1935* (SA) ss 33-33B; *Criminal Code Act 1924* (Tas) ss 178A178C; *Crimes Act 1900* (ACT) ss 73-77; *Criminal Code Act* (NT) ss 186A-186D.
- 8 *Criminal Code Act 1995* (Cth) ss 270.7A-270.13.
- 9 *Crimes (Sentencing Procedure) Act 1999* (NSW) div 1A, Table.
- 10 See *Crimes Act 1900* (NSW) s 66A.
- 11 *Criminal Procedure Act 2009* (Vic) sch 1, cl 4A.
- 12 *Crimes Act 1958* (Vic) s 49B.
- 13 *Crimes Act 1958* (Vic) s 327.
- 14 *Crimes Act 1958* (Vic) s 49C.
- 15 Victoria, Legislative Assembly, 9 June 2016, *Parliamentary Debates (Hansard)*, pp 2439-42.
- 16 *Criminal Code Act 1899* (Qld) sch 1 (*Criminal Code* (Qld)) s 218B.
- 17 *Criminal Code* (Qld) ss 228A(1) and 228B(1).
- 18 Sentencing Act 1997 (Tas), ss 11A(1)(a) and 11A(1)(b). See also Tasmanian Government, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation paper: Criminal justice*, 2016, pp 7-8.
- 19 New South Wales Government, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation paper: Criminal justice*, 2016, p 10.
- 20 New South Wales Government, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation paper: Criminal justice*, 2016, p 11.
- 21 Office of the Director of Public Prosecutions, New South Wales, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation paper: Criminal justice*, 2016, p 6.
- 22 Tasmanian Government, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation paper: Criminal justice*, 2016, p 7.
- 23 Law Society of New South Wales, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation paper: Criminal justice*, 2016, p 4.
- 24 Law Society of New South Wales, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation paper: Criminal justice*, 2016, pp 4-5.
- 25 Law Society of New South Wales, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation paper: Criminal justice*, 2016, p 5.
- 26 Law Society of New South Wales, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation paper: Criminal justice*, 2016, p 6.
- 27 Law Society of New South Wales, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation paper: Criminal justice*, 2016, p 6.
- 28 Director of Public Prosecutions, Victoria, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation paper: Criminal justice*, 2016, p 9.
- 29 Director of Public Prosecutions, Victoria, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation paper: Criminal justice*, 2016, p 9.
- 30 Director of Public Prosecutions, Victoria, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation paper: Criminal justice*, 2016, pp 9-10.
- 31 [2000] HCA 60; (2000) 206 CLR 161.
- 32 (2000) 206 CLR 161, [26].
- 33 *Crampton v R* [2000] HCA 60, [63] per Gaudron, Gummow and Callinan JJ, Gleeson CJ agreeing at [3], McHugh J at [69], Kirby J at [104], Hayne J at [165]; (2000) 206 CLR 161, 169-70, 187, 188, 200, 219.
- 34 *Crampton v R* [2000] HCA 60, [58]; (2000) 206 CLR 161, 185-6.
- 35 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, pp 20, 75.
- 36 J Goodman-Delahunty, M Nolan and E van Gijn-Grosvenor, *Empirical guidance on the effects of child sexual abuse on memory and complainants' evidence*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2017.
- 37 *R v Johnson* [2015] SASCF 170.
- 38 *R v Johnson* [2015] SASCF 170, [102].
- 39 *R v Johnson* [2015] SASCF 170, [1].
- 40 *R v Johnson* [2015] SASCF 170, [111].
- 41 *R v Johnson* [2015] SASCF 170, [114].

42 *R v Johnson* [2015] SASCFC 170, [2].
43 [2016] SASCFC 130; (2016) 126 SASR 374.
44 Transcript of A Kimber, Case Study 46, 1 December 2016, T24240:23-T24241:1.
45 Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No 11: 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*, 2014, pp 71-2.
46 Transcript of D Boyle, Case Study 26, 22 April 2015, TC8080:39-TC8082:31.
47 Transcript of A Kimber, Case Study 33, 14 October 2015, T11758:20-T11759:9.
48 Transcript of H Baker, Case Study 38, 23 March 2016, T18083:15-T18086:35; Transcript of A Kimber, Case Study 38, 21 March 2016, T17955:17-T17958:4.
49 Transcript of L Lungo, Case Study 46, 28 November 2016, T23812:38-41.
50 Transcript of FAB, Case Study 46, 28 November 2016, T23805:45-T23806:4.
51 Transcript of FAB, Case Study 46, 28 November 2016, T23805:45-T23807:36.
52 Transcript of FAB, Case Study 46, 28 November 2016, T23807:38-44.
53 Transcript of FAB, Case Study 46, 28 November 2016, T23807:41-T23808:22.
54 Transcript of FAB, Case Study 46, 28 November 2016, T23809:20-T23810:6.
55 Transcript of FAB, Case Study 46, 28 November 2016, T23810:38-46.
56 Transcript of FAB, Case Study 46, 28 November 2016, T23811:1-5.
57 Transcript of FAB, Case Study 46, 28 November 2016, T23811:13-16.
58 Transcript of L Lungo, Case Study 46, 28 November 2016, T23813:32-38.
59 *R v Christopher Rafferty* (Unreported, NSWDC, Frearson SC DCJ, 25 August 2016), p 16. NSW.2098.001.0080_R.
60 *R v Christopher Rafferty* (Unreported, NSWDC, Frearson SC DCJ, 25 August 2016), p 4. NSW.2098.001.0080_R.
61 Transcript of L Lungo, Case Study 46, 28 November 2016, T23817:8-30.
62 *R v Christopher Rafferty* (Unreported, NSWDC, Frearson SC DCJ, 25 August 2016), p 8. NSW.2098.001.0080_R.
63 Transcript of L Lungo, Case Study 46, 28 November 2016, T23817:42-T23818:3.
64 *R v Christopher Rafferty* (Unreported, NSWDC, Frearson SC DCJ, 25 August 2016), p 10. NSW.2098.001.0080_R.
65 Transcript of L Lungo, Case Study 46, 28 November 2016, T23818:28-36.
66 *R v Christopher Rafferty* (Unreported, NSWDC, Frearson SC DCJ, 25 August 2016), p 12. NSW.2098.001.0080_R.
67 *R v Christopher Rafferty* (Unreported, NSWDC, Frearson SC DCJ, 25 August 2016), p 13. NSW.2098.001.0080_R.
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69 Transcript of L Lungo, Case Study 46, 28 November 2016, T23820:24-37.
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71 *Johnson v Miller* [1937] HCA 77; (1937) 59 CLR 467, 489 (Dixon J).
72 See, for example, transcript of H Baker, Case Study 38, 23 March 2016, T18084:32-T18085:26.
73 *R v Stevens* [1998] QCA 271 [13]-[14]; [2000] 1 Qd R 445, 452; *Johnson v Miller* [1937] HCA 77; (1937) 59 CLR 467, 497.
74 This is a common law requirement that has also been reproduced in statute. See, for example, *Criminal Code* (Qld) s 567.
75 *Johnson v Miller* [1937] HCA 77; (1937) 59 CLR 467, 497.
76 See, for example, *Criminal Procedure Act 1986* (NSW) s 50; *Criminal Code* (Qld) s 564, s 573.
77 See, for example, *Veysey v R* [2011] VSCA 309; (2011) 33 VR 277.
78 *S v The Queen* [1989] HCA 66; (1989) 168 CLR 266.
79 *Kirk v IRC* [2010] HCA 1 [26], (2010) 239 CLR 531, 557.
80 *Johnson v Miller* [1937] HCA 77; (1937) 59 CLR 467, 486.
81 *WGC v The Queen* [2007] HCA 58 [127]; (2007) 233 CLR 66, 103 (Hayne and Heydon JJ).
82 [1989] HCA 66; (1989) 168 CLR 266.
83 *S v The Queen* [1989] HCA 66; (1989) 168 CLR 266, 274.
84 *S v The Queen* [1989] HCA 66; (1989) 168 CLR 266, 274, 276 (Dawson J), 282-3 (Toohey J), 287-8 (Gaudron and McHugh JJ).
85 The Hon. Justice J Wood, Royal Commission into the New South Wales Police Service, *Volume V: The Paedophile Inquiry*, New South Wales, 1997, pp 1064-1065.
86 *Criminal Code* (Qld) s 229B. See: *Criminal Code, Evidence Act and Other Acts Amendment Act 1989* (Qld).
87 *Crimes Act 1958* (Vic) s 47A, inserted by *Crimes (Sexual Offences Act) 1991* (Vic) s 3; *Crimes Act 1900* (ACT) s 56, inserted by *Crimes Amendment Act (No 3) 1991* (ACT) s 3 (originally as s 92EA).
88 *Criminal Code Act Compilation Act 1913* (WA) Appendix B, sch 1 (*Criminal Code* (WA)) s 321A, inserted by *Acts Amendment (Sexual Offences) Act 1992* (WA).
89 *Criminal Code Act 1924* (Tas) sch 1 (*Criminal Code* (Tas)) s 125A, inserted by *Criminal Code Amendment (Sexual Offences) Act 1994* (Tas) s 4; *Criminal Law Consolidation Act 1935* (SA) s 74 (amended and substituted as s 50 in-2008), inserted by *Criminal Law Consolidation (Child Sexual Abuse) Amendment Act 1994* (SA) s 3; *Criminal Code Act* (NT) sch 1 (*Criminal Code* (NT)) s 131A, inserted by *Criminal Code Amendment Act (No. 3) 1994* (NT) s 7.
90 *Crimes Act 1900* (NSW) s 66EA; *Crimes Legislation Amendment (Child Sexual Offences) Act 1998* (NSW) s 3, sch 1, [2].
91 *Crimes Act 1900* (NSW) s 66EA; *Crimes Act 1958* (Vic) s 47A.
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Child sexual assault offences include all aggravated and non-aggravated sexual assault offences that are prosecuted in New South Wales courts (including under Commonwealth Acts) where the fact that the victim is under 18 is an element of the offence.
The data includes matters that are resolved by way of a guilty plea and also those that are determined following a defended hearing. Defended hearings include matters where the appearance was finalised through a finding of guilty or not guilty rather than via a guilty plea.
'All matters' includes appearances that were finalised through a guilty plea, the matter being dismissed due to mental illness and where the matter was withdrawn by the prosecution, as well as the outcomes from defended hearings.
The data is also presented both aggregated and for the different court jurisdictions in New South Wales. Children's Courts deal only with defendants under 18. The Local Court deals with the least serious matters and does not use juries. The District Court hears more serious matters and, unless the matter is heard before a judge sitting alone, a defended hearing will be before a jury. The Supreme Court only hears the most serious offences and hears relatively few matters compared with the other Courts.
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